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## To Catch an Art Thief: Using International and Domestic Laws to Paint Fraudulent Art Dealers into a Corner

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## TO CATCH AN ART THIEF: USING INTERNATIONAL AND DOMESTIC LAWS TO PAINT FRAUDULENT ART DEALERS INTO A CORNER

“Beauty provoketh thieves sooner than gold.”<sup>1</sup>

### I. INTRODUCTION

Perhaps the biggest name in the art world, the Wildenstein family has amassed a several billion-dollar fortune dealing fine art since 1852.<sup>2</sup> The family is at the center of a recent shockwave that threatens to expose not only the Wildensteins, but the entire international art community, an impenetrable business based on reputation and handshake deals.<sup>3</sup> In January 2011, French police discovered thirty paintings that had been reported stolen in the Wildenstein vaults.<sup>4</sup> Most notable among the collection was a painting by the famous Impressionist artist, Berthe Morisot, estimated at

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1. WILLIAM SHAKESPEARE, AS YOU LIKE IT act 1, sc. 3.

2. See *Guy Wildenstein's Stepmother Dies, But Her Suit Against the Dealer Over Billions in Art Lives On*, ART INFO FRANCE (Nov. 17, 2010), <http://www.artinfo.com/news/story/36372/guy-wildensteins-stepmother-dies-but-her-suit-against-the-dealer-over-billions-in-art-lives-on/> (noting Wildenstein family net worth and presence in art world). The family is no stranger to lawsuits, even among the family members themselves. See *id.* (mentioning recent, protracted lawsuit between Wildenstein family members). Guy Wildenstein was sued by his stepmother over allegations that Wildenstein hid part of his father's fortune from her after his father's death in 2001. See *id.* (explaining that Wildenstein officially declared his late father's estate to be \$60 million, while it was allegedly closer to \$4-5.5 billion). While investigating that lawsuit, the French anti-fraud police unit searched a Wildenstein warehouse where the family holds artwork for clients and discovered the artworks now in question. See *Guy Wildenstein Charged over Missing Artwork*, ART NEWSPAPER, Sept. 2011, at 58, available at <http://edition.pagesuite-professional.co.uk/launch.aspx?referral=other&pnum=40&refresh=7Jnlm80Q1C5j&EID=94693d82-ff34-443d-a3ad-cb2ed90a28a3&skip=&cp=40> (addressing police involvement).

3. See Doreen Carvajal & Carol Vogel, *Venerable Art Dealer Is Enmeshed in Lawsuits*, N.Y. TIMES, Apr. 20, 2011, at A1, available at <http://www.nytimes.com/2011/04/20/arts/design/wildenstein-art-gallery-is-beset-by-lawsuits.html?pagewanted=all> (highlighting Wildenstein family's influence in art events since 1875); see also Paul Sullivan, *Protect Your Wealth With More Than a Handshake*, N.Y. TIMES, Apr. 3, 2010, at B6, available at <http://www.nytimes.com/2010/04/03/your-money/home-insurance/03wealth.html?scp=1&sq=Protect%20Your%20Wealth%20With%20More%20Than%20a%20Handshake&st=cse> (“Dealings in the art world have often been conducted with a decorum that belies the money at stake. Handshake agreements are still commonplace.”).

4. See Jeff Fulmer, *A Man Named Guy*, ONLINE HERMAN PAUL PROJECT (July 11, 2011), <http://www.hermann-paul.org/blog/index/2011/07/11/man-named-guy/> (summarizing French police's initial encounter with missing artwork).

\$1.1 million.<sup>5</sup> The painting was last in the possession of Anne-Marie Rouart and went missing shortly after her death.<sup>6</sup>

Guy Wildenstein, the current family figurehead, was the executor of Rouart's estate and had the responsibility of assuring that her art collection was transferred to the Academie de Beaux-Arts in Paris.<sup>7</sup> The transfer never occurred.<sup>8</sup> Twenty additional pieces of art found in the warehouse were the missing property of a ninety-eight year old woman, whose family had contacted Wildenstein in 2007 requesting a list of works in the family collection that Wildenstein had in his possession.<sup>9</sup> The family was informed that no records were found.<sup>10</sup> Investigators discovered the paintings in the Wildenstein vaults in January 2011, and Guy Wildenstein was subsequently charged with concealment and breach of trust in July.<sup>11</sup> Wildenstein denies any knowledge of the presence of the paintings in his vaults, insisting that the vaults had not been inventoried.<sup>12</sup> If convicted, he faces up to seven years in prison.<sup>13</sup>

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5. See FRED S. KLEINER & CHRISTIN J. MAMIYA, *GARDNER'S ART THROUGH THE AGES* 874 (12th ed. 2005) (explaining Morisot's relevance in art world). Berthe Morisot was one of the few well-known female Impressionist painters. See *id.* (illuminating Morisot's place in art history). Morisot regularly exhibited with the Impressionists, including Edouard Manet, her brother-in-law. See *id.* (indicating success of Morisot's career). Morisot escaped the criticism directed at most other Impressionists, and was in fact praised for her ability to accurately depict pictorial moments. See *id.* (commenting on Morisot's impressive technical skill). Impressionism is immutably tied to Paris in both its content and style. See *id.* at 869 (recognizing inherently French nature of Morisot's paintings); see also *Did Art Wildenstein Gather a Multimillion-Dollar Cache of Stolen Art?*, ARTINFO (Feb. 4, 2011), <http://www.artinfo.com/news/story/36913/did-art-dealer-guy-wildenstein-gather-a-multimillion-dollar-cache-of-stolen-art/> (highlighting famous painting among many in collection).

6. See Carvajal & Vogel I, *supra* note 3 (explaining timeline of disappearance of Morisot painting).

7. See *id.* (noting Wildenstein's participation in Rouart's estate).

8. See *id.* (commenting on Wildenstein's failure to complete assigned duty).

9. See Doreen Carvajal & Carol Vogel, *Ignorance is Defense in a Case of Lost Art*, N.Y. TIMES, July 21, 2011, at C1, available at <http://www.nytimes.com/2011/07/21/arts/design/french-art-dealer-spends-time-in-detention-in-case-of-missing-art-works.html?pagewanted=all> [hereinafter Carvajal & Vogel II] (describing nature of Reinach family's involvement in Wildenstein matter).

10. See *id.* (reporting Wildenstein's answer to Reinach family).

11. See *Did Art Wildenstein Gather a Multimillion-Dollar Cache of Stolen Art?*, *supra* note 5 (noting Wildenstein's criminal charges); see also Carvajal & Vogel II, *supra* note 9 (summarizing timeline from investigation to charges). "Breach of trust is committed when a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way." CODE PENAL [C. PEN.] art. 314-1 (Fr.), available at [http://195.83.177.9/upl/pdf/code\\_33.pdf](http://195.83.177.9/upl/pdf/code_33.pdf).

12. See Carvajal & Vogel II, *supra* note 9 (explaining Wildenstein's defense).

13. See *id.* (indicating potential penalty Wildenstein faces if convicted).

Legal problems pertaining to the art world typically address ownership and repatriation of stolen cultural works to their original countries.<sup>14</sup> Examples of Nazi-looted art spring up every year, creating uncomfortable demands between aggrieved former owners and current good-faith purchasers.<sup>15</sup> Famous auction houses sell antiquities for which provenance cannot be established.<sup>16</sup> Implicit in

14. See Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1225 (2005) (admitting Austria is still criticized for failing to adequately restore Nazi-looted art after World War II). Problems involving Nazi-looted art are well documented. See Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good Faith Purchasers of Stolen Art*, 50 DUKE L. J. 955, 958 (2001) (commenting on number of disputes between heirs of original owners and museums over artworks stolen by Nazis). The Nazis stole twenty percent of all European art, and many current possessors of such art may be unaware that it was ever stolen. See Kreder, *supra* note 14, at 1200-01 (noting difficulty of tracing painting's provenance). Current possessors, including museums, dealers, and individuals, frequently have strong claims that they were unaware of the Nazi taint to their artwork, and should therefore qualify as bona fide purchasers. See *id.* (articulating distance between original thief and eventual owner). Further, as many of these artworks end up in the United States, U.S. law becomes particularly important. See Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L. J. 295, 309 (2003) (explaining that claims for restitution in U.S. continue to grow). The National Stolen Property Act requires a scienter component on behalf of the current owner. See Kreder, *supra*, at 1205 (explaining requirement of knowledge of wrongdoing). Since more than sixty years have passed since World War II, this element is usually impossible to prove, and Nazi-looted works frequently remain with the bona fide purchaser. See *id.* at 1219 (recognizing problems of proof). Policies seeking to return artworks to original owners run the risk of "unnecessarily alienating dealers, scholars, and museum staff members, upon whose expert knowledge, services, and cooperation successful return of stolen objects depends." *Id.* at 1250 (quoting George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 97 (1978)); see also Michele Kunitz, *Switzerland & the International Trade in Art and Antiquities*, 21 NW. J. INT'L L. & BUS. 519, 525 (2001) (emphasizing many causes of action in relation to paintings stolen during World War II); Jenya Shanayeva, *Repatriation of Russian Art: The Eggs, the Law, and the Morals. Who Owns Fabregé?*, 36 SYRACUSE J. INT'L L. & COM. 259, 270 (2009) (explaining difficulty in establishing good title in Fabregé eggs stolen during Russian Revolution).

15. See Shanayeva, *supra* note 14, at 281 (identifying tension between those who were stolen from and good-faith purchasers unaware of theft). Many cases concerning Nazi-looted artwork are litigated in the United States because either the artwork or the descendants of past owners have moved to the United States. See *id.* (proposing that many works originally stolen by Nazis end up in U.S.). Conflict of laws further complicates these replevin, rescission, and conversion claims. See Youngblood Reyhan, *supra* note 14, at 955 (addressing tort causes of action used to reacquire stolen artworks).

16. See Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property Are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 602 (2007) [hereinafter Fincham I] (explaining that in Sotheby's auction catalogues between 1960 and 1998, of 1,550 vases auctioned, only 15% had provenance information); see also Christine L. Green, *Antiquities Trafficking in Modern Times: How Italian Skullduggery Will Affect United States Museums*, 14 VILL. SPORTS &

many legal issues pertaining to art is the fact that at some point, a crime took place.<sup>17</sup> Fraud, theft, and trafficking are all crimes that begin with an act of greed and end with a piece of art or cultural property relegated to the status of contraband.<sup>18</sup>

International treaties address criminal charges for theft and trafficking of cultural property, thereby reflecting the international community's recognition of cultural property offenses as serious and reprehensible crimes.<sup>19</sup> Nevertheless, as in the Wildenstein case, domestic laws are much more frequently used to prosecute art crimes; further, when fraud is perpetrated in connection with art dealing, prosecution under fraud laws is the most effective course of action.<sup>20</sup> Examining criminal punishments throughout the world exposes underlying beliefs about exploitation of pieces of cultural heritage.<sup>21</sup> For countries that do not have cultural property

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ENT. L.J. 35, 49 (2007) [hereinafter Green I] (recounting Greek Orthodox Patriarchate v. Christies, Inc., in which Greek religious institution requested return of 10th century manuscript from auction house); Steven Erlanger, *Saint Laurant Sale Brings in \$264 Million*, N. Y. TIMES, Feb. 24, 2009, at A8, available at <http://www.nytimes.com/2009/02/24/arts/design/24auction.html> (noting recent challenges to Christie's regarding questionable provenance of Chinese artifacts in Yves Saint Laurant's collection auctioned in 2009).

17. See Youngblood Reyhan, *supra* note 14, at 975 (recognizing that although original thief is impossible to find, criminal taint of stolen art results in legal consequences for whoever eventually comes in possession of piece).

18. See Sarah S. Conley, *International Art Theft*, 13 WISC. INT'L L. J. 493, 497 (1995) (examining connection between original illegal act and ensuing legal battle for rights to piece of art).

19. See Stephanie Doyle, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 COLUMB. J. TRANSNAT'L L. 657, 699 (2001) (noting staggering numbers of art theft as impetus for adoption of international policies); see also John Henry Merryman, *Cultural Property, International Trade, & Human Rights*, 19 CARDOZO ARTS & ENT. L.J. 51 (2001) [hereinafter Merryman I] (noting protection as main reason for implementing international art laws); Lauren Fae Silver, *Recapturing Art: A Comprehensive Assessment of the Italian Model for Cultural Property Protection*, 23 N.Y. INT'L L. REV. 1, 28 (2010) (addressing presence of international treaties addressing proper criminal punishment for those engaged in art or cultural property theft).

20. See Karin E. Bourke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. 381, 388-89 (2003) (expressing that art theft is usually addressed domestically rather than internationally). "[T]he only deterrent to pillagers in economically-strapped source countries are strictly enforced domestic property laws." *Id.* See also Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. TOL. L. REV. 919, 953 (1991) (explaining limited applicability of international law).

21. See Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for defining New Crimes under the Rome Statute of the ICC*, 23 PENN ST. INT'L L. REV. 857, 859 (2005) (suggesting that criminal punishment for art related crime evolved from laws of war); see generally Anne Carlisle Schmidt, *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*, 23 B.C. INT'L &

provisions, fraud law can apply instead.<sup>22</sup> Further, civil law countries allow an ignorance defense, providing a way out for art dealers, despite their professional responsibility to maintain care for their clients' art goods.<sup>23</sup>

This Comment explains the occurrence of high profile art fraud as it fits into the larger picture of art theft crimes.<sup>24</sup> Section I introduces art fraud and the Wildenstein affair.<sup>25</sup> Section II provides a comprehensive background on art theft.<sup>26</sup> Section III addresses the underlying cultural reasons for nations' differing policies and laws on cultural property.<sup>27</sup> Section IV provides a survey of international laws and domestic laws from around the world that address art crimes.<sup>28</sup> Section V addresses the effectiveness of American fraud law when applied to art crimes and discusses specific examples of recent art crimes.<sup>29</sup> Finally, section VI addresses the viability of an ignorance defense to fraud charges in France and other civil law countries, how the defense would affect outcomes in the U.S., and how to prevent fraud of this nature from occurring again.<sup>30</sup>

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COMP. L. REV. 185 (2000) (identifying different views on cultural property for source nations and market nations).

22. See CODE PENAL [C. PEN] art. 314 (Fr.) (recognizing that crime "breach of trust" in French penal code relates to fraud generally with no reference to art or cultural property).

23. See Elies van Sliedregt, *Defences in International Criminal Law Convergence of Criminal Justice Systems: Building Bridges, Bridging the Gap*, INT'L SOC'Y FOR THE REF. OF CRIM. L., 31 (2003) (acknowledging ignorance defense and ease with which that may be used to evade conviction).

24. For a further discussion of the occurrence of high profile art fraud as it fits into the larger picture of art theft crimes, see *infra* notes 180 to 227 and accompanying text.

25. For a further discussion of general problems relating to art fraud, see *supra* notes 1 to 23 and accompanying text.

26. For a further discussion of the context of art crimes, see *infra* notes 31 to 55 and accompanying text.

27. For a further discussion of culture's impact on laws relating to art, see *infra* notes 56 to 115 and accompanying text.

28. For a further discussion of specific laws regarding general theft and cultural property theft, see *infra* notes 116 to 283 and accompanying text.

29. For a further discussion of the U.S. approach to art fraud, see *infra* notes 284 to 318 and accompanying text.

30. For a further discussion of the ignorance defense applied in this context, see *infra* notes 319 to 347 and accompanying text.

## II. PAINTING A PROBLEMATIC PICTURE: A BACKGROUND TO ART THEFT AND FRAUD

The international community uses the term “cultural property” to refer to both newer art objects and antiquities.<sup>31</sup> “Antiquity” is a broad term that refers to a relic or monument from ancient times.<sup>32</sup> Laws may also speak in terms of “cultural property,” to refer to a wide range of cultural objects, including books, buildings, and scientific collections.<sup>33</sup>

Looting of cultural antiquities traditionally has been the impetus for international laws on cultural property.<sup>34</sup> The long history of cultural destruction that lies behind looting has consistently dominated the international art theft conversation.<sup>35</sup> Looted objects make up a substantial segment of stolen art in the world.<sup>36</sup>

Typically, countries do not keep data on the types of objects stolen in theft cases, and as such, it is difficult to gain accurate data on the art and cultural property stolen throughout the world.<sup>37</sup> Art is thought to be the second or third most highly trafficked commodity, behind narcotics and arms.<sup>38</sup> Estimates of illicit trade of

31. See Edwards, *supra* note 20, at 928 (explaining that broad definition of “cultural property” in international laws includes much more than archeological artifacts).

32. See Merriam-Webster (2012), available at <http://www.merriam-webster.com/dictionary/antiquity> (searching term “antiquity”).

33. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 1, May 14, 1954, 249 U.N.T.S. 215 (using term “cultural property” for international standard).

34. See Edwards, *supra* note 20, at 919 (“The exposure of cultural property to damage, destruction, pillage, and looting in times of armed conflict has resulted in the creation of various provisions of international law to protect cultural property.”).

35. See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 249 (2006) [hereinafter Gerstenblith I] (“The looting of art works has a long history, going back to Roman times and probably earlier.”).

36. See Doyle, *supra* note 19, at 661 (explaining that international laws have “addressed the problem of cultural property with the hope that controversies such as the massive looting occurring now in developing countries and widespread displacement of art during World War II can be curtailed or eliminated in the future”).

37. See *Works of Art: Frequently Asked Questions*, <http://www.interpol.int/Crime-areas/Works-of-art/Frequently-asked-questions> (last visited Mar. 24, 2012) (recognizing that national statistics are usually based on circumstances of theft rather than type of object stolen).

38. See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 378 (1995) (“[I]f you put copyright crime theft [and] fraud together with the illegal importation of antiquities and art theft fraud . . . the war on drugs is small material.”); see also Conley, *supra* note 18, at 493 (placing art theft at the second most profitable illegal trade in the world); Jason M. Taylor, *The Rape and Return of China’s Cultural Property: How Can Bilateral Agreements*



cultural property range between \$100 million to \$5 billion worldwide.<sup>39</sup> Interpol reports that art thieves focus their efforts on France, Poland, Russia, Germany, and Italy, which possibly reflects only which countries have reported their art theft most effectively.<sup>40</sup> China, Japan, and Iraq also suffer from massive art theft but lack a unified reporting system.<sup>41</sup> One fact is certain: art's value is established enough to be a sure investment for thieves.<sup>42</sup> The art market tends to rise when stocks decline, reflecting the belief that tangible art may provide more investment benefits than stocks.<sup>43</sup>

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*Stem the Bleeding of China's Cultural Heritage in a Flawed System?*, 3 LOY. U. CHI. INT'L L. REV. 233, 238 (2006) (asserting that illicit art trade ranks second in world, with only drug trade ranking higher).

39. See Geoffrey R. Scott, *Spoilation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803 (2008) (estimating trade in illicit or stolen art and antiquities from \$100 million to \$4 billion); see also Silver, *supra* note 19, at 1 (providing \$5 billion estimate of current black market in art and artifacts).

40. See *Works of Art: Frequently Asked Questions*, *supra* note 37 (recognizing western European nations as major victims of art theft).

41. See Gerstenblith I, *supra* note 35, at 288-95 (explaining looting of Iraqi archeological sites and of Iraq Museum). "It is estimated that in two years looters removed as much earth from sites in southern Iraq as was removed during all the archaeological excavations carried out in the past 180 years." *Id.* at 293. See also Scott *supra* note 39, at 812 (explaining that Japan suffers from growing trade in stolen cultural property, art, and artifacts); Taylor, *supra* note 38, at 223 (addressing recent increase of destruction and pillage of cultural relics in China). "[B]etween 1998 and 2003 over 220,000 Chinese tombs have been broken into and looted with the pieces illicitly sold throughout the world." *Id.*

42. See Kelly Crow, *Sotheby's Sells Giacometti for Record \$104.3 Million*, WALL ST. J. (Feb. 3, 2010), <http://online.wsj.com/article/SB10001424052970204224604577028531443041436.html?KEYWORDS=kelly+crow> (acknowledging record price for work of art and speculating that artwork is good investment). Works of art consistently garner large amounts of money at auctions and private sales. See *id.* (recognizing high prices art objects sell for). The most expensive work of art sold at auction was *Walking Man I* by Alberto Giacometti, which sold for \$104.3 million in 2010. See *id.* (identifying price of *Walking Man I*). The sale came as a surprise to Sotheby's, which expected the piece to go for a quarter of the final price. See *id.* (elaborating on inconsistent nature of art market). One Monte Carlo art dealer noted that, after a weak year, the wealthy are once again "parking their cash in art." *Id.* See also Kimberly A. Short, *Preventing Theft and Illegal Export of Art in a Europe Without Borders*, 26 VAND. J. TRANSNAT'L L. 633, 639 (1993) (asserting that art market rises as stock market falls, reflecting belief that art is more valuable than stocks). "[I]n 1975, the value of French Impressionist works rose 230 percent, while stocks on the Dow Jones rose only 38 percent." *Id.* See also Carol Vogel, *A Pollack is Sold, Possibly for Record Price*, N.Y. TIMES (Nov. 2, 2006), <http://www.nytimes.com/2006/11/02/arts/design/02drip.html> (reporting sale of Jackson Pollack painting for around \$140 million). The sale, which took place in 2006, was never officially confirmed, and took place through private sale rather than an auction. *Id.* (describing nature of auction). If confirmed, it would be the highest price paid for a work of art. See *id.* (asserting record-breaking nature of Pollack's painting).

43. See Short, *supra* note 42 at 638-39 (explaining stable value of artworks as part of appeal).

Further, the black market art trade shares a strong connection with organized crime.<sup>44</sup> Black market art dealing is attractive to those who cannot legitimately participate in the insular art market.<sup>45</sup> Nevertheless, art pieces—particularly paintings—are unique, making art difficult to conceal and market.<sup>46</sup> The easiest works to steal and profit from are mid-level works, such as anonymous 17th century Dutch landscapes, because they are unlikely to attract attention from authorities, and yet can be sold for estimates of around \$200,000.<sup>47</sup> Stolen art also becomes profitable when it is exchanged for ransom, rather than fair market value.<sup>48</sup> Additionally, the secrecy of the art market allows it to be the prime medium through which to launder money, as auction transactions only require cash.<sup>49</sup> Further, art ownership tends to signal legitimacy, increasing its appeal to black market participants.<sup>50</sup>

Frequently, artworks go missing easily and are nearly impossible to recover.<sup>51</sup> Low recovery rates can be attributed to the complexities of international law and the secretive nature of the art

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44. See ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD 64 (Noah Charney, ed., 2009) (explaining that art crime is run by organized crime units, therefore funding other enterprises, like arms trade and terrorism); see also *The FBI Art Theft Program and Its Impact on Collecting: A Report From FBI Special Agent Robert Whitman and the Editor*, 52, [http://asoac.org/bulletins/91\\_wittman\\_theft.pdf](http://asoac.org/bulletins/91_wittman_theft.pdf) (explaining that over forty Russian organized crime groups have been identified as dealing in stolen art).

45. See Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud*, 8 SUM. CRIM. JUST. 16, 18 (1993) (explaining high profitability and link to organized crime as particularly dangerous aspects of art theft).

46. See James A. R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L L. 835, 836 (1985) (noticing qualities of art that make theft difficult to profit from).

47. See Noah Charney, *Mexico: When Art Finances Crime*, BLOUIN ARTINFO (Sept. 30, 2011, 11:14 AM), <http://blogs.artinfo.com/secrethistoryofart/2011/09/30/mexico-when-art-finances-crime/> (identifying best items for thieves to steal).

48. See *id.* (relating other way to profit from art theft).

49. See Conley, *supra* note 18, at 496 (specifying reasons why art theft facilitates money laundering); see also *Money Laundering Charges for Art Dealers*, N.Y. TIMES (June 2, 2001), <http://www.nytimes.com/2001/06/02/nyregion/money-laundering-charges-for-art-dealers.html> (recounting case in which New York art dealers conspired to launder \$4.1 million in drug money); Laura Crimaldi, *Art Dealer Rocco DeSimone, Convicted Rhode Island Con Man, to Be Sentenced in Money Laundering, Mail Fraud Case*, HUFFINGTON POST (July 21, 2011, 4:13 PM), [http://www.huffingtonpost.com/2011/07/21/art-dealer-rocco-desimone\\_n\\_905507.html](http://www.huffingtonpost.com/2011/07/21/art-dealer-rocco-desimone_n_905507.html) (detailing conviction Rhode Island art dealer, sentenced to sixteen years in jail).

50. See Conley, *supra* note 18, at 496 (explaining that organized crime participants see art ownership as raising prestige).

51. See INTERPOL, *supra* note 37 (noticing breaking and entering still primary way art is stolen); see also *Frequently Asked Questions*, ART LOSS REGISTER, <http://www.artloss.com/content/faqs-2> (last visited Mar. 19, 2012) (acknowledging art recovery process takes very long time, with many works stolen during World War II only being recovered recently).

market.<sup>52</sup> Additionally, there is no effective centralized system for reporting stolen or missing art works, a service that would increase transparency among dealers and auction houses.<sup>53</sup> Increased accountability among dealers and auction houses leads to less art theft: without the eventual prospect of a legitimate buyer, artwork is less valuable.<sup>54</sup> Some in the industry believe, however, that reporting art theft may lead to more theft, as it makes obvious places or people with relatively unguarded art collections.<sup>55</sup>

### III. SKETCHING OPPOSING PERSPECTIVES ON ART CRIMES: MARKET NATIONS AND SOURCE NATIONS

Contemporary state attitudes on art theft explain why criminal punishment for art theft is varied among nations, and in some cases, absent.<sup>56</sup> The art world is divided into selling nations and buying nations, with the selling nations typically providing a variety

52. See Conley, *supra* note 18, at 493 (explaining even legitimate art deals as secret and complex due to web of international laws).

53. See *id.* at 505 (theorizing why centralized system for reporting stolen art works would facilitate more open atmosphere in art world). However, Interpol had made recent changes to its website, increasing accessibility to information about stolen artworks. For a further discussion on Interpol's website and database, see *infra* notes 307-313 and accompanying text.

54. See ART LOSS REGISTER: HISTORY AND BUSINESS, <https://www.artloss.com/content/history-and-business> (last visited Mar. 19, 2012) (recognizing Art Loss Register's theft-curbing effect).

55. See Conley, *supra* note 18, at 500-01 (explaining that some art dealers believe publicity encourages theft); see also Megan K. Maher & John Michael Thompson, *Intellectual Property Crimes*, 39 AM. CRIM. L. REV. 763, 803-04 (2002) (commenting that auction houses and collectors hesitate to report fraud). For this reason, museums and churches, many of which cannot afford insurance, are less likely to report theft. See Conley, *supra* note 18, at 500-01 (asserting that reporting theft draws unwanted attention to museums and churches). Therefore, because lost art is so difficult to recover, effective prevention of art theft should examine not just typical breaking and entering, but art fraud as well. See Del Piano, *supra* note 45, at 16 ("The value of art, reflected in staggering prices paid at auction . . . has skyrocketed in recent years . . . . With this increase in value has come the inevitable increase in theft and illegitimate trade. It is not uncommon, however, for purchasers of fraudulently obtained art work to make their acquisitions from reputable art dealers and galleries.") (quoting *Hoelzer v. The City of Stamford*, 933 F.2d 1131 (2d Cir. 1991)). This is particularly necessary because art fraud is so easy to perpetuate, due to the exclusive nature of the art market. See Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 120 (2001) (recognizing that artists need intermediary of dealer or gallery for success, and thus are subject to their decisions).

56. See Charles S. Desmond, *The Formation of Law: The Interrelation of Decision and Statute*, 26 FORDHAM L. REV. 217, 220 (1957) (asserting that laws reflect concerns of underlying culture).

of criminal cultural property offenses, and the buying nations preferring general provisions with minimal penalties.<sup>57</sup>

#### A. Introduction to Source and Market Nations

The art world is composed of buying “market” nations and selling “source” nations.<sup>58</sup> The term “market nation” refers to countries that do not possess their own wealth of cultural property, and have an interest in obtaining the cultural property of other nations.<sup>59</sup> The United States, France, Germany, England, Japan, Switzerland, and the Scandinavian nations are market nations.<sup>60</sup> The considerable wealth of market nations allows them to make purchases from abroad.<sup>61</sup> Market nations opine that cultural property belongs to all humanity, not a single nation.<sup>62</sup> Additionally, market nations justify owning property that originated in a source nation by pointing to source nations’ inability to care for their cultural objects.<sup>63</sup> Market nations argue that their financial resources and interest in other cultures make them better hosts for art pieces.<sup>64</sup>

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57. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 832 (1986) [hereinafter Merryman II] (defining market nation and source nation).

58. See *id.* (describing interaction between market and source nations).

59. See Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT’L L. 197, 205 (2001) [hereinafter Gerstenblith II] (questioning practical results of trade between market and source nations); see also Merryman II, *supra* note 57, at 832 (discussing qualities of market nations).

60. See Merryman II, *supra* note 57, at 846 (recognizing British Museum and Biblioteque Nationale as major museums, and listing Switzerland, Germany, and United States as other wealthy nations with museums); see also *id.* at 832 (including Japan and Scandinavian nations in list of market nations).

61. See Gerstenblith II, *supra* note 59, at 205 n.26 (identifying “rescue argument”, according to which acquirers of greater financial wealth are considered best suited to own cultural object).

62. See *id.* at 200 (explaining “internationalist” perspective).

63. See *id.* at 209 (highlighting belief that source nations have excess of cultural objects and cannot care for what they already have). Museums in market nations are frequently filled with art works and antiquities that are either in storage or displayed only occasionally, and frequently inaccessible to the public and researchers. See *id.* (describing context in which many art objects end up); see also David N. Chang, *Stealing Beauty: Stopping the Madness of Illicit Art Trafficking*, 28 HOUS. J. INT’L L. 829, 845 (2006) (introducing theory of cultural internationalism).

64. See Chang, *supra* note 63, at 845 (“For example, the United Kingdom’s refusal to return the Elgin/Parthenon Marbles to Greece has been based in part on the argument that without adequate Athenian facilities for display and preservation, the pollution in Athens would destroy the marbles; as a result, they are best left in the British Museum.”). Museum purchase of objects with questionable provenance has been a growing debate, and the tide is turning toward repatriating these objects to their native countries. See Derek R. Kelly, *Illegal Tender: Antiquities*

Market nations buy from source nations.<sup>65</sup> The term “source nation” refers to countries that are rich in cultural property and usually are financially poor.<sup>66</sup> Egypt, Italy, Greece, China, and Peru are examples of source nations.<sup>67</sup> Source nations argue that the value of cultural property lies in their ability to educate, and as such, stealing or relocating artwork is not just an offense against the owner, it is an offense against anyone who could have learned or benefited from encountering it.<sup>68</sup> Additionally, as a result of market nations, items of cultural value end up in collections of a few major cities, away from their countries of origin.<sup>69</sup> Market and source nations consider cultural property from opposite perspectives.<sup>70</sup>

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*Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOKLYN J. INT’L L. 491, 506 n.95 (2009) (identifying Association of Art Museum Directors (“AAMD”) recent report, which stated “[m]ember museums should not acquire a work unless provenance research substantiates that the work was outside the country of probable modern discovery before 1970 or was legally exported from its probable country of modern discovery after 1970”). See also Silver, *supra* note 19, at 28 (“[I]t is really only since *United States v. Schultz*, where a dealer was convicted of conspiring to traffick [sic.] stolen antiquities, and the recent criminal trials in Italy of Giacomo Medici, Robert Hecht, and Getty Museum curator Marion True, that major museums have been forced to think differently about their collecting practices.”) (quoting Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of Antiquities Trade Debates*, 31 FORDHAM INT’L L.J. 690, 719-20 (2008)). This reflects a belief that cultural property should be in the country from which it originated, and not that it belongs to the world at large. See Gerstenblith II, *supra* note 59, at 205 (identifying theory of cultural nationalism).

65. See Merryman II, *supra* note 57, at 832 (introducing relationship between market and source nations).

66. See Gerstenblith II, *supra* note 59, at 209 (defining source nation).

67. See Merryman II, *supra* note 57, at 846 (listing Peru and Greece as states whose cultural property has been forcefully removed); see also *id.* at 832 (naming Mexico, Egypt, and India as other examples); Taylor, *supra* note 38, at 233 (identifying China’s black market antiquities trade); Silver, *supra* note 19, at 12 (calling Italy “the custodian of a wide range of cultural objects”).

68. See Gerstenblith II, *supra* note 59, at 207 (stating that original artwork is far more valuable than any replication); see generally G. Fernandez, *The Most Expensive Paintings Ever Sold*, ART WOLF (Oct. 8, 2011, 11:46 AM), [http://www.theartwolf.com/10\\_expensive.htm](http://www.theartwolf.com/10_expensive.htm) (highlighting most expensive paintings sold at auction and private sale). The article reports thirty-one confirmed sales of paintings at \$50 million or more. See *id.* (listing most expensive paintings).

69. See Gerstenblith II, *supra* note 59, at 206 (acknowledging typical lack of financial resources in source nations).

70. See Merryman II, *supra* note 57, at 832 (highlighting differences between market and source nations).

## B. Source Nations

Source nations consider property under a framework of four main categories of concerns: nationalistic, prestigious, cultural, and economic.<sup>71</sup>

### 1. *Nationalism Interests*

Nationalism interests are rooted in cultural property trade from colonial times, when the export of artifacts became a metaphor for colonialism the world over.<sup>72</sup> Consequentially, the return of one special object can revive nationalist feelings, and in turn, nationalistic feelings lead to the development of laws protecting cultural property.<sup>73</sup> Thus, among states that have had their culture stripped away from colonialism, renewed feelings of nationalism upon the return of their cultural property may be the impetus for strengthened laws regarding ancient artifacts and cultural property in general.<sup>74</sup>

Nationalistic feelings develop differently in cultures that have or have had many differing tribal groups within a state.<sup>75</sup> In 1973, the United States returned an artifact known as Afo-a-Kom to its native Cameroon.<sup>76</sup> The Koms are one tribe among many within Cameroon.<sup>77</sup> Representatives of Cameroon who were of the Kom tribe were overjoyed at the return, while those who were from other tribes were unenthusiastic.<sup>78</sup> Thus it must be remembered that multi-ethnic states potentially have an additional hurdle in regard to achieving a nationalist sentiment strong enough to inspire the

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71. See Schmidt, *supra* note 21, at 192 (summarizing way source nations think about their cultural property).

72. See *id.* (discussing historical basis underlying modern concepts of cultural property).

73. See Desmond, *supra* note 56, at 220 (expressing source of development of laws); see also Schmidt, *supra* note 21, at 192 (noting connection between nationalism and cultural group's historical items).

74. See Desmond, *supra* note 56, at 220 (identifying nationalistic pride arising from distinct culture).

75. See Schmidt, *supra* note 21, at 192 n.49 (explaining that disparate cultures within state leads to lack of unifying state culture).

76. See *Art: The Lost Totem*, TIME MAG., Nov. 5, 1973, available at <http://www.time.com/time/magazine/article/0,9171,908145-2,00.html> (discussing path of artifact).

77. See *id.* (indicating Cameroon as multi-tribe state).

78. See Schmidt, *supra* note 21, at 192 (detailing experience of nationalism in Cameroon). A representative of the Cameroon government, himself a Kom, described the return of the artifact as "the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together." *Id.* The Cameroon ambassador to the United States, who was not a Kom, was "unenthusiastic" about its return. See *id.* at 192 n.49 (emphasizing different reactions between Cameroon leaders).

creation of new cultural laws.<sup>79</sup> Yet some nations, such as China, have extremely comprehensive laws despite the multi-ethnic background of the Chinese people.<sup>80</sup> In China, the rise of cities as centers of economic activity has led to multiculturalism, decreasing the importance of smaller tribes to the advantage of the nation as a whole.<sup>81</sup>

## 2. *Prestige Interests*

The second factor source nations consider is prestige.<sup>82</sup> A rich body of cultural history enhances the prestige of a nation.<sup>83</sup> Indeed, art pieces convey instant prestige to whomever is the owner, be it a nation, museum, or private individual.<sup>84</sup> Furthermore, prestige facilitates opportunities for international cooperation, and creates global recognition.<sup>85</sup> In the post-World War I era, Japan adopted the European hierarchy of arts, with painting, architecture, and sculpture as “fine art” and traditionally Japanese art forms, like pottery and calligraphy, as “applied arts.”<sup>86</sup> This cultural

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79. *See id.* at 192 (noting that multi-ethnic states attempting to protect cultural history of all peoples face particularly daunting challenges).

80. *See id.* at 192 n.49 (concluding that China “has an interest in not fanning the flames of nationalistic fervor among its population groups”). For a further discussion on the Chinese Penal Code, see *infra* notes 131-144 and accompanying text.

81. *See China is a Multi-Ethnic State with Little Multiculturalism*, VANCOUVER SUN, Sept.8, 2008, available at <http://www.canada.com/vancouversun/news/editorial/story.html?id=c4ac0717-3d32-4235-873d-c17afbd82622> (identifying practice of suppressing cultural groups within China).

82. *See* Schmidt, *supra* note 21, at 192 (presenting prestige as element source nations consider in development of cultural artifact policy).

83. *See id.* (recognizing connection between cultural history and position on international stage); *see also* Fincham I, *supra* note 16, at 608-09 (“[A]rt is a good ambassador.”). “By sharing art and antiquities with other nations, a source nation can increase its standing among other nations.” *Id.*

84. *See* JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES IN THE WORLD’S RICHEST MUSEUM 4 (2011) (recognizing that ownership of antiquities conveys instant prestige); *see also* Ernesto Di Natale & Fulvio Lanzarone, *Cultural Heritage as a Driver of Development*, TODO PATRIMONIO, [http://www.todopatrimonio.com/pdf/cicop2010/10\\_Actas\\_Cicop2010.pdf](http://www.todopatrimonio.com/pdf/cicop2010/10_Actas_Cicop2010.pdf) (last visited Apr. 11, 2012) (“Considerations around the *heritage of Cultural Assets* can also be a decisive factor in a nation’s political and economic choices.”). Corporate collecting reflects this same idea, but on a smaller scale. *See* Reutter, *supra* note 55, at 120 (explaining corporate collecting, where corporations spend large sums of money on artworks). Corporate collecting enhances the prestige of the corporation’s identity. *See id.* (naming corporate collecting as prestige-enhancing).

85. *See* Schmidt, *supra* note 21, at 192 (explaining effects prestige may have in international arena).

86. *See* BERT WINTHER-TAMAKI, ART IN THE ENCOUNTER OF NATIONS: JAPANESE AND AMERICAN ARTISTS IN THE EARLY POSTWAR YEARS 73 (2001) (identifying difference in perception of two different types of artisans).

change reflects the shift that occurred in Japan's national identity, in its desire to apply European norms of artistic hierarchy and Japan's effort to gain foreign currency.<sup>87</sup> Thus, nations tie possession of desirable art and art ideals to national prestige.<sup>88</sup>

### 3. *Historical, Cultural, and Educational Interests*

The next factors for source nations are historical, cultural, and educational interests.<sup>89</sup> Artwork and other cultural property of a state supply an invaluable resource for understanding a state's history and culture.<sup>90</sup> Pieces of cultural property lose their context when removed from the state in which they were created.<sup>91</sup> They lose the power to educate altogether when they are stolen and introduced to the black market.<sup>92</sup> Art theft deprives a state of capital upon which to build a culture, and removes the potential for that culture to engage more fully in the international community.<sup>93</sup> Recent auctions in New York of Chinese art objects showed that Chinese players in the art market were willing to pay several times the market value for art objects perceived as "a symbol of traditional

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87. *See id.* at 6, 72-73 (explaining national identity and identifying attainment of foreign currency as central goal).

88. *See* FELCH & FRAMMOLINO, *supra* note 84, at 4 (connecting art ownership to prestige).

89. *See* Schmidt, *supra* note 21, at 192 (concluding source nations consider historical, cultural, and educational interests in development of cultural artifact policy); *see also* Di Natale & Lanzarone, *supra* note 84, at 3 ("One of the main aims that cultural heritage must pursue is that of transmitting a series of demographical, historical values . . .").

90. *See* WINTHER-TAMAKI, *supra* note 86, at 6 (examining "the art and craft objects . . . made and interpreted in the imaginative historical process of formulating and sustaining the cultural homogeneity among the large numbers of people that make up a nation").

91. *See* Borodkin, *supra* note 38, at 378 (noting loss of instructional and educational potential when piece of cultural property once it has been removed from home state). For example, the Elgin Marbles, originally from Greece, but housed in the British Museum until only recently, were originally part of the Parthenon. *See* Green I, *supra* note 16, at 35-36 (commenting on Elgin Marbles' recent move). In the past, market nations that possessed cultural property items relied on drawn out and expensive litigation to prevent source nations from succeeding on their claims. *See* Amy Bitterman, *Settling Cultural Property Disputes*, 19 VILL. SPORTS & ENT. L.J. 1, 37 (2012) (mentioning ease with which collectors and museums prevented claims for their artworks from succeeding). The influx of prosecutions, however, suggests that the tide is turning, and that dealers and curators are no longer immune from prosecution. *See id.* at 38 (commenting on Greece and Italy's increased efforts to gain possession of artworks).

92. *See* Borodkin, *supra* note 38, at 383 (describing void created when artwork goes missing, especially pertaining to archaeology).

93. *See id.* at 416 (linking cultural education to preservation of one's own cultural wealth).



China.”<sup>94</sup> This heavy interest in purchasing one’s cultural objects for the sake of returning the object to the home state is connected to a sense of nationalism.<sup>95</sup>

#### 4. *Economic Interests*

The final factor source nations consider is economic interests.<sup>96</sup> Art draws tourists and has its own lucrative, licit markets.<sup>97</sup> Egypt, for example, gains billions of dollars each year from tourists’ desire to see collections of antiquities.<sup>98</sup> Accordingly, the Minister of Culture is an incredibly important political position in Egypt.<sup>99</sup> Moreover, Egypt is sensitive to its financial reliance on tourism and the vulnerability of its antiquities in the midst of a shifting political climate.<sup>100</sup>

### C. Market Nations

In contrast to the concerns of source nations, market nations have only two interests: internationalism and economic interests.<sup>101</sup>

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94. See Soren Melikian, *Chinese Nationalist Fever Trumps Basic Facts*, N.Y. TIMES (May 26, 2011), <http://www.nytimes.com/2011/05/27/arts/27iht-rartmelik27.html?pagewanted=2&ref=artauctions> (describing behavior of Chinese spenders at auctions).

95. See Di Natale & Lanzarone, *supra* note 84, at 1 (elaborating on idea of cultural heritage as part of memory and people of nation).

96. See Schmidt, *supra* note 21, at 195 (addressing state’s economic considerations regarding cultural property).

97. See *id.* (listing sizeable economic effects cultural property can have in market).

98. See *Egypt’s 2010 Tourist Arrivals at 14 Mln Until October*, DAILY NEWS EGYPT (Nov. 1, 2010, 3:46 PM), <http://www.thedailynewsegypt.com/tourism/egypts-2010-tourist-arrivals-at-14-mln-until-october-dp1.html> (last visited Mar. 20, 2012) (noting Egypt’s \$11.5 billion dollar tourism industry as of 2010).

99. See *id.* (considering influential role of Minister of Culture).

100. See Nevine El-Aref, *Political Battle Rages Around Egypt’s Antiquities As Protesters Shut Down Tourist Sites*, AHAM ONLINE (Sept. 27, 2011), <http://english.ahram.org.eg/News/22698.aspx> (emphasizing that loss of antiquities reduces tourist numbers); see also Andrew Hammond, *Egypt Antiquities Boss Under Fire Over Jobs, Thefts*, DAILY NEWS EGYPT (Feb. 17, 2011 9:11 PM), <http://www.thedailynewsegypt.com/egypt-antiquities-boss-under-fire-over-thefts-jobs.html> (reiterating that tourism is key revenue earner); Kate Taylor, *Egypt Names Antiquities Chief to Replace Hawass*, N.Y. TIMES ARTS BEAT (Aug. 23, 2011, 2:32 PM), <http://artsbeat.blogs.nytimes.com/2011/08/23/egypts-names-antiquities-chief-to-replace-hawass/> (“Much of the council’s budget comes from ticket sales to museums and archaeological sites, and tourism to Egypt has been decimated by the revolution.”).

101. See Schmidt, *supra* note 21, at 190-91 (addressing market nation’s interests in cultural property).

1. *Internationalism Interests*

Internationalism encourages exchanging and loaning cultural property, so all can study works of the “common cultural heritage.”<sup>102</sup> Buyers claim an interest in the protection of international patrimony rather than national patrimony.<sup>103</sup> Market nations view art as a component of a common human culture rather than a national cultural heritage.<sup>104</sup> Market nations therefore do not protect transfer of cultural property through law and have fewer laws that penalize crimes to cultural property.<sup>105</sup>

2. *Economic Interests*

Market nations also appreciate the large amounts of money that can be made from art ownership and art dealing.<sup>106</sup> Commentators have noted that in light of the recent financial crisis, the art market has bounced back surprisingly well.<sup>107</sup> Europe’s economic interests are particularly strong: just under half of the value of all transactions in the global market take place in the European Union [EU], and the United Kingdom controls nearly seventy percent of the EU market.<sup>108</sup> Additionally, a strong art market leads to comfortable salaries for successful art dealers and business people.<sup>109</sup>

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102. See Merryman II, *supra* note 57, at 847 (explaining opposing views of cultural internationalism and cultural nationalism).

103. See *id.* at 832 (noting two contrasting theories: protecting culture for benefit of that culture, and protecting culture for benefit of international community). But see Fincham I, *supra* note 16, at 605-06 (critiquing Merryman’s dichotomy as limiting).

104. See Merryman II, *supra* note 57, at 847 (identifying contrasting perspectives on who benefits from cultural property).

105. See Chang, *supra* note 63, at 845 (explaining market nations as operating by theory of cultural internationalism, which encourages every person’s access to pieces of cultural property, rather than only persons of property’s original nation). For example, the penal codes of Japan, France, and United States have few, if any, criminal provisions against sale of cultural property. CODE PENAL [C. PEN.] (Fr.); KEIHO [PEN. C.] (Japan). See also Theft of Major Artwork Act, 18 U.S.C. § 668 (1996) (penalizing sale of cultural property only when stolen from museum).

106. See Conley, *supra* note 18, at 496 (acknowledging business of art dealing on black market); see also Tracey Ryniec, *Value: Sotheby’s Inc., ZACK’S INVESTMENT RESEARCH* (Sept. 9, 2011), <http://www.zacks.com/commentary/18774/Sotheby%26%2339%3Bs+Inc>. (explaining that Sotheby’s experienced its best quarter in its entire 267 year history in 2011).

107. See *How Investment Helped the Art Market Weather the Financial Crisis*, ARTDAILEY.ORG, [http://www.artdaily.com/index.asp?int\\_sec=11&int\\_new=36586&int\\_mod=2](http://www.artdaily.com/index.asp?int_sec=11&int_new=36586&int_mod=2) (last visited Feb. 13, 2012) (explaining that “investments of passion,” which includes artworks, rose by 5% during the recession).

108. See *id.* (commenting on 2008 findings of participation in art world).

109. See *Reduced Pay for Sotheby’s Chief in 2008*, N.Y. TIMES ARTS BEAT (Mar. 11, 2009 12:14 PM), <http://artsbeat.blogs.nytimes.com/tag/william-f-ruprecht/> (noting Ruprecht’s reported salary).

Indeed, the 2011 “Occupy Wall Street” protests attacked Sotheby’s CEO William Ruprecht’s \$700,000 annual salary.<sup>110</sup> Thus, the art market is undoubtedly intertwined with the global economy.<sup>111</sup>

The juxtaposition of source and market nations illuminates why market nations are more apt to criminalize cultural property offenses.<sup>112</sup> Criminal codes that include specific provisions for cultural property recognize the historical vulnerability that source nations experience.<sup>113</sup> Criminal codes that do not include specific provisions for cultural property allow the free market to control art

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110. See Susan Kendulak, “Occupy Wall Street” Targets Sotheby’s and its Handlers (Sept. 24, 2011), <http://fineart.about.com/b/2011/09/24/occupy-wall-street-targets-sothebys-and-its-art-handlers.htm> (noting Sotheby’s large profits in 2011); see also *Reduced Pay for Sotheby’s Chief in 2008*, *supra* note 109 (noting Ruprecht’s reported salary). The Occupy movement’s continued disapproval of Sotheby’s was further evidenced on November 8, 2011, when protestors snuck into the auction house in order express discontent about the laying-off of art handlers. See Steven Greenhouse, *Occupy Movement Inspires Unions to Embrace Bold Tactics*, N.Y. TIMES (Nov. 8, 2011), <http://www.nytimes.com/2011/11/09/business/occupy-movement-inspires-unions-to-embrace-bold-tactics.html?pagewanted=all> (highlighting connection between economy and art).

111. See *How Investment Helped the Art Market Weather the Financial Crisis*, ARTDAILY, [http://www.artdaily.com/index.asp?int\\_sec=11&int\\_new=36586&int\\_mod=2](http://www.artdaily.com/index.asp?int_sec=11&int_new=36586&int_mod=2) (last visited Mar. 26, 2011) (“Wealthy buyers have been switching away from expensive cars, yachts and jets in favour of assets with long term tangible value such as art and antiques.”); see also Sabine Oelze, DEUTSCHE WELLE, *The Art Market Is Doing Very Well, Gallery Owner Says* (Apr. 14, 2011), <http://www.dw-world.de/dw/article/0,,14985645,00.html> (recognizing speculation practices in art market and commenting on China, New York, and London as having highest volume of sales for 2010-2011); Daniel Silva, *Global Art Market Rebounds from Financial Crisis* (Feb. 16, 2011), [http://www.google.com/hostednews/afp/article/ALeqM5iiUiMa3YZ2\\_hag2ZgpSEe0VAxY0A?docId=CNG.c290e40a1c0e8fea7fa9aaf96fa3f507.241](http://www.google.com/hostednews/afp/article/ALeqM5iiUiMa3YZ2_hag2ZgpSEe0VAxY0A?docId=CNG.c290e40a1c0e8fea7fa9aaf96fa3f507.241) (noting that sales of contemporary art are increasing in major markets such as Germany and U.S.); Du Yuge, *Global Art Market Rebounds from Financial Crisis* (Oct. 9, 2011 7:07 PM), [http://news.xinhuanet.com/english2010/culture/2011-10/09/c\\_131181487.htm](http://news.xinhuanet.com/english2010/culture/2011-10/09/c_131181487.htm) (commenting on growth of art market in Beijing and Hong Kong).

112. See Chang, *supra* note 63, at 844-52 (indicating that underlying cultural issues influence state policies on cultural property). The policies of source nations tend to reflect a cultural nationalist perspective. This is unsurprising because many art-rich nations have lost their cultural patrimony through a steady history of theft, illegal export, military occupation, and colonial plunder. In contrast, cultural internationalism describes the theory that all nations have an interest in each other’s cultural property because it belongs to all humankind. This perspective focuses on preservation, access, and the nation where those goals are best pursued. *Id.* at 844-45.

113. See Conley, *supra* note 18, at 494-98 (indicating that artwork requires extra protection).

transactions.<sup>114</sup> Comparing criminal codes around the world supports this theory.<sup>115</sup>

#### IV. SURVEY OF LAWS: A COLORFUL SPECTRUM OF WAYS TO ADDRESS THEFT OF CULTURAL PROPERTY

##### A. Laws from Around the World

Domestic laws of various countries show that source nations incorporate specific provisions for the theft of cultural property into their penal codes.<sup>116</sup> Among countries with specific cultural theft property statutes, the penalties range from moderate to severe.<sup>117</sup> Many states have specific provisions addressing a variety of cultural property offenses, and restrictive export provisions.<sup>118</sup>

##### 1. *Crimes and Punishments of Source Nations*

Source nation crimes and penalties differ among themselves in length and comprehensiveness.<sup>119</sup> Albania's penal code implements heftier offenses for cultural property theft when committed 1) in collusion with others, 2) repeatedly, or 3) if it causes a serious consequence.<sup>120</sup> The baseline penalty is three to five years imprisonment, but with these enhancements, it rises to five to fifteen years.<sup>121</sup>

Armenia's statute is very clear in its application to items of historical, artistic, and cultural value.<sup>122</sup> The statute does not differen-

114. See Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 121 (2008) [hereinafter Fincham II] (explaining that when there is increased regulation, market will shift in effort to be more accommodating).

115. For a discussion of various laws concerning cultural property in different countries, see *infra* notes 119-159 and accompanying text.

116. For a discussion of relevant crimes and penalties of different nations, see *infra* notes 119-159 and accompanying text.

117. See IANS: Indo-Asian News Service, *China Executes Official for Plundering Cultural Relics* (Nov. 19, 2010), <http://www.elginism.com/20101214/3385/> (recognizing death sentence for cultural property crime).

118. For a discussion of different crimes related to destruction of cultural property, see *infra* notes 160-169 and accompanying text.

119. For a discussion of source nation laws, see *infra* notes 119-150 and accompanying text.

120. See Albania Penal Code art. 138, available at <http://legislationline.org/documents/section/criminal-codes> (asserting stricter punishment depending on circumstances).

121. See *id.* (increasing punishment significantly).

122. See Armenia Penal Code art. 180, available at <http://legislationline.org/documents/section/criminal-codes> (emphasizing comprehensiveness of Armenia's criminal code with regard to cultural property).

tiate between an antiquity and a more contemporary piece of art.<sup>123</sup> Theft of such items is punishable by imprisonment of three to five years.<sup>124</sup> If the theft leads to destruction or complete loss of the item, the punishment is increased to a five to eight year sentence.<sup>125</sup> If an organized group executes the theft, the penalty again is increased, to seven to twelve years imprisonment.<sup>126</sup>

Russia differentiates between crimes against objects of “exceptional value” and crimes against items of “cultural value.”<sup>127</sup> Stealing objects of exceptional value is punishable by “deprivation of liberty for a term of six to ten years,” and a fine of five hundred thousand roubles (\$17,300).<sup>128</sup> Smuggling items of cultural value is punishable by “deprivation of liberty” for seven to twelve years, and imposition of a one million rouble fine (\$34,601).<sup>129</sup> In contrast to the stiff punishments for theft and smuggling, destruction of monuments of history and culture is punishable by a two hundred thousand rouble fine (\$6,882), or deprivation of liberty for two years.<sup>130</sup>

China’s penal code contains a section on crimes against control of cultural relics that lists several punishable offenses, in addition to specific cultural relic provisions in its theft and smuggling provisions.<sup>131</sup> China criminalizes presenting a cultural relic to a foreigner as a gift, and imposes a maximum five-year imprisonment sentence.<sup>132</sup> Reselling a cultural relic can elicit a five-year sentence, and the same offense with especially serious circumstances is punishable by more than five but less than ten years.<sup>133</sup> If a museum or

123. *See id.* (addressing language including items of “artistic or cultural value”).

124. *See id.* (articulating punishment for theft in Armenia).

125. *See id.* (comparing punishment depending on severity of damage).

126. *See id.* (recognizing increased punishment when organized group involved).

127. *See* UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code] [art. 164] (Russ.), available at <http://legislationline.org/documents/section/criminal-codes> (explaining Russia’s distinction between certain kinds of special property).

128. *See id.* (detailing punishment for theft in Russia).

129. *See id.* art. 188 (indicating punishment for smuggling in Russia).

130. *See id.* art. 243 (contrasting punishment for theft and smuggling with punishment for destruction in Russia).

131. *See* Zhōngguó Xíngfǎ (中国刑法) [Criminal Law of People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong.), May 14, 1997, (China), available at [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html); for a discussion on provisions regarding cultural property in China, see *infra* notes 131- 144.

132. *See* Zhōngguó Xíngfǎ (中国刑法) [Criminal Law of People’s Republic of China] art. 325, available at [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html). (recognizing crime unique to China and penalty).

133. *See id.* art. 326 (explaining different punishments for reselling and reselling plus serious circumstances).

other institution sells or presents as a gift a cultural object, the persons in charge of the institution serve a three-year sentence.<sup>134</sup>

Nowhere is the distinction between “minor circumstances” and “major circumstances” in China’s penal code more apparent than for the charge of excavating and robbing a site of ancient culture.<sup>135</sup> Major circumstances lead to punishment of no less than ten years, or life imprisonment, or even the death penalty.<sup>136</sup> The code outlines four examples of “major” circumstances: (1) excavating and robbing a major site, (2) acting as ringleader in an excavation gang, (3) repeat offenses, and (4) damaging the relics.<sup>137</sup> In February 2011, China eliminated its use of the death penalty for thirteen nonviolent crimes, including smuggling historic relics.<sup>138</sup> This could be a possible reaction to the November 2010 execution of a China state official for stealing and selling cultural relics protected by the state.<sup>139</sup> The official was not convicted under any of the cultural relics provisions, but rather for embezzlement, for a crime that involved 259 cultural relics.<sup>140</sup> His four accomplices received sentences of up to seven years, and fines.<sup>141</sup>

China’s choice to prosecute the offense under the embezzlement provision of the penal code—thereby allowing punishment by death—reflects the seriousness with which the country regarded the crime.<sup>142</sup> China’s theft provision also recommends a penalty of death, and lists stealing precious cultural relics in particularly serious circumstances as one of the two instances where the sentence is

134. *See id.* art. 327 (summarizing crime specific to museum officials in China).

135. *See id.* art. 328 (contrasting similar crimes based on alleged severity of surrounding circumstances).

136. *See id.* (noting major circumstances increase penalty for crime in China); *see also* *China Executions Still Lead Those of All Other Countries Combined*, *Rights Group Says*, N.Y. TIMES (Mar. 28, 2011), <http://www.nytimes.com/2011/03/29/world/asia/29amnesty.html> (noting high number of death penalty convictions in China).

137. *See* *Zhōngguó Xíngfǎ* (中国刑法) [Criminal Law of People’s Republic of China] art. 328, *available at* [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html) (listing circumstances considered major).

138. *See* *China Executions Still Lead Those of All Other Countries Combined*, *Rights Group Says*, *supra* note 136 (reporting recent change to penal code in China).

139. *See* IANS: Indo-Asian News Service, *supra* note 117 (examining criminal charges and punishment of Chinese official and his associates).

140. *See id.* (recognizing conviction for embezzlement despite China’s thorough cultural relics provisions).

141. *See id.* (commenting on co-defendants’ charges).

142. *See* *Zhōngguó Xíngfǎ* (中国刑法) [Criminal Law of People’s Republic of China] art. 151, 382.1, *available at* [http://www.novexc.com/criminal\\_law.html](http://www.novexc.com/criminal_law.html) (noting difference between strict penalty for embezzlement and relatively mild penalty for smuggling).

recommended.<sup>143</sup> Despite these heavy penalties, the penalties for smuggling cultural relics remain modest: not less than five years, and if circumstances are minor, not more than five years imprisonment.<sup>144</sup>

Hungary prefers a cohesive approach to cultural property offenses.<sup>145</sup> Punishment for smuggling cultural items, receiving smuggled goods, theft, embezzlement, and deterioration of cultural goods is a maximum of three years imprisonment.<sup>146</sup> Hungary's theft provision also reflects the state's wariness of wartime destruction.<sup>147</sup> "Sinful warfare," the crime in which a military commander pursues an operation that causes serious damage to internationally protected cultural goods, calls for imprisonment for ten to fifteen years, or life imprisonment.<sup>148</sup> The former Yugoslav Republic of Macedonia has a nearly identical provision, imposing penalties of ten years or life imprisonment for the destruction of objects of cultural heritage during wartime.<sup>149</sup> Georgia has such a provision rooted in international wartime rules as well.<sup>150</sup>

## 2. *Crimes and Punishments of Market Nations*

Penalties in market nations are noticeably lighter.<sup>151</sup> Germany only criminalizes theft of property of special significance to art or history when it is stolen from a "generally accessible collection," or "is publically exhibited."<sup>152</sup> The crime is listed under an umbrella provision of "especially serious case[s] of theft," that are punished

143. *See id.* (comparing similarity between embezzlement and theft provisions).

144. *See id.* (contrasting penalties for theft and embezzlement with penalty for smuggling).

145. *See* 1978. évi IV. törvény Büntető Törvénykönyv (Act IV of 1978 on the Criminal Code) (Hung.), available at <http://legislationline.org/documents/section/criminal-codes> (providing comprehensive outline).

146. *See id.* art. 312.2.d, 316.4.b.1, 317.4.c, 324.3.b.1, 324.4.b, 325.2, 326.3 (Hung.) (noting identical punishments for many different crimes).

147. *See id.* art. 160 (acknowledging presence of crime of "sinful warfare").

148. *See id.* (detailing crime of "sinful warfare" and its strict penalty).

149. *See id.* art. 404.2 (recognizing similar crime in Former Yugoslav Republic of Macedonia).

150. *See* Georgia Penal Code art. 441(j), available at <http://legislationline.org/documents/section/criminal-codes> (elaborating on Georgia's Deliberate Violation of the Norms of International Humanitarian Law Amid Armed Conflict provision).

151. For a discussion of specific example of lighter penalties, see *infra* notes 152-159 and accompanying text.

152. *See* STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1988, FEDERAL LAW GAZETTE 945, § 243 para. 1, sentence 5 (Ger.), available at <http://www.iuscomp.org/gla/statutes/StGB.htm#243> (highlighting crime of theft from museum or like display).

by imprisonment from three months to ten years.<sup>153</sup> Australia criminalizes the removal of articles on public exhibition, which applies to items on display at a museum, but has no specific cultural property theft provision.<sup>154</sup> The penalty for this offense is one year in prison.<sup>155</sup> Neither Japan nor France has provisions for offenses against art or cultural property.<sup>156</sup>

Canada's cultural property provision defers to international treaties by stating that if the offense violates international law, it violates Canada's domestic law as well.<sup>157</sup> Finland follows this pattern of deference to international law with an extra provision stipulating specifically that if a Finnish citizen commits such offense in a state that does not criminalize aggravated criminal damage to cultural property, the person will be subject to penalty from the Finnish government.<sup>158</sup> Switzerland punishes offenses to cultural property only when they occur during armed conflict, imposing a minimum three-year sentence.<sup>159</sup>

### 3. *Export Provisions and Related Laws of Market Nations*

National export laws are also relevant to art theft.<sup>160</sup> The major museum states—Italy, France, and England—have laws concern-

153. *See id.* (explaining context under which crime is listed).

154. *See* Australia Penal Code art. 322, *available at* <http://www.legislation.act.gov.au/a/2002-51/current/pdf/2002-51.pdf> (noting no criminal provisions regarding cultural property).

155. *See id.* (stating penalty term).

156. *See* KEIHO [PEN. C.] (Japan), *available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf> (containing no explicit cultural property laws); CODE PENAL [C. PEN.] art. 314-1 (Fr.) *available at* [http://195.83.177.9/upl/pdf/code\\_33.pdf](http://195.83.177.9/upl/pdf/code_33.pdf) (listing no explicit cultural property laws).

157. *See* Canada Criminal Code, R.S.C. (2010), c. C-34 s. 4.2 (noting Canada's explicit reference to main source of international law). For a further discussion on the Hague Convention, see *infra* notes 260-265 and accompanying text.

158. *See* Finland Penal Code art. 71.2.1 (explaining Finland's policy of prosecuting art crimes outside its borders).

159. *See* CODE PENAL SUISSE [CP], [CRIMINAL CODE] Dec. 21, 1937, art. 264(d)(1)(e) (Switz.), *available at* <http://www.admin.ch/ch/e/rs/3/311.0.en.pdf> (stating penalty for offense against cultural property).

160. *See* Short, *supra* note 42, at 664 (noting significance of controlling exports). National laws concerning cultural property developed as a reaction to international treaties or cultural events. *See* Stephen A. Leacock, *In Search of a Giant Leap: Curtailing Insider Trading in International Securities Markets by the Reform of Insider Trading Laws Under European Union Council Directive 89/592*, 3 TULSA J. COMP. & INT'L L. 51, 56-57 (1995) (introducing Single European Act and many results of its opening European borders). In Europe, cultural property laws are invariably influenced by the Single European Act. *See id.* at 56 (suggesting implementation of Act in 1992 made it easier for certain illicit activities to go uncaught and unpunished); *see also* Short, *supra* note 42, at 635-36 ("The states of the European Economic Community signed the Single European Act in 1986 to advance realization of the fundamental principal of the European Community: the free movement of



ing the export of art, but yield different punishments.<sup>161</sup> In England, works that are over one hundred years old, were imported into the United Kingdom over fifty years ago, and are worth over four thousand pounds (\$6,398.26) must have licenses to leave the country.<sup>162</sup> If the work is found to be of historical, aesthetic, and academic importance, the Reviewing Committee will not grant a license for export, therefore encouraging the seller to find a domestic buyer for the artwork.<sup>163</sup> The buyer typically is a British museum that is willing to pay the asking price.<sup>164</sup> Thus England's system creates a market between sellers and museums, and reduces

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goods, persons, services, and capital.”). The Single European Act established a barrier-free market on goods, services, and capital for the states that would become the European Union. See Leacock, *supra*, at 56 (explaining purposes of Single European Act). In limiting restrictions on inter-European trade, the Act also made it easier for stolen art to move from country to country. See Short, *supra* note 42, at 636 (noticing difficulty of placing export controls and detecting movement of art). Eliminating customs and border checks facilitates the free movement of goods, persons, services, and capital, but it also makes it impossible to enforce the export controls most European Community Member States place on art. See *id.* at 635-36 (addressing unintended negative effect of freer trade among European states). Because goods that move within Europe require no documentation as they pass between countries, art stolen in one country can quickly move around Europe. See *id.* at 635 (noting art is easily movable good).

The Florence Agreement served as the predecessor to the Single European Act. See Edwards, *supra* note 20, at 924 (recognizing Florence Agreement as largely unrecognized European policy seeking to increase transport of information around Europe). Formally known as the *Agreement on the Importation of Educational, Scientific, and Cultural Materials*, the Florence Agreement was developed five years after World War II in an effort to promote peace via the free exchange of ideas across national boundaries. See *id.* (describing reasons for development of Florence Agreement). At this time, Communist forces suppressed political and cultural information and thus sought to impose restrictive barriers to the flow of “bourgeois” paintings and sculpture. See *id.* (remarking on specific historical context in which Florence Agreement was created). Signatories to the Florence Agreement joined in an expression of goodwill during the period of regrouping following World War II, thereby marking an instance of unified cultural expression on behalf of Western Europe to support a free economic market and reject Communism. See *id.* (elaborating on purpose of Florence Agreement). Their admirable political ideology left little protection for cultural treasures in danger of theft. See *id.* (highlighting unintended consequences of Florence Agreement).

161. See Nafziger, *supra* note 46, at 844 (noting legal frameworks for art trafficking and how frameworks support or discourage art theft).

162. See *id.* (explaining models of antiquities legislation). The three models of antiquities legislation are: “the French, based on a comprehensive inventory of non exportable property; the British, based on a governmental option to purchase any object headed for export; and the Mexican, based on a ban on all exports without presidential exemption.” *Id.* Overly restrictive systems, like the Mexican system, “create a black market, encourage a cottage industry in forgeries, generate international tensions, and do little to prevent illegal trafficking in antiquities.” *Id.* at 845.

163. See Short, *supra* note 42, at 651-52 (presenting British methodology of keeping art in Britain).

164. See *id.* (recounting museum tendency of hoping to retain British works).

the incentive to put art on the black market.<sup>165</sup> All sellers receive the fair market value, whether from a private buyer or the government.<sup>166</sup>

In contrast, France has no compensation for owners whose artwork cannot be sold out of the country, and therefore increased incentives for smuggling exist.<sup>167</sup> Additionally, in Italy, any work of artistic or historical importance over fifty years old may be exported only with permission from the Ministry of Education.<sup>168</sup> Both of these restrictions limit the legal market, thereby providing opportunities for an illegal market to take its place.<sup>169</sup>

#### 4. *Effect of Domestic Laws on International Stage*

A variety of domestic laws impose restrictions on art dealing and trade, thereby encouraging illicit art transactions.<sup>170</sup> Further, states' insistence on keeping cultural property within their respective borders limits their ability to export, restricting the artwork's access to people outside the country in which it is located.<sup>171</sup> Market nations point to source nations' preventing sale of artwork to other states for the sole purpose of maintaining a hold over that artwork as a reflection of a hoarding mentality.<sup>172</sup>

With such differing laws on criminal punishment, extradition places yet another wrinkle into the fold of how art theft is prose-

165. *See id.* (declaring presence of usable market for legal transactions, which thus reduces criminal enterprise).

166. *See* Fincham I, *supra* note 16, at 637 (explaining provisions of British export laws); *see also* Short, *supra* note 42, at 651-52 (acknowledging reason for seller not to engage in black market).

167. *See* Short, *supra* note 42, at 652-53 (declaring that when French seller is prohibited from engaging in market, France provides no financial compensation).

168. *See* Edwards, *supra* note 20, at 935 (describing restrictions on exports in Italy).

169. *See* Nafziger, *supra* note 46, at 846 (noting unintended creation of black market).

170. *See id.* (suggesting restrictions encourage black market and therefore harm art objects); *see also* Janene Marie Podesta, *Saving Culture But Passing the Buck*, 16 *CARDOZO J. INT'L & COMP. L.* 457, 463 (2008) (explaining connection between restrictions and black market).

171. *See* Merryman II, *supra* note 57, at 846 (questioning nationalist perspective). "To the cultural nationalist, the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its 'loss' through export." *Id.* *But see* Chang, *supra* note 63, at 846 (opining that nationalism may be viewed as correction of imbalance of power in marketplace).

172. *See* Merryman II, *supra* note 57, at 847 ("Cultural nationalism and internationalism also diverge in their responses to the practice of hoarding cultural objects, a practice that, while not necessarily damaging to the articles retained, serves no discernable domestic purpose other than asserting the right to keep them.").

cuted.<sup>173</sup> States with the greatest prosecutorial interest may be barred from extraditing alleged criminals because of provisions for double criminality, specialty of the criminal activity, non-extraditability of the rendering state's nationals, and high thresholds of punishability to define an extraditable offense.<sup>174</sup> Further, working outside of the scope of international law and using measures of self-help may pose a serious threat to the future of international cooperation.<sup>175</sup> Therefore, extradition is not as effective as it appears.<sup>176</sup>

The many different laws that exist cover various offenses against art and cultural property; however these provisions do not cover crimes that use art to defraud others.<sup>177</sup> Therefore, in order to protect art fully, nations should not only use specific cultural property laws, but also aggressively apply fraud laws when art is used to commit fraud.<sup>178</sup> The laws and practices of the United States show how this can be accomplished.<sup>179</sup>

## B. United States Laws

The United States uses a combination of fraud laws and laws directed at cultural property to prosecute art related crimes.<sup>180</sup> Cultural property statutes have been used effectively, but the United States has also prosecuted fraudulent art dealers and art experts under the same rubric used for other types of white-collar crime.<sup>181</sup> The success of the United States could be replicated in other countries.<sup>182</sup>

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173. See Nafziger, *supra* note 46, at 851-52 (stating that potential for extradition complicates matters of international law).

174. See *id.* (listing reasons why extradition may not be feasible).

175. See *id.* at 852 (explaining that extradition may cause rift among states whereas previously agreed upon international laws would not).

176. See *id.* (questioning effectiveness of extradition to remedy international art disputes).

177. For a discussion of cultural property laws focused on theft, not fraud, see *supra* notes 116-169 and accompanying text.

178. See Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973 (2006) (commenting on how fraud laws apply when crime evades theft prosecution).

179. For a discussion of successful fraud prosecutions, see *infra* notes 180-227 and accompanying text.

180. See Maher & Thompson, *supra* note 55, at 802-03 (stating that lack of effective legislation creates patchwork approach to prosecuting crime).

181. See *id.* at 803 (explaining similarities between fraud-based art theft and other white collar crimes).

182. For a discussion of U.S. convictions stemming from fraud laws, not cultural property laws, see *infra* notes 195-227 and accompanying text.

The Theft of Major Artwork Act (“Act”) is a United States statute aimed directly at protecting cultural property.<sup>183</sup> The Act protects “any object of cultural heritage” that is stolen or fraudulently obtained from a museum.<sup>184</sup> The statute is enforceable against a possessor of an item fraudulently obtained from a museum, even if that person is not the original thief.<sup>185</sup> Recently the Act was used to prosecute noted historian Barry Landau, who pled guilty to stealing thousands of documents, including letters signed by Napoleon, Marie Antoinette, Karl Marx, and various U.S. presidents.<sup>186</sup> Landau and his assistant stole the documents from museums in Baltimore, New York, Philadelphia, and Connecticut; most notable among the stolen items were the \$300,000 land grant signed by President Lincoln and \$500,000 in presidential inaugural ball programs and invitations taken from the Maryland Historical Society.<sup>187</sup> Landau will face sentencing in May 2012, and penalties under the Act include fines and a maximum jail sentence of ten years.<sup>188</sup>

Despite the Act’s success, the statute applies only to cultural property stolen from museums, and therefore cannot aid in prosecutions for theft or fraud from private homes or auction houses.<sup>189</sup> Therefore, while the Theft of Major Artwork Act is useful, it is also limited.<sup>190</sup> When an art theft occurs outside of a museum, if it is committed in conjunction with a fraud, the theft can be prosecuted under the fraud framework.<sup>191</sup> Several examples from the United States show how prosecuting art-related crimes under fraud laws

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183. 18 U.S.C. § 668 (1996).

184. *See id.* (detailing function of Act); *see also* Maher & Thompson, *supra*, note 55, at 805 (reporting purpose of Theft of Major Artwork Act).

185. *See* Maher & Thompson, *supra* note 55, at 805-06 (indicating purpose of Theft of Major Artwork Act is repatriation of artworks, not criminal punishment against thieves).

186. *See* Associated Press, *Historian Pleads Guilty to Document Theft Scheme*, MSNBC.COM (Feb. 7, 2012 7:29:37 PM), [http://www.msnbc.msn.com/id/46301379/ns/us\\_news-crime\\_and\\_courts/t/historian-pleads-guilty-document-theft-scheme/#.T0EorByH9wc](http://www.msnbc.msn.com/id/46301379/ns/us_news-crime_and_courts/t/historian-pleads-guilty-document-theft-scheme/#.T0EorByH9wc) (elaborating on 2012 charge under Act).

187. *See* Sarah Brumfield, *Barry Landau, Presidential Historian, Expected to Plead Guilty in Theft Case*, HUFFINGTON POST (Feb. 7, 2012 9:28 PM), [http://www.huffingtonpost.com/2012/02/07/barry-landau-theft\\_n\\_1259462.html](http://www.huffingtonpost.com/2012/02/07/barry-landau-theft_n_1259462.html) (emphasizing gravity of offense).

188. *See id.* (listing penalties facing Landau).

189. *See* 18 U.S.C. § 668 (1996) (mentioning limits of Act, leading to decreased usefulness); *see also* Maher & Thompson, *supra* note 55, at 805-06 (“The Theft of Major Artworks Act . . . specifically targets criminals that have stolen or fraudulently obtained ‘any object of cultural heritage’ from a ‘museum.’”).

190. *See* Maher & Thompson, *supra* note 55, at 805-06 (recognizing that statute criminalizes specific offense of stealing art from museum).

191. *See id.* at 803-07 (relating art theft to fraud crimes).

can lead to prosecution of the white-collar criminals who commit these crimes.<sup>192</sup> While the penalties remain relatively light in terms of jail time, heavy fines are typically imposed to reflect the seriousness of the crimes.<sup>193</sup> The following examples highlight successful United States art fraud prosecutions.<sup>194</sup>

### 1. *Center Art Gallery and Salvador Dali Forgery*

Wire fraud and mail fraud statutes are effective ways to prosecute art theft under United States law.<sup>195</sup> The statutes apply whenever a wire service or mail service is used to perpetrate fraud.<sup>196</sup> In 1989, the mail and wire fraud provisions were used to break up a large art fraud ring, which mailed false authentication certificates and made false representations about its artwork over the phone.<sup>197</sup> The ring had engaged in the production of forged Salvador Dali paintings, selling them as authentic works.<sup>198</sup> While the defendants in this case were not prosecuted for the sale of forged works of art nor for their false appraisals, the mail and wire fraud statutes led to a \$750,000 fine and a three year prison sentence for the gallery's president, and a \$282,000 fine and a two and a half year prison sentence for the vice president.<sup>199</sup>

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192. See *id.* at 803 (expressing belief that gallery and auction house dealers who commit art crimes act as white-collar criminals).

193. See Nafziger, *supra* note 46, at 838 (noting lack of criminal charges in international laws).

194. For an illustration of art fraud cases, see *infra* notes 195-227 and accompanying text.

195. See 18 U.S.C. § 1341 (2008) (outlining mail fraud statute); see also *id.* § 1343 (indicating wire fraud as potential ways to prosecute fraudulent actors); Maher & Thompson, *supra* note 55, at 807 (explaining successful prosecution under mail and wire fraud statutes). Violations do not require actual defrauding, just intent to defraud the victim. See *id.* at 776 ("Violation of these statutes does not require proof that the scheme's victims were in fact defrauded . . . [r]ather, violations turn on actual intent to harm the victim.").

196. See Maher & Thompson, *supra* note 55, at 776 ("The mail and wire fraud statutes provide criminal sanctions for using or attempting to use the mail [ ] and wire services to perpetrate fraud.").

197. See *United States v. Ctr. Art Galleries—Hawaii, Inc.*, 875 F.2d 747 (9th Cir. 1989) (presenting example of successful prosecution for art fraud under mail and wire fraud statutes); see also Maher & Thompson, *supra* note 55, at 807 (highlighting facts of case).

198. See *Ctr. Art Galleries—Hawaii, Inc.*, 875 F.2d at 749 (commenting that investigation began as involving sale of forged Salvador Dali artwork). Salvador Dali was a preeminent surrealist painter, whose most expensive painting sold for 13.5 million pounds in 2011. See Scott Reyburn, *Record Dali, Bacon Triptych Top \$150 Million Sotheby's Auction*, BLOOMBERG (Feb. 10, 2011, 7:51 PM), <http://www.bloomberg.com/news/2011-02-10/dali-painting-sells-for-artist-record-21-7-million-at-sotheby-s-london.html> (reporting price of final sale).

199. See Maher & Thompson, *supra* note 55, at 807 n.343 (listing penalties imposed against defendants).

2. *Antiques Roadshow*

In 2009, two former appraisers from PBS's *Antiques Roadshow* were sentenced to prison terms and heavy penalties for fraud involving over \$1.2 million in historical memorabilia.<sup>200</sup> Russ Pritchard III and George Juno lured clients into selling their Civil War artifacts by promising to donate them to a local museum.<sup>201</sup> Instead, Pritchard sold the memorabilia for nearly \$800,000 in profit.<sup>202</sup> Though not "art," the memorabilia are cultural property, in that they are valuable, one of a kind objects, with value tied directly to their historical importance.<sup>203</sup> The Federal Bureau of Investigation ("FBI") caught Pritchard and Juno after hearing of their scheme.<sup>204</sup> In an effort to increase their reputation as Civil War experts, the pair provided acquaintances with Civil War swords ahead of time, and then appraised the swords on *Antiques Roadshow* as if they were chosen from the crowd.<sup>205</sup> The pair hoped that their scheme would attract potential sellers, and it did.<sup>206</sup> The two quickly found sellers to swindle, purchasing their goods for \$87,500 and reselling them for ten times that amount.<sup>207</sup>

Juno pled guilty to one count of fraud, and Pritchard, who was significantly more involved in the plan, pled guilty to more than twenty counts including wire fraud, mail fraud, theft from a museum, and Interstate Transportation of Stolen Property.<sup>208</sup> Pritchard was sentenced to two consecutive terms of four to eight years

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200. See Catherine Saunders-Watson, *Former Auction House Owner, TV Appraiser Sentenced to Prison*, AUCTION CENTRAL NEWS (Oct. 27, 2009, 3:17 PM), <http://acn.liveauctioneers.com/index.php/features/crime-and-litigation/1578-former-auction-house-owner-tv-appraiser-sentenced-to-prison> (recounting criminal penalties for art fraud defendants).

201. See *'Antiques Roadshow' Dealers Accused of Fraud*, ABC NEWS (Mar. 16, 2009), <http://abcnews.go.com/US/story?id=93814&page=1> (describing Pritchard and Juno's fraudulent acts).

202. See *id.* (mentioning Pritchard's fraudulent act).

203. See Kunitz, *supra* note 14, at 523 (determining cultural property to be broader than artworks).

204. See *Appraisers Pritchard and Juno Indicted*, CIVIL WAR NEWS, [http://www.civilwarnews.com/archive/articles/pritchard\\_juno\\_indict.htm](http://www.civilwarnews.com/archive/articles/pritchard_juno_indict.htm) (last visited Mar. 26, 2012) (highlighting FBI involvement in case).

205. See Deborah Fitts, *Juno Pleads Guilty to Four Counts of Fraud and Lying*, CIVIL WAR NEWS, <http://www.civilwarnews.com/archive/articles/juno.htm> (last visited Mar. 20, 2012) (describing fraudulent practices).

206. See *id.* (noting Pritchard and Juno's complex scheme to defraud).

207. See *id.* (detailing Pritchard and Juno's scheme).

208. See Saunders-Watson, *supra* note 200 (explaining different levels of culpability and different penalties for two defendants).

and a \$65,784 restitution payment on top of the \$800,000 civil judgment against him.<sup>209</sup>

### 3. *Sotheby's Auction House*

While mail and wire fraud violations have increased prosecution for art-related crimes, traditional fraud laws still lead to serious convictions.<sup>210</sup> Sotheby's auction officials Diana Brooks and A. Alfred Taubman were convicted in 2002 and 2001, respectively, for price fixing.<sup>211</sup> The two used their influence and expertise to gain clients' trust, and profited richly.<sup>212</sup> Private art sellers, who employed both Sotheby's and Christie's, lost millions of dollars in the scheme.<sup>213</sup> Taubman was convicted of price fixing, and was sentenced to a year in prison along with a \$7.5 million fine.<sup>214</sup> In exchange for her cooperation in Taubman's prosecution, Diana Brooks received a lighter sentence, which included probation, six months of home confinement, one thousand hours of community service, and a \$350,000 fine.<sup>215</sup> The prison time for these crimes is noticeably mild in light of the amount of money that Taubman and Brooks allegedly defrauded from customers.<sup>216</sup>

### 4. *New York Dealer Lawrence Salander*

In 2010, once-prominent art dealer Lawrence Salander pled guilty to a \$120 million fraud scheme, perpetrated by selling paintings he did not own and selling fractional shares of a painting that

209. *See id.* (declaring Pritchard's penalty).

210. *See id.* (mentioning convictions under U.S. fraud laws addressing art related issues).

211. *See* Dan Ackman, *Sotheby's Brooks Sent to Her Room, But No Jail*, FORBES (Apr. 29, 2002, 12:50 PM), <http://www.forbes.com/2002/04/29/0429brooks.html> [hereinafter Ackman I] (explaining Brooks's involvement in Sotheby's scheme to fix prices and steal money from clients); *see also* Dan Ackman, *Guilty! Jury Drops Hammer on Taubman*, FORBES (Dec. 5, 2001, 6:20 PM), <http://www.forbes.com/2001/12/05/1205taubman.html> [hereinafter Ackman II] (referring to Taubman's high level position and involvement in defrauding scheme).

212. *See* Ackman II, *supra* note 211 (detailing Taubman and Brooks' offenses); *see also* Maher & Thompson, *supra* note 55, at 803-04 (explaining unlikelihood that collectors will report fraud and advanced level of expertise and intellect needed to carry out art fraud).

213. *See* Ackman II, *supra* note 211 (noting that both major auction houses were involved in scheme).

214. *See Ex-Sotheby's Chairman Sentenced*, CNN MONEY (Apr. 22, 2002, 3:41 PM), <http://money.cnn.com/2002/04/22/news/taubman/index.htm> (specifying Taubman's sentence).

215. *See* Ackman I, *supra* note 211 (detailing lighter penalties for Brooks resulting from her cooperation with prosecutors).

216. *See id.* (stating that millions of dollars were stolen from clients).

added up to more than 100 percent.<sup>217</sup> The court sentenced Salander to the maximum sentence of six to eighteen years in prison, and imposed a fine of \$114 million to be paid as restitution.<sup>218</sup> One of Salander's victims was a close friend, who entrusted Salander with the sale of his art collection upon his death.<sup>219</sup> Rather than sell the artwork for the benefit of the estate, Salander kept the profits for himself.<sup>220</sup> In another instance, Salander befriended the son of American artist Stuart Davis, becoming so close to the family members that they asked Salander to hold many of Stuart Davis's paintings.<sup>221</sup> Salander secretly sold some ninety of Davis's pieces.<sup>222</sup> Salander acknowledged that his fraudulent activity lasted for over a decade before he was caught.<sup>223</sup>

##### 5. *Los Angeles Dealer Matthew Taylor*

In September 2011, the FBI arrested Matthew Taylor, a former San Diego art dealer, for selling forged paintings he claimed were the work of Claude Monet, Vincent van Gogh, Jackson Pollack, and Mark Rothko.<sup>224</sup> Moreover, Taylor was also charged with stealing a painting from a Los Angeles art gallery and later selling it to another gallery.<sup>225</sup> In addition to wire fraud and money laundering, Taylor was charged with interstate transportation of stolen property and possession of stolen property.<sup>226</sup> Taylor defrauded one client of over \$2 million, and faces up to one hundred years in prison if convicted on all counts.<sup>227</sup>

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217. See James Barron, *Art Dealer Pleads Guilty in \$120 Million Fraud Case*, N.Y. TIMES, Mar. 19, 2010, at A19, available at <http://www.nytimes.com/2010/03/19/nyregion/19salander.html> (introducing fraud allegations in Salander case).

218. See John Elgion, *Art Dealer is Sentenced For \$120 Million Scheme*, N.Y. TIMES, Aug. 4, 2010, at A17, available at <http://www.nytimes.com/2010/08/04/nyregion/04salander.html> (mentioning penalty assessed against Salander).

219. See *id.* (addressing specific circumstance of Salander fraud).

220. See *id.* (identifying Salander's wrongdoing).

221. See *id.* (exemplifying situation in which Salander defrauded close friend).

222. See *id.* (portraying Salander's admission of guilt).

223. See Sullivan, *supra* note 3 ("Remarkably, he acknowledged that he had sustained the fraud for more than a decade before he was caught.").

224. See Alex Dobuzinskis, *FBI Arrests Florida Man Over L.A. Art Scam*, REUTERS (Sept. 15, 2011 6:58 PM), <http://www.reuters.com/article/2011/09/15/us-art-arrest-idUSTRE78E7I920110915> (recounting current Taylor prosecution).

225. See *id.* (detailing Taylor's offense). The painting in question is *Seascape at Twilight*, by Granville Redmond. See *id.* (noting that painting was sold by Taylor for \$85,000).

226. See *id.* (identifying other charges).

227. See *id.* (acknowledging serious penalty that Taylor faces).



6. *New York Dealers Glafira Rosales and Ann Freedman*

In February 2012, the New York Times reported that a number of Abstract Expressionist paintings that had been circulating the market since 1996 were not legitimate paintings, but rather forgeries.<sup>228</sup> Glafira Rosales, who had access to the artworks through a client whose name she refused to release, introduced the paintings to New York's Knoedler Art Gallery.<sup>229</sup> Rosales met and befriended Ann Freedman of Knoedler, who had a distinguished and long-standing reputation in the art world.<sup>230</sup> Together they secured sales of paintings by Robert Motherwell, Mark Rothko, Willem de Kooning, and Barnett Newman, among other artists.<sup>231</sup> One painting was attributed to Jackson Pollock, and sold for \$17 million to hedge fund manager Pierre LeGrange in 2007.<sup>232</sup> When LeGrange later sought to sell the painting through Sotheby's and Christie's, both auction houses refused to handle the sale and cited its questionable provenance.<sup>233</sup> LeGrange conducted his own forensic testing and confirmed that the paint used on the Pollack was not commercially available until after the artist's death.<sup>234</sup> The painting was a fraud.<sup>235</sup>

Questions surrounding Rosales' legitimacy began to arise in 2003, when other artworks that Rosales had made available to Knoedler were deemed inauthentic.<sup>236</sup> Rosales was unable to provide the requisite paperwork to establish provenance, and would not release the name of the seller.<sup>237</sup> In 2007, the Dedalus Foundation, experts on Motherwell's artwork, refused to confirm Motherwell as the creator of a painting Rosales attributed to him.<sup>238</sup>

228. See Patricia Cohen, *Suitable for Suing*, N.Y. TIMES, Feb. 26, 2012, at A1, available at [http://www.nytimes.com/2012/02/26/arts/design/authenticity-of-trove-of-pollocks-and-rothkos-goes-to-court.html?\\_r=1](http://www.nytimes.com/2012/02/26/arts/design/authenticity-of-trove-of-pollocks-and-rothkos-goes-to-court.html?_r=1) (introducing news of New York art scandal).

229. See *id.* (naming parties involved).

230. See *id.* (explaining Freedman's participation).

231. See *id.* (identifying artists whose artwork allegedly passed through gallery).

232. See Charlotte Burns, *Knoedler Forgery Scandal Grows*, ART NEWSPAPER (Jan. 9, 2012), <http://www.theartnewspaper.com/articles/Knoedler+forgery+scandal+grows/25427> (noting circumstances of sale).

233. See Cohen, *supra* note 228 (commenting on early problems surrounding artwork).

234. See *id.* (recognizing process in which artwork was determined to be forged).

235. See *id.* (stating result of investigation).

236. See *id.* (asserting early problems with Rosales).

237. See *id.* (noticing signs of unusual circumstances surrounding artwork connected to Rosales).

238. See *id.* (acknowledging experts denying alleged Motherwell painting).

Glafira Rosales and Ann Freedman are now at the center of civil suits and criminal investigations regarding the legitimacy of the paintings.<sup>239</sup> Legrange sued Knoedler and Freedman for breach of express warranty, fraud, and unjust enrichment.<sup>240</sup> Additionally, the FBI is investigating the matter, and hopefully will uncover exactly who in the chain of buyers and sellers knew the paintings were forged.<sup>241</sup> It is unclear whether Rosales was aware that the paintings were fraudulent and even less clear if Freedman had knowledge.<sup>242</sup> Freedman still insists the paintings are legitimate.<sup>243</sup>

It is puzzling why Rosales used Freedman to make the sales in the first place, when Rosales's commission from each sale would be drastically cut by involving Knoedler.<sup>244</sup> However, Freedman's sterling reputation in the art community was a necessary connection for Rosales, and without Freedman, it is unlikely that Rosales would have had the legitimacy to make the sales.<sup>245</sup> Rosales became a trusted figure because of Freedman's reputation.<sup>246</sup>

Knoedler's demise highlights the role of authenticators in art crimes, and opens up the question of their legal liability.<sup>247</sup> Artworks' value obviously turns on whether it is a legitimate piece or a forgery, and there are severe repercussions for error.<sup>248</sup> Thus, the appraiser has a supreme position of power and may be drawn to corruption.<sup>249</sup> Furthermore, validating an artwork as legitimate is

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239. See *id.* (explaining FBI investigation of Rosales); see also Bruce Golding, *Jackson Bollocks! \$17M Sap Sues Gallery Over 'Phony' Painting*, N.Y. Post (Dec. 3, 2011), [http://www.nypost.com/p/news/local/manhattan/jackson\\_bollocks\\_LKI DoHY3h8YGunsfgVXmML](http://www.nypost.com/p/news/local/manhattan/jackson_bollocks_LKI DoHY3h8YGunsfgVXmML) (identifying civil claims brought against gallery and Freedman).

240. See Golding, *supra* note 239 (stating allegations).

241. See Cohen, *supra* note 228 (identifying FBI involvement).

242. See *id.* (explaining that with such little information, it is difficult to assess who is criminal and who is victim).

243. See *id.* (presenting Freedman's idea that, because artists were given new paints before general public, it is possible that dating paintings according to type of paint is inaccurate method).

244. See *id.* (questioning why Rosales would seek assistance to sell paintings, thereby losing portion of commission).

245. See *id.* (identifying Freedman's reputation in art community as central reason Rosales befriended her).

246. See *id.* (alleging Rosales had easy access to art market through connection to Rosales).

247. See Burns, *supra* note 232 (questioning role of authenticators in perpetuating art crimes).

248. See Raúl Jáuregui, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. Rev. 1947, 1950 n.3 (1997) ("Attributions greatly increase the value of a work of art, not only in monetary terms but also in terms of increased art history scholarship.").

249. See Louisa Lim, *In China's Red Hot Market, Fraud Abounds*, NPR.COM (Oct. 10, 2011), <http://www.npr.org/2011/10/10/141125011/in-chinas-red-hot-art>

an imperfect science, and it is unlikely one can ever be sure without a complete provenance.<sup>250</sup> If authenticators were to become legally and financially liable for every appraisal, it is unlikely that many in the profession would make their claims so assuredly, and few would be willing to put their reputations on the line just to identify an artist.<sup>251</sup> Ultimately, purchasers must decide whether to trust the appraisal.<sup>252</sup> An authenticator should not be liable for a false authentication unless evidence exists of corruption or conspiracy.<sup>253</sup> Traditional standards apply to determine if the authenticator is criminally involved in authenticating the artworks.<sup>254</sup> Therefore, art experts as well as art dealers can be held criminally liable in many art fraud cases.<sup>255</sup>

### C. International Laws

As art is commonly sold internationally, it is appropriately addressed by international law.<sup>256</sup> The international community has made several attempts to create effective laws regarding cultural property.<sup>257</sup> However, these laws are of limited effectiveness because they have not been ratified by all nations and apply only in

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market-fraud-abounds (“In too many cases, the art is fake . . . [and] the experts are crooked . . .”).

250. See Seth Tipton, *Connoisseurship Corrected: Protecting the Artist, the Public, and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 281 (2009) (calling connoisseurship “an imperfect science”).

251. Additionally, it so follows that the evolution of art history “will stagnate.” See Jáuregui, *supra* note 248, at 1951 (describing logical conclusion to art attributors’ fear).

252. See Kai B. Singer, “Sotheby’s Sold Me a Fake!” – Holding Auction Houses Accountable for Authenticating and Attributing Works of Fine Art, 23 COLUM.-VLA J.L. & ARTS 439, 447 (2000) (describing standard of care to which art experts should be held accountable).

253. See Jáuregui, *supra* note 248, at 1978 (recognizing that owner of artwork that has been de-attributed may sue for negligence, but there is no criminal recourse).

254. See *id.* at 1977 (emphasizing fraud cases’ focus on punishing defendant, not economic relief to plaintiff).

255. See *id.* (reiterating criminal punishment for art dealers).

256. See Edwards, *supra* note 20, at 920 (explaining that art has been traded among different nations for ages, but contemporary economic considerations require enhanced regulation).

257. See Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention] (providing one example of international effort); see also UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 19 U.S.C. § 2601(6), 823 U.N.T.S. 232 [hereinafter UNESCO Convention]; UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 24 I.L.M. 1322 (1995) [hereinafter UNIDROIT Convention].

very specific circumstances.<sup>258</sup> Further, there is little guidance regarding the criminal punishments to be imposed upon those who violate international laws.<sup>259</sup>

### 1. *The Hague Convention*

The first attempt at international cooperation regarding cultural property developed out of a desire to protect art in light of the destruction during the World Wars.<sup>260</sup> Europe suffered substantial artistic losses due to Nazi efforts to remove all artwork from Jewish collections, as well as collateral damage from bombings.<sup>261</sup> The ensuing agreement therefore addressed wartime looting and destruction of art objects.<sup>262</sup> This agreement, the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”), has become particularly relevant regarding the destruction of the Bamiyan Buddhas in Afghanistan.<sup>263</sup> The ancient carvings, which dated back to the third and fifth centuries, were destroyed in 2001.<sup>264</sup> Despite the immeasura-

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258. See UNIDROIT CONVENTION SIGNATORY TABLE, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, available at <http://www.unidroit.org/english/implement/i-95.pdf> (showing lack of international involvement).

259. See Nafziger, *supra* note 46, at 383 (explaining lack of sentencing provisions in international cultural heritage agreements).

260. See Borodkin, *supra* note 38, at 388 (highlighting plundering and bombing that resulted from wars as major destroyer of art and artifacts, and impetus for developing better protection policies).

261. See Kunitz, *supra* note 14, at 526 (expressing that systematic Nazi removal of Jewish-owned artworks brought attention to destructive impact of war on cultural objects); see also John Varrol, *Ukraine Suffered Colossal Looting During World War II*, ART NEWSPAPER (June 4, 2009), <http://www.theartnewspaper.com/articles/Ukraine-suffered-colossal-looting-during-World-War-II/17455> (reporting Nazis looted 250,000 items from major Ukraine museums, which accounted for 74% of Soviet Union’s major losses); OXFORD DICTIONARY OF ART (2004), available at [http://www.encyclopedia.com/topic/Gustave\\_Courbet.aspx#1](http://www.encyclopedia.com/topic/Gustave_Courbet.aspx#1) (noting loss of Gustav Courbet’s *The Stonebreakers* during World War II bombing of Dresden, Germany). “The Zwinger museum, where the collection was stored, was damaged, and 197 paintings were destroyed by fire.” Anatoly Korolyov, *Anniversary of the Return of Masterpieces to Dresden Gallery*, RIA NOVOSTI (Feb. 9, 2005), <http://en.rian.ru/analysis/20050902/41282345.html>.

262. See Kunitz, *supra* note 14, at 256 (“Since the end of the Second World War, international consciousness regarding cultural heritage has been rising incrementally. Following the massive destruction wrought during the war, the international community saw the need to protect treasures and works of art from the ravages of war. As a result, concerned countries convened and negotiated the Hague Convention . . .”).

263. See Gerstenblith I, *supra* note 35, at 247 (evaluating Bamiyan Buddha destruction in light of Hague Convention).

264. See W.L. Rathje, *Why the Taliban Are Destroying Buddhas*, U.S.A. TODAY (Mar. 22, 2001), <http://www.usatoday.com/news/science/archaeology/2001-03-22-afghan-buddhas.htm> (recognizing significant cultural property loss).

ble cultural loss, wartime destruction of this sort is nearly impossible to prosecute due to the frenzied nature of war, and despite its good intentions, the Hague Convention has not led to tangible results.<sup>265</sup>

## 2. UNESCO Convention

The Hague Convention is of limited use because it addresses destruction only during wartime.<sup>266</sup> A more flexible international solution is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970 (“UNESCO Convention”).<sup>267</sup> The UNESCO Convention is noticeably light on penal consequences.<sup>268</sup> Earlier drafts included criminal sanctions against curators who purchase cultural property without requiring proper certification, but the penalties were deleted in favor of a more good-will spirit.<sup>269</sup>

The UNESCO Convention enables nations to pursue their illegally exported cultural property in foreign jurisdictions.<sup>270</sup> The Convention focuses on remedies, but is considered ineffective because of political reasons: the Convention requires that a minority of market nations be almost universally responsible for the protection of source nations’ cultural property.<sup>271</sup> Most major art-purchasing nations have ratified the agreement, but because the provisions are biased toward claims of artifact-rich nations, market nations have little incentive to participate.<sup>272</sup>

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265. See Gerstenblith I, *supra* note 35, at 247 (noting state of chaos in Middle East around time of Bamiyan Buddha destruction).

266. See Shanayeva, *supra* note 14, at 275 (explaining purpose of Hague Convention).

267. See UNESCO Convention, *supra* note 257 (introducing UNESCO convention and explaining its more comprehensive approach).

268. See Nafziger, *supra* note 46, at 838 (addressing absence of penalty provisions in UNESCO Convention).

269. See *id.* (stating reasons for elimination of penalties).

270. See Borodkin, *supra* note 38, at 388 (mentioning treaty’s policy allowing states to search out cultural property abroad).

271. See *id.* at 389 (addressing lack of participation in treaty); see also Podesta, *supra* note 170, at 464 (arguing that UNESCO’s current policy is contrary to international public good).

272. See UNESCO CONVENTION RATIFICATION TABLE, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION (Apr. 24, 1972), <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha> (providing list of ratifying nations) (last visited Mar. 20, 2012); see also Borodkin, *supra* note 38, at 389 (“One of its most serious shortcomings is the uneven distribution of benefits and burdens among member nations. Its provisions are heavily biased toward claims of artifact rich nations, while the transaction costs of litigation are allocated almost exclusively to art-producing nations, which are the designated fora.”).

### 3. *UNIDROIT Convention*

The final major convention is the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”).<sup>273</sup> The Convention allows private individuals to bring claims for the return of stolen cultural property that is within another state’s borders.<sup>274</sup> However, the Convention addresses the restitution and return of stolen objects rather than theft prevention or penalization.<sup>275</sup> Further, the Convention has only thirty-two contracting countries.<sup>276</sup> Source countries such as Cambodia and Peru ratified the Convention, but it remains unpopular with market nations.<sup>277</sup> Overall, the Convention has been largely ignored.<sup>278</sup>

None of the three major international art-related treaties apply to domestic art fraud.<sup>279</sup> The Hague Convention applies only to damage and theft of cultural property during wartime.<sup>280</sup> The UNESCO Convention applies only to nations seeking to re-obtain stolen art from abroad.<sup>281</sup> The UNIDROIT Convention applies only when an individual is trying to obtain a piece of art that has ended up in another nation.<sup>282</sup> Yet considering the international significance of the objects in question, international solutions to art theft concerns are encouraged.<sup>283</sup>

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273. See Borodkin, *supra* note 38, at 390 (introducing UNIDROIT convention as most recent international convention on cultural property).

274. See ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS & THE RETURN OF CULTURAL OBJECTS* 274 (2006) (highlighting participation of individual persons, rather than only nations, in UNIDROIT process).

275. See Andrew Cranwell, *The Price of Age—An International Investigation Into The Illicit Trade of Antiquities* (May 31, 1999), <http://www.museum-security.org/cranwell/law.html> (noting return of property as central concern).

276. See UNIDROIT CONVENTION SIGNATORY TABLE, *supra* note 258 (commenting on lack of international involvement).

277. See *id.* (showing that market nations who signed convention have not yet entered convention into force).

278. See Nate Mealy, *Mediation’s Potential Role in International Cultural Property Disputes*, 26 OHIO ST. J. ON DISP. RESOL. 169, 176 n.35 (2011) (explaining that source nations resent paying restitution to current owners of their cultural property, and Convention gives too much leeway in defining cultural property).

279. See Carvajal & Vogel, *supra* note 9 (stating Wildenstein was charged under French law).

280. For discussion of the Hague Convention, see *supra* notes 260-265 and accompanying text.

281. For discussion of the UNESCO Convention, see *supra* notes 266-272 and accompanying text.

282. For discussion of the UNIDROIT Convention, see *supra* notes 273-283 and accompanying text.

283. See Fincham II, *supra* note 114, at 116 (commenting on guidelines issued in 2008 by American Association of Art Museum Directors, which seeks to prevent flow of cultural property); see also Edwards, *supra* note 20, at 945 (describing protections under Hague Convention as equating cultural property to private prop-

## V. DRAWING UP A SOLUTION

Art crimes are so appealing to criminals because art objects are easily moveable, highly valuable, and perennially desirable.<sup>284</sup> Therefore, solutions to art theft must address each of these concerns.<sup>285</sup> Effective use of stolen-art databases can prevent theft from occurring in the first place by making theft less attractive to

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erty). *But see* Fincham I, *supra* note 16, at 641 (noting philosophy under which cultural heritage and its physical manifestations cannot be privately owned). Bilateral agreements are an alternative to international treaties. *See* Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT'L L. 623, 629 (2007) ("The legal regime protecting the international trade in cultural property is a complex array of international conventions, bilateral agreements, national ownership and export laws, and judicial interpretation."). Rather than the international community imposing overarching restrictions on free trade of states, these agreements come from two states' desire to achieve a feasible agreement. *See* Kelly, *supra* note 64, at 515 (expressing preference for local law over international solutions). It is noted that without criminal penalties, "import restrictions appear to have little teeth." *Id.* The United States has entered many such bilateral agreements with source nations, following the Convention on Cultural Property Implementation Act. *See* 19 U.S.C. §§ 2601, 2613 (1988) (giving example of bilateral treaty U.S. has entered into). Most recently, the United States signed a Memorandum of Understanding with Greece, which will restrict importation into the U.S. of Greek archeological and cultural materials. *See* Lee Rosenbaum, *Greek Cultural-Property Agreement: U.S. Adopts Broad Import Restrictions*, CULTURIGRRL (Sept. 10, 2011, 9:43 AM), [http://www.artsjournal.com/culturegrrl/2011/07/greek\\_cultural-property\\_agreem.html](http://www.artsjournal.com/culturegrrl/2011/07/greek_cultural-property_agreem.html) (explaining purpose of Memorandum). The central provisions of the memorandum require the United States to impose import restrictions, but there is also a requirement on the part of Greece to at least consider participating in a licit market for antiquities. *See id.* (expressing central points of Memorandum). The emphasis appears to be on reciprocity: the United States will attempt to enforce restrictions on illegal trafficking in hopes that Greece will be more open to long term lending of cultural objects to U.S. museums. *See id.* (identifying intention of addressing individual requests with more nuance). As made apparent here, the flexibility and specificity of bilateral agreements makes them more practical solutions to art disputes. *See* Gerstenblith I, *supra* note 35, at 245-46 (mentioning that bilateral agreements facilitate "cultural globalism, which places contextualism at the heart of its policy"). It appears that the United States' propensity for entering into bilateral agreements with source nations will continue. *See* Rosenbaum, *supra* (surmising that new personnel in high level positions reflect growing seriousness about cultural property policy). In June 2011 President Obama appointed ardent repatriationist Patty Gerstenblith as Chair of the Cultural Property Advisory Committee. *See id.* (identifying Gerstenblith as new Chair). Further, the most recent bilateral treaty between Greece and the United States market the first time a treaty of this sort was signed such a high-ranking U.S. official. *See id.* (recognizing increased prominence when accord signed by Hillary Rodham Clinton, Secretary of State). Therefore, it is clear that the United States is beginning to take cultural property issues more seriously. *See id.* (noting United States' State Department's Cultural Property Advisory Committee's recent pro-source country leanings).

284. *See* Conley, *supra* note 18, at 494 ("Art works are often mobile, and easily concealed and stored.").

285. *See generally* Silver, *supra* note 19 (detailing Italy's process of protecting cultural property).

would-be thieves.<sup>286</sup> Once theft has already happened, though, the United States model of prosecuting cultural property theft as fraud is highly effective, and can be a model for all countries.<sup>287</sup>

#### A. The United States: A Model for Application of Fraud Laws to Art Theft

The United States has had plenty of success in applying fraud charges to art theft cases.<sup>288</sup> As more causes of action are brought against the art expert community, there is likely to be a greater value placed on transparent business transactions.<sup>289</sup> Regulating art sale may be the only way to ensure fairness.<sup>290</sup> Until then, the threat of criminal prosecution must suffice to urge art dealers to act ethically.<sup>291</sup> For art theft addressed by domestic law, prosecution under fraud laws effectively lead to punishment.<sup>292</sup> Therefore, fraud prosecution can significantly deter future fraud perpetration.<sup>293</sup>

Beyond the redressibility of fraud law, charging defendants with fraud is more likely to shift public perception toward viewing art crimes seriously.<sup>294</sup> Financial crimes have been widely publicized in recent years, and the devastating effects are infamous.<sup>295</sup> Therefore, charging and prosecuting art crimes under a well-known

286. See Conley, *supra* note 18, at 505 (explaining that databases make lost art easier to recover, and thus less valuable to steal).

287. See *supra* notes 195-255 (highlighting examples of successful convictions under fraud framework).

288. See *supra* notes 195-255 (noting many successful convictions).

289. See Conley, *supra* note 18, at 512 (“The imposition of record keeping standards and breaking the secrecy tradition is crucial to the revamping of art world business techniques.”).

290. See Gerstenblith II, *supra* note 59, at 213 (addressing other regulations related to art, such as export regulations and antiquities sale regulations, and their success at controlling market).

291. See Conley, *supra* note 18, at 512 (“The fear of being sued should, in and of itself, provide a catalyst for change and initiate more cautionary procedures on the part of dealers.”).

292. See Maher & Thompson, *supra* note 55, at 802-05 (discussing issues surrounding application of fraud laws to art crimes).

293. See Buell, *supra* note 178, at 2017 n.140 (asserting that higher punishments deter international actors).

294. See Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 7 (2004) [hereinafter Green II] (recognizing problems involved with crimes of “elite deviance”).

295. See *Fraud Reporting: The Rise in Financial Crime in America*, ECONOMIST (Jul. 21, 2009), [http://www.economist.com/node/14067467?story\\_id=14067467](http://www.economist.com/node/14067467?story_id=14067467) (reporting increase in financial crimes).



fraud rubric immediately frames the offense as one of serious consequence.<sup>296</sup>

Uncovering art fraud seems daunting, but it is possible.<sup>297</sup> The FBI, as well as Italy's Tutela Patrimonio Culturale ("TPC"), illustrate that federal government involvement can aid in the recovery of stolen art and prosecution of art fraud.<sup>298</sup> However, these departments require funding, and protection of cultural property is not perceived to be as threatening as crimes associated with violence.<sup>299</sup> Further, federal investigation units are much more likely to address theft from large, public museums than from privately owned collections.<sup>300</sup> Therefore, other solutions that address theft from private collections are more useful.<sup>301</sup>

### B. Databases: The Art of Cooperation

In the art world, experts with monopolized knowledge and contacts are granted the utmost trust and have few checks imposed on their power.<sup>302</sup> Increasing the transparency of the art world by means of an international art registry database is a potential way to

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296. See Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 506 (2004) [hereinafter Green III] (noting fine line between behavior that is fraudulent and criminally punishable, and behavior that is "merely aggressive").

297. See FBI—ART THEFT: ART CRIME TEAM, [http://www.fbi.gov/about-us/investigate/vc\\_majorthfts/arttheft/art-crime-team](http://www.fbi.gov/about-us/investigate/vc_majorthfts/arttheft/art-crime-team) (last visited Mar. 20, 2012) (stating that FBI art theft division began in 2004 and currently has thirteen special agents across country).

298. See Silver, *supra* note 19, at 39-40 (naming the Tutela Patrimonio Culturale as unit of Italian military specialized in art investigations). "[T]he [TPC] [is] a law enforcement unit in the military police (the *Carabinieri*) specifically dedicated to combating the rampant art theft all over Italy." *Id.* at 27. "The TPC has been very successful in recovering Italian plundered artifacts both within the country and abroad. Between 1970 and 2008, the TPC recovered 389,188 stolen items and 823,053 archaeologically significant objects and seized 252,932 forgeries." *Id.* at 40. See generally FBI—ART THEFT: IT'S LIKE STEALING HISTORY, [http://www.fbi.gov/about-us/investigate/vc\\_majorthfts/arttheft](http://www.fbi.gov/about-us/investigate/vc_majorthfts/arttheft) (last visited Mar. 20, 2012) (providing overview of recent successful recoveries within United States).

299. See Charney, *supra* note 47 ("The general public, and also governments and police, tend to have the same misconceptions about art crime. They think it happens infrequently . . . with the implication that it is not a very serious crime type. Next to murder and the drug trade, perhaps it is not so serious.")

300. See Lori J. Parker, *Proof of Claim Involving Stolen Art or Antiquities*, 77 AM. JUR. PROOF OF FACTS 3d § 5 (2004) (commenting on state's hesitance to involve state in private disputes).

301. See Conley, *supra* note 18, at 505 (discussing databases as more individually-focused solution).

302. See Sullivan, *supra* note 3 (recognizing art world as more concerned with graciousness and reputation than binding legal documents).

curb art theft.<sup>303</sup> Existing databases provide the necessary documentation, photographs, and expert descriptions needed by investigators to properly search out the missing artwork.<sup>304</sup> An international database can disseminate news of a recent theft, thereby reducing the artworks' international mobility and potential for sale.<sup>305</sup> Additionally, national databases can reduce instances of theft and fraud within a country and aid in its recovery.<sup>306</sup> Canada, Italy, and Poland have small local databases, but these pale in comparison to those of the FBI and INTERPOL.<sup>307</sup> Cooperation between national and international databases is central to successful artwork recovery, but such cooperation has not always been present.<sup>308</sup> For example, while Canada's registry works in conjunction with INTERPOL, the system in Poland is reportedly inaccessible to police officers, rendering it useless.<sup>309</sup>

INTERPOL has made recent improvements to its database to increase the system's usability.<sup>310</sup> Direct access to the database has been available since 2009, and the database now contains over 38,000 images.<sup>311</sup> Now anyone can access images of recently stolen artworks, recently recovered artworks, and items seized by law enforcement that have yet to be returned to their proper owner.<sup>312</sup> By

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303. See Conley, *supra* note 18, at 506 (theorizing that centralized base for identification of stolen art would facilitate rediscovery and prevent initial theft).

304. See *id.* at 506 n.85 (commenting that police are unable to investigate art theft properly without this information).

305. See *Searching*, ART LOSS REGISTER, <http://www.artloss.com/content/searching> (last visited Mar. 20, 2012) (explaining how international art database makes interested parties more aware that artwork is stolen, thereby preventing artwork from entering market again legitimately).

306. See Conley, *supra* note 18, at 510 (describing success of Italy's art database).

307. See *id.* at 509 (noting disjuncture among domestic and international databases).

308. See *id.* at 494 (asserting that database cooperation is central to effectively deterring art theft).

309. See *id.* at 510 (commenting how local police in Poland cannot access system, which operates through Ministry of Culture).

310. See *Works of Art*, INTERPOL, <http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art> (last visited Mar. 20, 2012) (recognizing website redesigned in 2011).

311. See *Frequently Asked Questions*, *supra* note 37 (explaining recent improvements to accessibility of website and database). The General Secretariat circulated international stolen property notices from 1947 until 2000, when the improvements to remote database access and development of the website were implemented. See *id.* (noting previous efforts to disseminate information of stolen artworks).

312. See *Recent Thefts*, INTERPOL, [http://www.interpol.int/Works-of-art?type=RECENTTHEFTS&woa\\_search](http://www.interpol.int/Works-of-art?type=RECENTTHEFTS&woa_search) (last visited Mar. 20, 2012) (illustrating system to display stolen artworks).

making the images accessible to anyone, the website increases art world transparency and makes art theft less profitable.<sup>313</sup>

Private databases are another method by which art theft can be prevented or remedied.<sup>314</sup> The Art Loss Register (“ALR”) is a private organization where victims of art theft report the theft, and that information is made available to those from whom it is requested.<sup>315</sup> Because it is a private service, the ALR charges for art objects to be registered and for access to the list of reported missing pieces.<sup>316</sup> In addition to the possible cost-prohibitive nature of private databases, the effectiveness of such systems is further limited by the fact that burglary and theft detectives may not know that these databases exist.<sup>317</sup> The ALR has yielded some impressive results, however, recovering over \$320 million worth of stolen items, including works by Cezanne, Manet, and Picasso.<sup>318</sup>

#### VI. A CERTAIN *JE NE SAIS QUOI*: IGNORANCE REALLY IS BLISS IN FRENCH ART FRAUD

Defenses lie on the other side of the coin of fraud charges.<sup>319</sup> To illustrate defense of a fraud charge, it is helpful to once again consider Guy Wildenstein’s breach of trust charges.<sup>320</sup> Wildenstein’s defense is one of ignorance—claiming that because he did not inspect the vault, he was unaware that the paintings were there.<sup>321</sup> The defense seems suspicious in light of most galleries’

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313. *See id.* (displaying images of stolen pieces). The website further breaks down stolen artworks into categories: recovered, recent theft, and unclaimed. *See id.* (displaying artworks according to when theft was perpetrated). Additionally, there are many different categories of missing Afghan and Iraqi art objects, ranging from sculptures and paintings to coins and cuneiform tablets. *See id.* (collecting variety of items covered by INTERPOL database).

314. *See* Conley, *supra* note 18, at 510-511 (announcing private databases as other option).

315. *See Services*, ART LOSS REGISTER, <https://www.artloss.com/content/services> (last visited Mar. 20, 2012) (detailing procedure for use of Art Loss Register).

316. *See Payment Structure*, ART LOSS REGISTER, <https://www.artloss.com/content/payment-structure> (last visited Mar. 20, 2011) (explaining prices for services through Art Loss Register).

317. *See* Conley, *supra* note 18, at 511 (stating that Art Loss Register will remain of limited effectiveness until it is more commonly known).

318. *See History and Business*, ART LOSS REGISTER, <https://www.artloss.com/content/history-and-business> (last visited Mar. 20, 2012) (highlighting most successful Art Loss Register cases).

319. *See* United States v. Schultz, 333 F.3d 393, 412 (2d Cir. 2003) (exemplifying ignorance defense in case involving illegal import of Egyptian antiquities by renowned art dealer). For a discussion of facts in *Schultz*, see *infra* note 331.

320. For a discussion on Wildenstein’s current legal problems, see *supra* notes 2-10 and accompanying text.

321. *See* Carvajal & Vogel II, *supra* note 9 (recounting Wildenstein’s defense).

careful record keeping of their possessions for tax and insurance requirements.<sup>322</sup> However, an ignorance defense is a plausible defense to art fraud charges.<sup>323</sup>

France's civil law tradition directs how the ignorance defense will result there, in contrast to how an ignorance defense will play out in the United States.<sup>324</sup> The common law tradition maintains that ignorance or mistake of law is not a defense.<sup>325</sup> In contrast, civil law countries require a *dolus malus*, or an "awareness of the unlawfulness of the act."<sup>326</sup> Therefore, Wildenstein will only be convicted if his awareness of the presence of the paintings can be proved, a fact that he vehemently denies.<sup>327</sup> Thus, fraud cases may lead to differing results in civil law nations and common law nations.<sup>328</sup>

International law also allows mistake of fact as a viable defense.<sup>329</sup> The Rome Statute—international law's criminal code—lists mistake of fact and mistake of law as defenses in two different provisions.<sup>330</sup> Further, it provides that a "[m]istake of fact *shall* be a

322. See *id.* (commenting that others in Wildenstein's position typically keep their books updated).

323. See Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1410 (1992) ("The distinctive moral blameworthiness associated with the breach of a duty to know might explain why wilful ignorance most often appeared as an adequate mens rea in early criminal cases when such a duty existed, either legally or ethically. It might also account for the continuing sizable number of fraud-related wilful ignorance cases.").

324. See van Sliedregt, *supra* note 23, at 4 (explaining civil law and common law have different origins and sometimes lead to different results).

325. See *id.* (noting that Anglo-American model historically had not accepted ignorance as defense).

326. See *id.* (recognizing civil law tradition of expecting awareness of wrongness of act). Some of the systems—namely Germany and the Netherlands—have now adopted a concept of "neutral intention". See *id.* (listing nations that have moved away from *dolus malus* model). France and Belgium, however, maintain the *dolus malus* notion, which requires awareness. See *id.* (explaining that mistake of law, when successfully raised, will lead to acquittal because it leads to failure of proof).

327. See Carvajal & Vogel II, *supra* note 9 (reporting that Wildenstein insists he was unaware paintings were in his possession).

328. For a discussion comparing civil law ignorance defense and common law ignorance defense, see *supra* notes 319-328 and accompanying text.

329. See van Sliedregt, *supra* note 23, at 4, 31 (announcing that in France, and per Article 32 of International Criminal Code, mistake of law will lead to acquittal, because it qualifies as viable failure of proof defense). The International Law Commission recognized the defense of mistake as a potential addition to a Draft International Criminal Code in 1980, but did not draft a final provision until 1996. See *id.* at 31 (recounting history of including mistake defense).

330. See Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Art. 30, 32, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *The Rome Statute*] (addressing mistake of fact and mistake of law defenses). The

ground for excluding criminal responsibility while a mistake of law *may* be a ground for excluding criminal responsibility.”<sup>331</sup> As such, mistake of fact invariably leads to acquittal.<sup>332</sup> Therefore, Wildenstein’s likely acquittal under French law would yield no different result under international law—with proof that he was ignorant as to the contents of the vault, he will not be convicted of his criminal wrongdoing.<sup>333</sup>

However, were the case to be prosecuted under United States law, the result could be different.<sup>334</sup> It appears likely that if Wildenstein indeed was ignorant of the paintings’ presence in the vault, he may have been *deliberately* ignorant.<sup>335</sup> In the United States legal system, an instruction on deliberate ignorance can allow a jury to convict if the defendant “formed a conscious purpose to avoid the truth.”<sup>336</sup> Deliberate ignorance requires only that the defendant know of the unlawful goals of the crime, and nothing more.<sup>337</sup> Therefore, if Wildenstein were tried in a U.S. court, a jury could find that he was so willfully ignorant that he had a culpable mens

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International Law Commission initially recognized two approaches: one would allow only mistake of fact to act as a defense, and the other would allow both mistake of fact and mistake of law to exclude criminal responsibility. See van Sliedregt, *supra* note 23, at 31 (indicating two potential results from mistake of law defense). The latter viewpoint eventually succeeded. See *id.* (acknowledging eventual result of mistake defense).

331. See van Sliedregt, *supra* note 23, at 32 (clarifying when mistake of fact and mistake of law may be used). Although mistake of law *may* be used, it is infrequently used successfully. See *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003) (providing example of attempted use of ignorance defense). In *Schultz*, a New York art dealer was accused of illegally importing antiquities from Egypt. See *id.* at 395 (summarizing facts of case). He stated that he did not know that restrictions on antiquities existed, and as such, should not be punished for not understanding the National Stolen Property Act. See *id.* at 410-11 (highlighting elements of defense). The Second Circuit Court of Appeals was unconvinced, and found that because Schultz knew the antiquities were stolen, it was necessary to convict Schultz even if he did not know the law. See *id.* at 412 (reporting court’s disposition of issue).

332. See van Sliedregt, *supra* note 23, at 32 (noting mistake of fact leads to case dismissal).

333. See Carvajal & Vogel II, *supra* note 9 (reiterating Wildenstein’s assertion that he was ignorant as to contents of vault).

334. See van Sliedregt, *supra* note 23, at 4 (suggesting different result for ignorance defense cases in Anglo-American tradition).

335. See Carvajal & Vogel II, *supra* note 9 (questioning lack of records in Wildenstein family vault).

336. See Jessica Kozlov-Davis, *A Hybrid Approach to the Use of Deliberate Ignorance in Conspiracy Cases*, 100 MICH. L. REV. 473, 496 (2001) (explaining standard for criminal conviction).

337. See *id.* at 499 (expressing that deliberate ignorance requires some knowledge of criminal culpability).

rea.<sup>338</sup> Nevertheless, in the civil law context, an ignorance defense appears irrefutable in the absence of proof that Wildenstein hid the paintings away.<sup>339</sup>

## VII. CONCLUSION

Nations without provisions on cultural property should use the United States as an example of how to aggressively apply fraud law to “experts.”<sup>340</sup> Prosecuting art theft under domestic fraud statutes leads to convictions and is proven successful in the United States.<sup>341</sup> Unfortunately, availability of the ignorance defense to criminal defendants is an additional hurdle civil law nations must overcome in order to successfully convict art thieves.<sup>342</sup>

On a cultural level, the world is finally waking up to the considerable amount of fraud occurring among art dealers.<sup>343</sup> Applying fraud laws in these cases allows the law to catch up with those who make a living buying and selling the world’s most beautiful and desirable possessions.<sup>344</sup> The mystique that surrounds the art world

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338. See *United States v. Schultz*, 333 F.3d 393, 412 (2d Cir. 2003) (holding that willful ignorance is not excuse for criminal action).

339. See van Sliedregt, *supra* note 23, at 4 (explaining burden of proof in civil law case of ignorance defense).

340. For a discussion providing examples of successful United States prosecutions, see *supra* note 195-255 and accompanying text.

341. For a discussion detailing criminal punishment of high-ranking Sotheby’s employees, see *supra* notes 210-216 and accompanying text.

342. For a discussion explaining ignorance defense in civil law countries, see *supra* notes 319-328 and accompanying text.

343. See Charlotte Burns, *Art Thefts on the Rise Across North America*, ART NEWSPAPER (Aug. 24, 2011), <http://www.theartnewspaper.com/articles/Art-thefts-on-the-rise-across-North-America/24420> (showing increasing awareness of art theft on North American continent); see also *Art Theft Increases Two-Fold in a Decade*, ART FIX DAILY (Sept. 1, 2011), [http://www.artfixdaily.com/news\\_feed/2011/09/01/2447-art-theft-increases-two-fold-in-a-decade](http://www.artfixdaily.com/news_feed/2011/09/01/2447-art-theft-increases-two-fold-in-a-decade) (discussing effect of media attention on art theft). The breach of trust charge may be difficult to prosecute, but Wildenstein now has bigger worries: on October 13, 2011, the French government formally charged Wildenstein with money laundering and another breach of trust offense for hiding billions of Euros around the globe. See *New Charges Against Art Dealer Guy Wildenstein*, ART FIX DAILY (Oct. 13, 2011), [http://www.artfixdaily.com/news\\_feed/2011/10/14/2592-new-charges-against-art-dealer-guy-wildenstein](http://www.artfixdaily.com/news_feed/2011/10/14/2592-new-charges-against-art-dealer-guy-wildenstein) (noting new charges against Wildenstein). Further, in March 2012, another French family came forward with allegations against Wildenstein, believing he possessed the family’s Monet, which went missing during World War II. See Doreen Carvajal, *Prominent French Families Battle Over Missing Monet*, N.Y. TIMES (Mar. 19, 2012), [http://www.nytimes.com/2012/03/20/arts/design/prominent-french-families-battle-over-a-missing-monet.html?\\_r=2&pagewanted=1&hp](http://www.nytimes.com/2012/03/20/arts/design/prominent-french-families-battle-over-a-missing-monet.html?_r=2&pagewanted=1&hp) (addressing new accusations against Wildenstein).

344. See Buell, *supra* note 178, at 2017 (explaining that in fraud prosecutions, most effective punishments rely on market actors to tell courts what behaviors should be disqualified).

may be intriguing, but the global lack of transparency in all areas concerning the sale of cultural property creates two classes: those who have money, connections, and power, and those who do not.<sup>345</sup> Art experts who defraud clients do just as much damage as looters and thieves because they engage in the ultimate objectification—reducing beauty to nothing more than cold hard cash.<sup>346</sup> We must first discover and reinstate lost pieces of cultural property and artwork, and then deliver justice to thieves and con artists who silently pillage the world's cultural record.<sup>347</sup>

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345. For a discussion of perspectives of source and market nations, see *supra* notes 56-115 and accompanying text.

346. See Chang, *supra* note 63, at 830 (noting theft of any type of cultural property should be deterred).

347. See Bitterman, *supra* note 91, at 37-38 (commenting that both settling cultural property dispute and finding justice are top concerns for victim nations).

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