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How New York Investors Financed the Looting of Syria, Ukraine, and Iraq: The Need to Increase Civil Liabilities for "Current Possessors" of Stolen Antiquities in the 21st Century

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**How New York investors financed the Looting of Syria, Ukraine, and Iraq;
The Need to increase Civil Liabilities for “current possessors” of Stolen Antiquities in the
21st Century**

By: Lukas Padegimas
Abstract

This note will argue that the U.S. should pass its own self-policing legislation that will make it less enticing for thieves to try to sell stolen antiquities to the U.S. market. Our world heritage is under threat from undeterred looting, which results in antiquities vanishing from museum storerooms and archeological sites before ending up in the store rooms of investors. Currently, source nations that attempt to have stolen antiquities returned are deterred by the high legal costs involved. As the biggest market for stolen cultural property, states within the U.S. should amend current replevin laws so that the possessors of stolen cultural property will be liable for the attorney fees incurred by the source nation/institution during a recovery action for such antiquities, should the source nation prevail in its action.

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Introduction

The echoes of another explosion permeate the ruins of the ancient Syrian city of Palmyra while dozens of men pillage the historical site of its treasures.³⁶⁸ For nearly forty years, archeologists have painstakingly helped preserve these thousand year old ruins and reconstruct the story of civilization and humanity.³⁶⁹ Now, the Islamic State is making a statement to the international community by desecrating a few significant landmarks.³⁷⁰ Meanwhile, barely a word enters the headlines of leading news sources on the looting of hundreds of thousands of artifacts from the region by locals on both sides of the conflict.³⁷¹

The looting of vulnerable sites in the twenty-first century occurs far beyond the borders of Syria. Sites as distant as Iraq, Ukraine, and China increasingly fall prey to opportunists who take advantage of subpar security to steal antiquities and sell them on the black market.³⁷² As a result,

³⁶⁸ *IS “Blows Up Palmyra Columns to Kill Three Captives,”* BBC (Oct. 27, 2015), <http://www.bbc.com/news/world-middle-east-34647186>.

³⁶⁹ *Profile: Khaled al-Asaad, Syria's “Mr. Palmyra,”* BBC (Aug. 19, 2015), <http://www.bbc.com/news/world-middle-east-33991863>.

³⁷⁰ Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NATIONAL GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/>.

³⁷¹ *See generally* US COMMITTEE OF THE BLUE SHIELD, <http://uscbs.org/> (last visited Nov. 29, 2015). The Blue shield website has numerous reports on the looting which takes places across the world – including Syria under the control of the Assad regime. Only ISIS has made its looting and destruction highly public; *See also* Graciela Gestoso Singer, *ISIS’s War on Cultural Heritage and Memory*, UK BLUE SHIELD (May 9, 2015), *available at* http://ukblueshield.org.uk/wp-content/uploads/2015/06/Singer-Isis_Against_World_Heritage.pdf.

³⁷² *See generally* Ricardo J. Elia, *Looting, Collecting, and the Destruction of Archaeological Resources*, 6 NONRENEWABLE RESOURCES, 85 (1997); *See also* Benjamin Genocchio, *Deal to Curb Looting in China Worries Museums*, N.Y. TIMES, Mar. 17, 2009, *available at* http://www.nytimes.com/2009/03/19/arts/artsspecial/19IMPORT.html?_r=0, *See also* THE ALL-

these pieces are no longer available for the public to appreciate and for scholars to use as a basis for the reconstruction of the past.³⁷³ Instead, most of these pieces are destined for the largest market for stolen cultural property, the United States – more specifically, New York City.³⁷⁴ So many looted antiquities enter the United States, despite the United States having entered into various treaties to discourage pillage, because the current laws of the United States protect the end purchasers of antiquities. This protection of the end purchaser thus provides pillagers with an incentive to continue destroying the cultural history of their countries so as to fuel this market's demand. As the world's cultural heritage disappears into the storerooms of investors at an unprecedented rate, it is time to explore new ways to stem the market for stolen cultural property in the United States.

This note will argue that the U.S. should pass its own self-policing legislation that would make it less enticing for thieves to try to sell stolen antiquities to the U.S. market. Currently, source nations³⁷⁵ attempting to have stolen antiquities returned to them are also deterred by the

UKRAINIAN PUBLIC ASSOCIATION OF ARCHAEOLOGISTS: ITS PURPOSES AND PLAN OF ACTIONS
[http://www.academia.edu/1905307/The_All-Ukrainian Public Association of Archaeologists Its Purposes and Plan of Actions](http://www.academia.edu/1905307/The_All-Ukrainian_Public_Association_of_Archaeologists_Its_Purposes_and_Plan_of_Actions) (last visited Nov. 29, 2015).

³⁷³ Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 170-71 (2007).

³⁷⁴ Patty Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities*, 14 Art Antiquity & L. 21, 22 (2009); *See also* Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, ART & ADVOCACY, Spring/Summer 2011, at 3, *available at* <http://www.herrick.com/siteFiles/Practices/E7897718CFCD9704C7ED731AB72A4122.pdf>.

³⁷⁵ Source Nations are countries that have cultural objects for which there is a world market. Barbara Hoffman, ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 89, (Cambridge Univ. Press, 1st ed. 2006) . Source nations are often poor, but artifact rich. John Henry

legal costs involved.³⁷⁶ The U.S. should amend current laws so that the possessors of stolen cultural property would be liable for the attorney fees and other civil costs incurred by the source nation during a recovery action for such antiquities should the source nation prevail in its action.³⁷⁷

In reaching this conclusion, Part A will offer a background on the black market for stolen cultural property. It will also describe the harm caused to cultural heritage sites as a result of looting, and the important public policy behind the need to stem this market. Part B will cover international agreements into which the U.S. entered regarding the sale of stolen antiquities. Part C will cover the current methods through which the U.S. Attorney General can recover stolen antiquities on behalf of the source nation or institution. The section will also describe the defects found within these laws.³⁷⁸ Part D will suggest that Federal Laws are ineffective when the current possessor of the object offers a bona fide purchaser defense. Part E will elaborate upon how, as an alternative, a source institution can pursue a replevin action in New York state courts. This part

Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831-32 (1986).

³⁷⁶ Folarin Shyllon, *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*. Rev. dr. unit. 219, 220 (2000-2).

³⁷⁷ US laws have failed to stem the black market for Stolen Cultural Property since these laws mainly exist to deter middlemen who smuggle antiquities and not the “current possessors” who later purchase such pieces as “bona fide purchasers”. The discussion of this article will focus upon how current US laws fail to deter bona fide purchasers from purchasing potentially looted antiquities.

³⁷⁸ As a result of extensive lobbying by museum and dealer associations, a “current possessor” who made a bona fide purchase in the US, remains mostly shielded from liability in an action where a source nation seeks the return of a stolen antiquity. Should the source nation prevail, the current possessor usually has only the antiquity to forfeit and every incentive to successfully rebut the source nation’s claims. *See* 18 U.S.C. 2315, *See also* 18 U.S.C 2606, *see also* 18 U.S.C. 2609(A).

then proposes a modification to the current law so as to increase the liability for current possessors of stolen antiquities in order to discourage further investment in the market for stolen cultural property, and thus decrease the incentive to loot antiquities.

Background

III. The Black Market in Antiquities in the United States

Before ending up in the hands of its current (end) possessor³⁷⁹ in the United States, a stolen object of antiquity is subject to a series of transactions. The antiquity first enters the black market when it is illegally excavated from an archeological site³⁸⁰ or stolen from the storeroom of a museum³⁸¹ in a source nation.³⁸² After passing through the hands of several middlemen, the

³⁷⁹ The “end possessor” for the purpose of this article is a bona fide purchaser who acquired the object at near market value. End possessors tend to be part of the social elite, investors, and museums. JAMES A. R. NAFZINGER ET. AL., *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 217 (Cambridge Univ. Press 2010).

³⁸⁰ The story of the Lydian Horde is one such story. Local villagers in Turkey discovered the tombs of Lydian nobles in 1967. They dig these items and sell them to a middle man who then sells these items to another contact within the United States. This contact approaches the curator of antiquities for the Metropolitan Museum of Art in NYC. The curator buys the horde. Sharon Waxman, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* 136-52 (Henry Holt & Co. 2008).

³⁸¹ Museums and other cultural institutions within developing nations suffer from budget problems. Security is thus lacking. Most of these museums also lack an easily accessible database. Coupled with the large array of objects held in storage within such countries, the disappearance of an object is usually unnoticed until much later. *Id.* at 109; *see also* NAFZINGER, *supra* note 12, at 478.

³⁸² A source nation is nation which has a large concentration archeological resources within its borders. It has a legacy of ancient civilizations and an even longer period of inhabitation. Source nations are often developing nations and usually lack a reasonable budget to adequately police archeological sites. Lack of policing of such sites encourages looting, a profitable business for those involved. Most source nations also claim ownership over all archeological materials which still remain underground and consider the looting of ancient tombs and archeological sites a statutory offense equivalent to that of theft. *Example*: See Egyptian statute penalty for stealing and for possession of looted artifacts. James Cuno, *Beyond Bamiyan: Will the World be Ready*

antiquity is eventually smuggled out of the source nation and crosses the border of a market nation,³⁸³ such as the United States.³⁸⁴ Once within the United States, the antiquity's value appreciates³⁸⁵ since it had supposedly passed through customs.³⁸⁶ It also becomes harder to trace the antiquity back to the original theft due to the added difficulty involved in distinguishing stolen antiquities among those that are legitimately placed on the market.³⁸⁷

For the purposes of this paper, the final transaction occurs when the antiquity is sold at a "reputable" gallery or auction house at a price similar to that of a non-stolen item.³⁸⁸ These antiquities then end up in the possession of the market nation's social elite, investors, and

Next Time?, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 41 (Hoffman, Cambridge Univ. Press 2006).

³⁸³ A Market Nation is usually a wealthy developed nation which often lacks cultural antiquities within its soil, but has a large market for such objects. Hoffman, *supra* note 8, at 159.

³⁸⁴ Gerstenblith, *supra* note 6, at 180-81.

³⁸⁵ New citation: NAFZINGER, *supra* note 12, at 482.

³⁸⁶ Until very recently the art world overwhelmingly discouraged inquiry into the origin of an object for sale. An inquiry could lead to the seller of the item to potentially refuse to continue a transaction with the buyer. The fact that the item crossed the US border would be enough to establish some legitimacy. WAXMAN, *supra* note 13, at 312.

³⁸⁷ Hoffman, *supra* note 8, at 52;); *see also* Provenance is the history of an object's excavation and past ownership.

³⁸⁸ A great example is a cypher stolen from the Baghdad National Museum in Iraq in 2003. In Baghdad, the item sold for \$2-3 on the market. Once beyond the border in Turkey, it sold for \$100-200. Once within the United States, such cyphers sold for \$1,500-\$3,000. At Sothbey's a cypher of this sort sold for \$90,000. Gerstenblith, *supra* note 6, at 180-81.

sometimes in world renowned museums.³⁸⁹ However, investigative journalists from both market and source nations coupled with authorities sometimes discover yet another smuggling network and the records of various smugglers who purchased such items – which leads to an attempt at restitution by the source country.³⁹⁰

One might think that there would not be a market for stolen antiquities in the United States. Collectors would reasonably avoid spending hundreds of thousands of dollars on objects when exposed to the risk of having to forfeit this investment upon proof that these items were actually stolen. Most museums would also prefer to avoid the public criticism that stems from overtly taking part in the pillaging our world’s cultural antiquities. However, even though the United States has entered into various treaties to return stolen antiquities to their source nations, these treaties are often limited in scope, and many collectors would rather take their chances when the opportunity arises to acquire another rare antiquity.

Part of the reason for this market dynamic is that 90% of all the antiquities on the U.S. market lack provable provenance – meaning that the legally significant circumstances surrounding the item’s discovery and import into the U.S. are unverifiable.³⁹¹ As a result, the New York elite art community has developed a mindset of willful blindness with respect to the provenance of

³⁸⁹ The “current possessor” is a person who is currently in possession of the object. Oftentimes, such a person had acquired the object under the good faith belief that the person who sold this object to “the current possessor” had good title to the object. It is important to also note that many museums have left the market for stolen antiquities in the past few years. Kiesha Minyard, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT’L L.J. 115, 116.

³⁹⁰ *United States. v. Schultz*, 178 F. Supp. 2d 445, 447 (S.D.N.Y. 2002).

³⁹¹ Gerstenblith, *supra* note 6, at 178. Provenance is defined as the place of origin and transaction history of the object.

antiquities.³⁹² This willful blindness has resulted in stolen antiquities entering the homes of the art community in New York City.³⁹³ The lucrative nature of the pillagers' vocations is further enhanced by United States laws that protect the end purchaser by providing him with an affirmative defense when this person's claims to be a "bona fide purchaser" – someone who held a good faith belief that the seller of the particular item had a good title to that item at the time of the transaction.³⁹⁴ Thus, even if an item is later discovered to be a stolen antiquity, the end purchaser rarely suffers from great monetary loss and is therefore not deterred from purchasing other art items.³⁹⁵

A. Implications of the Current Market for the World's Cultural Heritage

The lack of deterrence for the end possessor in the largest market nation for looted antiquities has resulted in a demand which has fueled the destruction of numerous cultural

³⁹² "Willful blindness" is in this context means a convenient lack of inquiry into the provenance of the object. A general "don't ask, don't tell" culture reigned in the art world before curators until several dealers in Italy and Greece came under legal investigation – which then led to the prosecution of Marian True, a Getty Museum Curator. WAXMAN, *supra* note 13, at 312.

³⁹³ It is thus common practice in the industry for buyers of antiquities to avoid further inquiry about an object's origin. *Id.*

³⁹⁴ A bona fide purchaser is a purchaser who held a good faith (belief that the seller had good title to the antique in question). *What is BONA FIDE?*, THE LAW DICTIONARY, <http://thelawdictionary.org/bona-fide/> (last visited Nov. 25, 2016). The buyer must also qualify as "a buyer in the ordinary course of business". Patricia Youngblood Rayhan. *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-faith Purchasers of Stolen Art*. 50 Duke L.J. 955, 974 (2001). Further details on the bona fide purchaser defense in criminal, civil forfeiture, and replevin actions are discussed with each separate statute below.

³⁹⁵ As the stolen antiquity is often sold near a legitimate object's market value to the (end) current possessor, it also becomes increasingly difficult to disprove a claim that the current possessor bought the item as a bona fide purchaser - should litigation over the right of ownership to the antiquity arise. The court's decision on whether the bona fide purchase defense works is fact specific, however. 77 Am. Jur. Proof of Facts 3d 259 (2004).

resources across the world. While even the most careful of excavations result in some destruction to an archeological site, professional archeologists strive to limit destruction to the site and to also record the context of the recovered object.³⁹⁶ Not only is this context important to understanding the history of civilizations, but it also serves as a means to better understand the significance and meaning of such objects.³⁹⁷ In contrast, the excavation of objects by looters takes these objects out of context and thus destroys the site's value to history. Specific archeological sites are a nonrenewable resource, and their destruction results in the loss of knowledge of the past forever.³⁹⁸

The looting of museums in war-torn areas as well as the pillage of archeological sites everywhere also removes antiquities from the public sphere. When antiquities wind up in the hands of private collectors, objects of historical significance and unusual beauty are no longer available to educate and delight the public in the source countries. This is a particularly poignant situation today, because most major museums in the world have recently made a concerted effort to collectively refuse to purchase pillaged antiquities.³⁹⁹ Although the departure of many museums

³⁹⁶ It's important to note that archeological excavations which began in the eighteenth century differed little from today's unsanctioned looting – interested individuals recruited the help of locals to dig objects out of the ground and displayed them as curiosities with little regard for the context. Yet since this era of mass treasure hunting, leading archeologists have refined the field to careful study of the context of the items to better recreate the story of the people who inhabited the site prior. Patty Gerstenblith, *The Law as Mediator Between Archaeology and Collecting*, *Internet Archaeology* (2013), <http://dx.doi.org/10.11141/ia.33.10>.

³⁹⁷ *Id.*

³⁹⁸ Neil Brodie, *An Archeologist's View of the Trade in Unprovenanced Antiquities*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 52* (Hoffman, Cambridge Univ. Press 2006).

³⁹⁹ Although museums in market nations constituted the largest market for antiquities of questionable provenance in the past, at the start of the twenty-first century most museums in market nations left the market as a result of public outcry. Market nation museums also began to limit their purchases of unprovenanced antiquities after authorities within the United States and Europe began to expose individual curators to criminal proceedings for the first time in 2004.

from the market was forecasted to stem this market, the market failed to decline because of the lack of repercussions to private purchasers.⁴⁰⁰ Thus, the damage resulting from the pillage of antiquities is now multifold: not only does the looting of stolen antiquities purge the source countries of their history from within their borders, but the antiquities' presence in the hands of individual collectors also means that the wider public loses the ability to study and appreciate that civilization's legacy elsewhere.⁴⁰¹

B. The United States as a Party to International Treaties that Address the Looting of Antiquities

The nations of the world are not insensitive to the need to prevent the looting of objects of art. Since 1954, market nations and source nations have entered into several multilateral treaties

Especially following the Marion True affair in Italy. Sharon Waxman, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* 298-342 (Henry Holt & Co., 1st ed. 2008). The combination of public outcry and pressure has “led museums to effectively leave the market for unprovenanced antiquities” – as elaborated upon by Philippe de Montebello, the curator of the Metropolitan Museum of Art. *Id.* at 181.

⁴⁰⁰ One example of such a policy is practiced by the Chicago Field Museum. Although the policies are most clearly laid out under policy for acquisitions of fossils, they are also fully applicable to anthropological material and art. *Fossils & Meteorites: Policies*, CHICAGO FIELD MUSEUM, <https://www.fieldmuseum.org/science/research/area/fossils-meteorites/fossils-meteorites-policies> (last visited Nov. 29, 2015).

⁴⁰¹ Although revised acquisition policies by museums in market nations should have stemmed the market for looted antiquities, the market has only grown in the past decade as private individuals have increased demand for such objects. Thus, looted antiquities have all but disappeared from the view of the public where they rightfully belong. The departure of museums in market nations from the black market in antiquities means that the recently stolen antiquities are not appreciated by the public in either source nor market nation museums. *See* Ildiko P. DeAngelis, *How Much Provenance is Enough? Post-Schultz Guidelines for Art Museum Acquisition of Archeological Materials and Ancient Art*, in *ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE* 52 (Hoffman, Cambridge Univ. Press 2006).

in an attempt to stem the black market for looted antiquities and other stolen cultural property in times of war and peace.⁴⁰²

In the aftermath of the second world war, 126 nations ratified the Hague Convention of 1954 and first recognized the obligation to protect moveable cultural property from looting and destruction during times of war (and occupation) of a signatory state by another signatory.⁴⁰³ The United States only ratified this convention in 2009 and has yet to adopt legislation⁴⁰⁴ to implement the treaty's provisions.⁴⁰⁵

⁴⁰² The Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict (1954); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970), Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995).

⁴⁰³ “Recogniz[ed] that cultural property suffered grave damage during recent armed conflicts . . . and that damage to cultural property . . . to any people . . . means damage to the cultural heritage of all mankind. The . . . contracting parties undertake to . . . prohibit, prevent, and if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situation in the territory of another High Contracting Party.” The 1954 *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*, in International Bureau of the Permanent Court of Arbitration, RESOLUTION OF CULTURAL PROPERTY DISPUTES 358 (Kluwer Law Int., 2004).

⁴⁰⁴ The U.S. has followed the provisions of this treaty only once – prior to ratification – after the widespread looting of the Iraqi National Museum and various sites in Northern Iraq during the US occupation in 2003. The Emergency Protection for Iraqi Cultural Antiquities Act of 2004 allowed for the US to impose import restrictions on any items which originated from Iraq prior to 1991. “Emergency Protection for Iraqi Cultural Antiquities Act of 2004,” The House of Representatives, H.R. 1047, Title III, Iraqi Cultural Antiquities, Sec. 3001.” *see also* Barbara T. Hoffman, *Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy*, in ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 3 (Hoffman, Cambridge Univ. Press, 1st ed. 2006).

⁴⁰⁵ The Hague Convention is limited in application to circumstances where the US is officially at war with another signatory nation; thus it does not obligate the US to actively prevent the import of antiquities in a myriad of other circumstances such as its limited involvement in Syria. *See* Patty Gerstenblith, Professor, DePaul University of Law, Lecture at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium: INTERNATIONAL HUMAN RIGHTS AND

All the while, the U.S. ratification of the UNESCO⁴⁰⁶ Convention of 1970 obligates it to address the black market in stolen cultural property in times of peace. As a result of the increased looting of museums and cultural heritage sites within source nations, the 1970 UNESCO Convention mandated signatory nations to take steps to “prevent museums and similar institutions within their territories from acquiring cultural property originating in another signatory state from which it has been illegally exported⁴⁰⁷ after the entry into force of this convention, in the states concerned.”⁴⁰⁸ This agreement applies only to cultural property stolen after 1970.⁴⁰⁹ As of August 2014, 191 nations are signatories to the 1970 UNESCO Convention.⁴¹⁰

The 1970 UNESCO Convention further provides an operational framework for market nations to enter into bilateral agreements with source nations that would provide for import restrictions of cultural property from the source nation and also facilitate an administrative process

THE PROTECTION OF CULTURAL PROPERTY DURING ARMED CONFLICT: SIBLINGS SEPARATED AT BIRTH lecture (Oct. 16, 2015).

⁴⁰⁶ United Nations Educational, Scientific, and Cultural Organization (UNESCO). *UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION*, <http://whc.unesco.org/en/> (last accessed Nov. 29, 2015).

⁴⁰⁷ By the 1940s, many source nations adopted cultural patrimony laws and restricted the export of cultural property (including antiquities) beyond their borders. Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 90 (Cambridge Univ. Press, 1st ed. 2006)

⁴⁰⁸ *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970)*, in International Bureau of the Permanent Court of Arbitration, *RESOLUTION OF CULTURAL PROPERTY DISPUTES* 358 (Kluwer Law Int., 2004).

⁴⁰⁹ *Id.*

⁴¹⁰ *States Parties Ratification Status*, *UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION*, <http://whc.unesco.org/en/statesparties/> (last accessed Nov. 29, 2015). Listed here are the signatory nations to the 1970 UNESCO treaty.

for the eventual restitution of antiquities seized by the market nation.⁴¹¹ The United States has entered into sixteen such bilateral agreements – fifteen of which are valid in 2015.⁴¹²

Unfortunately, the UNESCO agreement does not provide the US with an effective system for the restitution of stolen cultural property to source nations. In lieu of this treaty, a source nation still encounters a lengthy administrative process before entry into a bilateral agreement with the US.⁴¹³ Many source nations also hesitate to approach the United States on an agreement on stolen cultural property when such a nation allegedly has favors of far greater political priority to request other than the return of its cultural property.⁴¹⁴ Source nations with limited diplomatic relations with the United States are also less likely to pursue these agreements.⁴¹⁵ Finally, many source

⁴¹¹ With odds stacked in favor of the current possessor during a liability action, the current possessor lacks any incentives to cease his participation in the market for stolen cultural property. In order for the United States to honor its international treaty commitments to combat the criminal trade in stolen cultural property, its legislatures will need to attach additional civil liabilities to “current possessors” even if they acquired stolen antiquities through a “bona fide” purchase.

⁴¹² *Bilateral Agreements*, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last accessed Nov. 29, 2015). These are the current bilateral treaties on the protection of stolen cultural property which the US has with other countries, including: Peru, Nicaragua, Mali, Italy, Honduras, Guatemala, Greece, El Salvador, Cyprus, Columbia, China, Cambodia, Bulgaria, Bolivia, and Belize. The agreement on the protection of stolen cultural property which originated from Canada has not been renewed.

⁴¹³ Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 161 (Cambridge Univ. Press, 1st ed. 2006)

⁴¹⁴ Thomas R. Kline, *Counsel of in Washington office of Andres Kurth and Professional Lecturer at George Washington University, interview at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium LOOTING* (Oct. 16, 2015). A nation of limited economic vitality will more often prioritize requests for economic investment and humanitarian aid prior to commencing negotiations on the return of stolen cultural property.

⁴¹⁵ Syria for example.

nations lack the resources within their ministries of culture to pursue bilateral agreements on the return of stolen cultural property as well as to litigate within the market nation for the return of a looted object of antiquity.⁴¹⁶ Thus the 1970 UNESCO agreement has fallen short of its aspirations to facilitate the return of looted antiquities and stolen cultural property.⁴¹⁷

C. Current Federal Statutes that Govern the Return of Stolen Cultural Property and their Deficiencies

1. The Convention on Cultural Property Implementation Act

Ever since the United States ratified the 1970 UNESCO Convention through the legislation of the Cultural Property Implementation Act of 1983 (CPIA), source nations that have sought restitution of their stolen antiquities under section 2609 of this provision. Under the Convention on Cultural Property Implementation Act, only a government of another nation can request the U.S. Attorney General to facilitate the restitution of the looted antiquity in question.⁴¹⁸ Section 2609 provides that:

⁴¹⁶ Folarin Shyllon. *The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*. Rev. dr. unit. 219, 220 (2000-2), *see also* Nafzinger, *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 482 (Cambridge Univ. Press., 1st ed. 2010).

⁴¹⁷ Stolen Cultural Property is defined as: products of archaeological excavations (including regular and clandestine) or of archaeological discoveries . . . elements of artistic or historical monuments or archaeological sites which have been dismembered . . . [and] antiquities more than one hundred years old. Definitions 19 U.S.C. §1601 (2012).

⁴¹⁸ Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 162 (Cambridge Univ. Press, 1st ed. 2006).

Any . . . article of cultural property . . . imported into the United States in violation of section 2606 of this title or section 2607 of this title shall be subject to seizure and forfeiture.⁴¹⁹

Section 2606 prohibits the import of certain categories of cultural property into the United States, absent proper documentation of the legality of the export from the source nation, following the specifications of the bilateral treaty signed by the source nation and the United States.⁴²⁰ The listed categories of objects are then subject to forfeiture to the U.S. Customs Service absent proof of certification at the border.⁴²¹

As mentioned, the Convention on Cultural Implementation Act includes fifteen bilateral treaties signed with specific countries. Some treaties, like that signed with Italy in 2001 have a sweeping scope: the U.S. – Italy agreement restricts the import of antiquities that originated in Italy from the 9th century B.C. to the 4th century A.D. – a time span which includes Etruscan, Classical, and Roman objects.⁴²² This agreement also provides that the United States will restore

⁴¹⁹ Seizure and Forfeiture, 19 U.S.C. § 2609 (2012).

⁴²⁰ Section 2606 (a): No designated archaeological or ethnological material that is exported (whether or not such exportation is to the United States) from the State Party after the designation of such material under section 2604 of this title may be imported into the United States unless the State Party issues a certification or other documentation which certifies that such exportation was not in violation of the laws of the State Party. Import Restrictions, 19 U.S.C. § 2606 (a), (2012).

⁴²¹ Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 161 (Cambridge Univ. Press, 1st ed. 2006).

⁴²² James Cuno, *Beyond Bamiyan, Will the World be Ready Next Time?*, in *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 41 (Hoffman, Cambridge Univ. Press, 1st ed. 2006).

all the forfeited objects to Italy.⁴²³ Not all bilateral treaties provide for a streamlined restitution process or cover as grand a scope and time period.⁴²⁴ If the antiquity falls outside the scope of the treaty, section 2606 does not apply to the object in question. The implication is that a significant amount of antiquities are either from nations that have not signed a bilateral treaty with the U.S. or fall outside the scope of the specific agreements.

Section 2607 provides a nation with another cause of action for the recovery of a looted antiquity, as this section prohibits import into the United States of any documented item from a museum inventory or monument from a signatory nation.⁴²⁵ It does not require a request of the signatory nation, but does require the existence of an inventory where such item is listed.⁴²⁶ The U.S. Attorney General then commences an action to recover the item from the current possessor.⁴²⁷

⁴²³ Article I, Section 2 of the US-Italian agreement provides that: “The Government of the United States of America shall offer for return to the Government of the Republic of Italy any material on the Designated List forfeited to the Government of the United States of America.”
AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF ITALY CONCERNING THE IMPOSITION OF IMPORT RESTRICTIONS ON CATEGORIES OF ARCHAEOLOGICAL MATERIAL REPRESENTING THE PRE-CLASSICAL, CLASSICAL, AND IMPERIAL ROMAN PERIODS OF ITALY, U.S. – It., Art. 1, Jan. 19, 2001. U.S.T. 13141.

⁴²⁴ Cultural Property Memorandum of Understanding Between the UNITED STATES OF AMERICA and CAMBODIA, U.S. – Cambodia, Sept. 19, 2003, 03 U.S.T. 919.

⁴²⁵ See Stolen Cultural Property, 19 U.S.C. § 2607: No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date of this chapter, or after the date of entry into force of the Convention for the State Party, whichever date is later, may be imported into the United States.

⁴²⁶ Barbara Hoffman, ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 162 (Cambridge Univ. Press, 1st ed. 2006).

⁴²⁷ *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of Doble Trinidad*, 597 F. Supp. 2d 618, 619 (E.D.Va., 2009).

There are various deficiencies with this provision. For instance, absent a bilateral treaty, the source nation will need to renegotiate the transfer of the item from U.S. custody to its rightful owner after the US notifies the source nation's authorities – a resource-intensive procedure.⁴²⁸ Additionally, most source nations have yet to effectively catalog the holdings within their monuments and museums in order for Section 2607 to even apply.⁴²⁹

Recovery for a source nation under section 2609 provides the most effective method to confiscate objects in transit from middlemen who attempt to smuggle such objects into the United States. However, this provision is rarely used.⁴³⁰ In one rare instance, the United States recovered two crudely cut and damaged paintings in the possession of a middleman who attempted to sell them far below their market value. The court determined that these paintings fell under the patrimony (ownership) of Bolivia – as they had been stolen from a rural church – and that the current possessor lacked a credible defense in asserting his right to possession.⁴³¹ In this rare instance, the US then restituted the paintings to that church absent excessive delay.

2. Recovery of Stolen Antiquities under the National Stolen Property Act

⁴²⁸ Paul M. Bator, *An Essay on the International Trade in Art*, 34 *Stan. L. Rev.* 277, 382 (1982); *See also* Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 162 (Cambridge Univ. Press, 1st ed. 2006).

⁴²⁹ Sharon Waxman, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* 113-114 (Henry Holt & Co., 1st ed. 2008).

⁴³⁰ *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of Doble Trinidad*, 597 F. Supp. 2d 618, 622 (E.D. Va., 2009).

⁴³¹ *United States v. Eighteenth Century Peruvian Oil on Canvas Painting of Doble Trinidad*, 597 F. Supp. 2d 618 (E.D. Va., 2009).

The U.S. Attorney General has also used the National Stolen Property Act (NSPA), a criminal statute, to recover stolen cultural property on behalf of a source nation/institution. 18 U.S.C. Section 2315 provides that: Whoever . . . possesses . . . any goods . . . of the value of \$5,000 or more . . . knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined under this title or imprisoned.⁴³² The stolen good is then subject to forfeiture upon the defendant's conviction.⁴³³

For the U.S. Attorney General to commence an action on behalf of a party against the current possessor under the National Stolen Property Act, the moving party first needs to meet the difficult legal and factual burden of showing by a preponderance of the evidence that the object was stolen.⁴³⁴ Museums and monuments that lack adequate documentation of title to the objects sometimes encounter difficulty in meeting this burden.⁴³⁵

In the cases of clandestinely excavated antiquities (which could not have appeared in any catalog), the country will also need to first prove that its laws vest the country with ownership to any antiquities found within the earth.⁴³⁶ In the absence of a law which vests ownership of the antiquities to the source country, the National Stolen Property Act does not apply, as the item is

⁴³² 18 U.S.C. § 2315 (2012)

⁴³³ Under Forfeitures and other penalties, 19 U.S.C. § 1595 (a) (2012).

⁴³⁴ Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, ART & ADVOCACY, Spring/Summer 2011, at 5, available at <http://www.herrick.com/siteFiles/Practices/E7897718CFCD9704C7ED731AB72A4122.pdf>.

⁴³⁵ Barbara Hoffman, ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 170, (Cambridge Univ. Press, 1st ed. 2006) .

⁴³⁶ *United States. v. Schultz*, 178 F. Supp. 2d 445, 447 (S.D.N.Y., 2002).

not considered “stolen” for the purposes of the statute.⁴³⁷ The claimant source nation often needs to show that its laws impose penalties on individuals who wrongfully possess excavated antiquities within the nation’s borders as opposed simply imposing penalties on individuals who attempt to export such items.⁴³⁸ In the successful prosecution of Patty McClain, a dealer of Mexican antiquities, Mexico’s cultural patrimony law over archeological items within the earth met the requirements of a law which vests national ownership to those antiquities.⁴³⁹ Most nations have followed suit and adopted ownership laws that meet this burden.

The source nation often encounters the greatest difficulty and expense when it attempts to meet the second element needed for the U.S. Attorney General to commence a criminal case - its factual burden that the antiquity in question was looted from an archeological site.⁴⁴⁰ Before the prosecutor can commence the action, the source nation will need to compile evidence of geographic origin, eyewitness testimony, defendant admissions, and other evidentiary proof to show by a preponderance of the evidence that the item was “stolen.”⁴⁴¹ Failure to establish

⁴³⁷ “For property to be stolen, it must belong to someone else” see *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill., 1993); see also *United States v. McClain*, 593 F. 2d, 658 (5th Cir. 1979).

⁴³⁸ *Schultz*, 178 F. Supp. 2d at 447. Egypt applied both sanctions internally to those who possessed such items and provided punishment of imprisonment and a fine as well as to those who are caught exporting such item beyond the borders. Thus, the Egyptian patrimony law vested the Egyptian state with the ownership right to antiquities and monuments within the country.

⁴³⁹ *United States v. McClain*, 593 F. 2d, 658 (5th Cir. 1979).

⁴⁴⁰ Howard Spiegler and Yael Weitz, *The Ancient World Meets the Modern World, A Primer on the Restitution of Looted Antiquities*, ART & ADVOCACY, Spring/Summer 2010 at 1, available at <http://www.herrick.com/siteFiles/Practices/380D22CFC300DEC1803B8046224F3868.pdf>.

⁴⁴¹ Hoffman, *supra* note 8 at 170.

geographic origin to a particular site within a state will result in judgment for the defendant.⁴⁴² The source nation often incurs sizeable expenses when it gathers evidence necessary for the prosecution to commence the case against the defendant possessor. Due to the limited funds available to the cultural departments of most source nations, the expense and evidentiary burden hinders many source nations from effectively facilitating the recovery of objects through the NSPA.⁴⁴³

After the nation has met the evidentiary burden under the NSPA, the prosecutor must then prove beyond reasonable doubt that the current possessor of the item had “knowingly” acquired stolen property.⁴⁴⁴ The National Stolen Property Act has successfully resulted in the prosecution of several dealers and middlemen who lead the smuggling rings.

The National Stolen Property Act has also contributed to the departure of many museums from the U.S. market for stolen antiquities. Since the 1990s, the U.S. Attorney General has effectively threatened several individual museum curators with an action under the National Stolen Property Act to encourage a resolution to civil actions of replevin by source nations.⁴⁴⁵ Threats under the N.S.P.A. have encouraged settlement by auction houses and also led many museums to

⁴⁴²: *Gov’t of Peru v. Johnson*, 720 F.Supp. 810, 812 (C.D.Cal., 1989). Peru failed to establish the particular site from where the artifacts in Johnson’s possession originated. Failure to meet the burden of evidentiary proof that the objects were excavated in modern day Peru, resulted in the inability to convict the defendant of violating the NSPA.

⁴⁴³ Nafzinger, *supra* note 14 at 482.

⁴⁴⁴ *Id.* at 489; *see also* Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, ART & ADVOCACY, Spring/Summer 2011, at 3, *available at* <http://www.herrick.com/siteFiles/Practices/E7897718CFCD9704C7ED731AB72A4122.pdf>.

⁴⁴⁵ *U.S. v. Portrait of Wally*, 663 F.Supp.2d 232, 246 (S.D.N.Y., 2009); *see also* Barbara Hoffman, *supra* note 8 at 168.

exit the market⁴⁴⁶ for unprovenanced antiquities.⁴⁴⁷ All the while, although museums have exited this market – since the specialized knowledge of the museum curators on the origins of their acquisitions could potentially make them liable under the N.S.P.A. – this statute is unlikely to deter investors and private individuals.⁴⁴⁸ In order to prevail under the N.S.P.A., the prosecutor must overcome the significant difficulty in meeting his or her burden of proof by establishing that the individual had the adequate *mens rae* – that of “knowingly” acquiring the “stolen cultural property” – so as to violate the statute’s provisions.⁴⁴⁹ Thus the presumed lack of specialized knowledge of non-curatorial staff effectively prevents the U.S. Attorney General from establishing an adequate *mens rae* so as to create a basis for liability for most private collectors under the N.S.P.A.⁴⁵⁰ And since private individuals are the largest class of purchasers of stolen antiquities,

⁴⁴⁶ Howard N. Spiegler, *What the Lady has Wrought: The Ramification of the Portrait of Wally Case*. ART & ADVOCACY, 1 (Fall 2010), available at <http://www.herrick.com/siteFiles/LegalServices/82C0FABABB3EAE71FE4BB8C3CB44E63B.pdf>, see also Howard N. Spiegler and Laura Tom, *Recent Disputes and Controversies Involving Asian Antiquities and Cultural Property*, ART & ADVOCACY, 3 (Winter 2014) available at <http://www.herrick.com/publications/recent-disputes-and-controversies-involving-asian-antiquities-and-cultural-property/>.

⁴⁴⁷ A fraction of the legal community has also argued that curators of museums should be held to a higher standard of care as a result of their expertise within their field. See Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 191 (Summer 2007). The prosecution by Italian authorities of Marion True, a Getty Museum curator, further removed museums from the market. Gerstenblith *supra* note 6 at 191. See also Waxman *supra* note 13 at 275.

⁴⁴⁸ Spiegler & Tom, *supra* note 79 at 3.

⁴⁴⁹ United States. v. Schultz, 178 F. Supp. 2d 445, 447 (S.D.N.Y., 2002).

⁴⁵⁰ Gerstenblith, *supra* note 6 at 170-73.

the National Stolen Property Act fails to adequately address the black market for stolen antiquities as a whole.⁴⁵¹

3. Import Restriction Statutes: the Most Common Restitution Method for Stolen Antiquities

a. Recovery Under the 18 U.S.C. Section 981(a)(1)(c) Civil Assets Reform Act for 18 U.S.C. Sections 542 and 545 Violations.

The United States has often used 18 U.S.C. sections 542 or 545 to facilitate the recovery of stolen cultural property from a smuggler on behalf of a source nation after it has crossed the U.S. border.⁴⁵² 18 U.S.C. section 542 criminalizes false statements made to customs upon the entry of a good into the United States.⁴⁵³ Meanwhile, 18 U.S.C. section 545 mandates that “whoever fraudulently or knowingly imports/causes the import of any merchandise into the U.S. contrary to law . . . shall . . . forfeit() the item to the United States”.⁴⁵⁴ 18 U.S.C. section 981(a)(1)(c) provides the mechanism for the U.S. government to seize any items imported in violation of either of these

⁴⁵¹ *Id.*

⁴⁵² *United States v. An Antique Platter of Gold*, 184 F.3d 131-34 (C.A.2 (N.Y.), 1999).

⁴⁵³ Entry of goods by means of false statements, 18 U.S.C. § 542 (1996): Whoever enters or introduces . . . into the commerce of the United States any imported merchandise by means of any fraudulent or false . . . declaration. . . or means of any false statement . . . Shall be fined for each offense under this title or imprisoned not more than two years, or both. Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

⁴⁵⁴ *Smuggling Goods into the United States* 18 U.S.C. § 545 (2006). Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law . . . Shall be fined . . . Merchandise introduced into the United States in violation of this section. . . shall be forfeited to the United States.

custom declaration statutes.⁴⁵⁵ In one such instance, the United States successfully invoked 18 U.S.C. section 542 to recover a 1.3 million dollar “antique platter of gold from Italy” after its owner falsely declared that its value was \$200,000 on a customs document, even though he had paid over a million dollars for the item only days prior.⁴⁵⁶ The court determined that the gross misstatement of the object’s value, as well as failure to state Italy as the country of origin on the customs form, constituted a material violation of 18 U.S.C. sections 542 and 545.⁴⁵⁷

b. 19 U.S.C. Section 1595(a)

Amongst the import statutes, the invocation of 19 U.S.C. section 1595(a) is one of the most effective methods used by the U.S. Attorney General in facilitating the restitution of a stolen antiquity to a source nation. It provides that the United States may seize or cause forfeiture of an object known to be stolen at the time of import or imported contrary to law.⁴⁵⁸ Under the “contrary to law provision” within 19 U.S.C. section 1595, the prosecution can also use a violation of 18

⁴⁵⁵ Civil Forfeiture, 18 U.S.C. § 981(a)(1)(c) (2016).

⁴⁵⁶ *An Antique Platter of Gold*, 184 F.3d at 134.

⁴⁵⁷ *Id.* at 134; *citing* United States v. Avelino, 967 F.2d 815, 817 (2d Cir. 1992). This Court adopted the natural tendency test: which makes a misrepresentation to custom officials material if such misrepresentation would have a natural tendency to influence their action in regards to the item in question. In the case of the Antique Gold Platter, misstating the country of origin as Switzerland instead of Italy had such an effect as there are no restrictions on imports of antiquities which originate in Switzerland while a multitude of laws restrict antiquities which originate in Italy.

⁴⁵⁸ Forfeitures and Other Penalties 19 U.S.C. § 1595 (c) Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be . . . be seized and forfeited if it . . . is stolen, smuggled, or clandestinely imported or introduced. . . (B) its importation or entry requires a license, permit or other authorization of an agency of the United States Government and the merchandise is not accompanied by such license, permit, or authorization;

U.S.C. sections 542 or 545 as a basis for an action.⁴⁵⁹ Unlike under the Civil Assets Forfeiture Reform Act, the prosecutor has to meet a more reduced burden to prevail in an action: “probable cause.”⁴⁶⁰ The current possessor then bears the burden to prove, by a “preponderance of the evidence,” that the item in question was not imported contrary to law.⁴⁶¹

19 U.S.C. section 1595(a) has mostly proven useful in the recovery of items covered under bilateral agreements, such as those between the U.S. and Italy under the Convention on Cultural Property Implementation Act – since the statute provides for blanket seizure of objects imported into the United States absent proper documentation as required by U.S. law.⁴⁶² In the absence of a bilateral agreement where items imported from the source country need to be accompanied by a certificate as mandated by a U.S. agency, this provision rarely applies.⁴⁶³ As mentioned previously,

⁴⁵⁹ *United States v. Portrait of Wally*, 663 F.Supp. 2d 232, 250 (S.D.N.Y 2009). *Id.* See also *An Antique Platter of Gold*, 184 F.3d 134. In pertinent part, the court accepted the government’s reason for their line of action: “The Government seeks forfeiture under 19 U.S.C. § 1595a(c) and 18 U.S.C. § 545 claiming that the Museum knowingly imported Wally “contrary to law” insofar as it did so in violation of the NSPA. *Id.* This issue concerned a portrait stolen by the Nazis in the 1930s and which was held by a Viennese museum. The museum was aware of a claim by a descendant of the original owner, but refused to forfeit the item. When the portrait arrived in the United States for an exhibition, US authorities seized the painting and applied 19 U.S.C. § 1595a(c) and 18 U.S.C. § 545 as the basis for the seizure. See also *United States v. An Antique Platter of Gold*, 184 F.3d 131, 134 (C.A. 2 (N.Y.), 1999).

⁴⁶⁰ Hoffman, *supra* note 8 at 168.

⁴⁶¹ Weitz, *supra* note 7 at 6.

⁴⁶² Forfeitures and other penalties U.S.C. § 1595a(c)(2)(b).

⁴⁶³ Applies only in cases where the US Customs has decided to regulate the import of certain antiquities from countries which are facing rampant looting. A main example is Iraq after the 2004 looting of the Baghdad National Museum. Brodie, *supra* note 30 at 58; see also, FRANCESCO FRANCONI & GEDERICO LENZERINI, *The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq*, in ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 28-30 (Hoffman, Cambridge Univ. Press, 1st ed. 2006).

only twelve source countries currently have bilateral treaties with the United States that regulate imports from within their borders.⁴⁶⁴ The U.S. has, however, passed a number of laws which limit imports from Iraq⁴⁶⁵ and any Pre-Columbian objects from Central and South America absent such agreements.⁴⁶⁶

D. The Failure of Federal Statutes to Stem the Stolen Antiquities Market when Confronted with the Bona Fide Purchaser Defense

Although the United States does have laws that are intended to protect the stolen antiquities of source nations from entering the U.S. market, most do not even have the potential of being used. Furthermore, once an antiquity has crossed the border, the difficulty in restituting the work increases substantially as a result of the protections the U.S. has in place for bona fide purchasers.⁴⁶⁷ The bona fide purchaser defense allows those who pay full value for an item to assert that they should not be held culpable should it later be determined that the object was stolen. The theory is that, when one pays full value for an item, the presumption is that the purchaser has good title.⁴⁶⁸ As previously mentioned, the culture of the art community conveniently maintains a

⁴⁶⁴ *Bilateral Agreements, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS*, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last accessed Nov. 29, 2015).

⁴⁶⁵ “Emergency Protection for Iraqi Cultural Antiquities Act of 2004,” The House of Representatives, H.R. 1047, Title III, Iraqi Cultural Antiquities, Sec. 3001.”

⁴⁶⁶ *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544 (N. Dist. Ill. Lexis 14656, 1993). *See also*; 19 U.S.C. 2091-2095 (2015).

⁴⁶⁷ Seizure and Forfeiture, 19 U.S.C. § 2609 (2012).

⁴⁶⁸ Patricia Youngblood Rayhan. *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-faith Purchasers of Stolen Art*. 50 Duke L.J. 955, 966 (2001).

willful blindness to the true provenance of the item when the full market price is paid – and thus leaves its final purchasers with an effective bona fide purchaser defense to most federal actions on behalf of a source institution by the Attorney General.⁴⁶⁹

Ironically, the CPIA is amongst the least effective of statutes as a result of the bona fide purchaser defense. The Convention on Cultural Property Implementation Act specifically protects bona fide purchasers from liability. While dealers and current possessors who paid far below market value or made the purchase under highly suspicious circumstances will fail in asserting such defense, most end possessors are willing to pay full market value for the object.⁴⁷⁰ Moreover, if the item had been on public display for three years or on exhibit at a museum, the source country has to reimburse the current possessor with the full market value of the object.⁴⁷¹ Failure to reimburse the bona fide purchaser will result in the release of the forfeited item back to the current possessor.⁴⁷² Most end possessors are public people who publicize the existence of their new

⁴⁶⁹ *Hoelzer v. Stamford*, 933 F. 2d 1131 (2d Cir. 1991).

⁴⁷⁰ *United States v. An Original Manuscript Dated November 19, 1778*, 1999 WL 97894, at *8 (S.D.N.Y., 1999). The court stated: “because I find that Toft was not an innocent purchaser, he would not receive compensation under Part (A) of section 2609(c)(1) as well. The middleman Duane Douglas paid \$300-\$400 in cash for the manuscript, failed to declare it to customs, and sold the item to the current possessor Toft for \$16,000. Toft failed to prove that he was an innocent purchaser as the circumstance of the sale consisted of an exchange of the manuscript for \$16,000 inside of hotel room.” However, 90% of antiquities are unprovenanced and purchased under less than suspicious circumstances Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing Harm, Preserving the Past*, 8 CHI. J. INT’L L. 169, 178 (Summer 2007).

⁴⁷¹ *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 225 (S.D.N.Y. 1997), *see also* Gillian Flynn, *The Recovery of Stolen Cultural Property in the State of Maryland*, 38 U. Balt. L. F. 103, 109 (2008).

⁴⁷² Gillian Flynn, *The Recovery of Stolen Cultural Property in the State of Maryland*, 38 U. Balt. L. F. 103, 109 (2008).

acquisition in such matter as to meet the statutory construction of a bona fide purchaser under the CPIA.⁴⁷³ Unfortunately, most cultural departments of source nations lack the funds to repurchase the stolen antiquity in the aftermath of such actions.⁴⁷⁴ Thus, a current possessor who acquires such item for full market value can at most lose the item in exchange for full compensation.⁴⁷⁵

The National Stolen Property Act also fails to impact “bona fide purchasers” because of the difficulty associated with proving the adequate mens rae of the defendant beyond reasonable doubt.⁴⁷⁶ In one successful instance, the prosecution convicted a famous ancient antiquities dealer, Fredrick Shultz, after documents surfaced on how he smuggled an ancient statue out of Egypt together with detailed corroborating evidence elicited from the diary of his coconspirator in England.⁴⁷⁷ Even if the source country meets its difficult legal and factual evidentiary burden to

⁴⁷³ *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 225 (S.D.N.Y. 1997).

⁴⁷⁴ Thomas R. Kline, *Counsel of in Washington office of Andres Kurth and Professional Lecturer at George Washington University, lecture at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium WHERE ARE WE AND WHERE ARE WE GOING: LEGAL DEVELOPMENTS IN CULTURAL PROPERTY AND NAZI ART LOOTING* (Oct. 16, 2015).

⁴⁷⁵ The Forfeiture reform act also provides that should a current possessor prevail in during a forfeiture action by the US government against the item, the current possessor is reimbursed for his attorney’s fees. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest, 28 U.S.C. § 2465 (2012).

⁴⁷⁶ Howard N. Spiegler and Laura Tom, *Recent Disputes and Controversies Involving Asian Antiquities and Cultural Property. ART & ADVOCACY, Winter 2014 at 3, available at <http://www.herrick.com/siteFiles/Practices/6475F236972C3CA3A3DB461F236ED433.pdf>* (This article presents an example of a middleman, an Indian family which smuggled millions of dollars of looted items from temples in India and had a gallery in New York)

⁴⁷⁷ *United States. v. Schultz*, 178 F.Supp.2d 445, 447 (S.D.N.Y., 2002); *see also* Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, ART & ADVOCACY, Spring/Summer 2011, at 3, *available at <http://www.herrick.com/siteFiles/Practices/E7897718CFCD9704C7ED731AB72A4122.pdf>*.

commence the action, the prosecution usually fails to show beyond reasonable doubt the current possessor “knowingly” obtained a “stolen” antiquity unless highly incriminating evidence similar to that in Shultz surfaces.⁴⁷⁸

The Civil Assets Reform Act also suffers from several shortcomings due to the existence of the bona fide purchaser defense. Just like the National Stolen Property Act and the Convention on Cultural Property Implementation Act, 18 U.S.C. Section 981 provides a bona fide purchaser with an affirmative defense to an *in rem action*.⁴⁷⁹ Unless the current possessor organized the import of the stolen antiquity and the prosecutor can prove by a preponderance of the evidence that the current possessor knowingly imported the antiquity contrary to law, thus subjecting it to forfeiture; the current possessor will prevail.⁴⁸⁰ Since most end possessors of antiquities are not involved in their import, 18 U.S.C. Section 981 does not provide an adequate recovery mechanism for looted antiquities in their possession.

Unlike other import statutes, 19 U.S.C. Section 1595(a) does not allow a current possessor to use the bona fide purchaser defense.⁴⁸¹ Yet while it has proven more effective than other *in rem*

⁴⁷⁸ Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 167, (Cambridge Univ. Press, 1st ed. 2006).

⁴⁷⁹ Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, *ART & ADVOCACY*, Spring/Summer 2011, at 6, *available at* <http://www.herrick.com/siteFiles/Practices/E7897718CFCD9704C7ED731AB72A4122.pdf>.

⁴⁸⁰ *Id.*; *see also* Patricia Youngblood Rayhan, *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-faith Purchasers of Stolen Art*, 50 *Duke L.J.* 955, 966 (2001).

⁴⁸¹ Sharon A. Williams, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY: A COMPARATIVE STUDY*, 129 (Oceana Publ'ns Inc., 1st ed. 1978); *citing United States v. Hollinshead*, 495 F. 2d 1154, 1155 (C.A.Cal. 1974). This statute also provides for the forfeiture of an item if it was proven that the item was “stolen” at the time of import. *Id.*

actions in the recovery of looted antiquities, its severely limited scope to just a few bilateral agreements has resulted in a minimal effect on the black market.⁴⁸² Federal agencies rarely pass import restrictions, and are very unlikely to further expand the types of objects that will be covered by this statute in the near future, as any such proposals are strongly contested by dealer and museum associations.⁴⁸³ The push back from dealer associations and museums has also resulted in statutory provisions which provide that the U.S. Attorney General shall reimburse the attorney fees of the current possessors should the Attorney General fail to prevail in a forfeiture action against the current possessor.⁴⁸⁴ The limited scope of items within 19 U.S.C. Section 1595, and the incentive of reimbursement for attorney's fees to current possessors, has limited the customs statute's effect on the art market.⁴⁸⁵ In lieu of its ability to affect certain bona fide purchasers (who

⁴⁸² Should the prosecution convict a dealer such a Fredrick Shultz under the National Stolen Property Act, any items which Schultz had already sold to a bona fide purchaser, are subject to forfeiture under *Supra* note 66; *see also* Portrait of Wally, 663 F. Supp. 2d at 250; *see also* Schultz, 178 F. Supp. 2d at 447. One such item included Schultz's smuggled Egyptian statue – which a bona fide purchaser since acquired for 1.3 million dollars. But if Schultz were not convicted under the NSPA, this act can only be evoked under a violation of the bilateral treaty or a specific act which bans the import of certain objects from various countries absent documentation into the U.S. Such acts are rare.

⁴⁸³ About one statute passes in congress every decade on specific objects. At that point, the looting of cultural property which is included in such acts has severely devastated the archeological resources of the region in question for many years. *See Bilateral Agreements, BUREAU OF EDUCATIONAL AND CULTURAL AFFAIRS*, <http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements> (last accessed Nov. 29, 2015).

⁴⁸⁴ In any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for . . . reasonable attorney fees and other litigation costs reasonably incurred by the claimant; § 2465 (B)(2)(A). Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest, 28 U.S.C. § 2465 (2012).

⁴⁸⁵ Weitz, *supra* note 7, at 3.

are also current “end” possessors), the customs statutes still mainly impact dealers and middlemen within the transaction chain instead. Absent a bilateral agreement, the source country will still need to use diplomatic channels to gain possession of the looted antiquity even once the item has been successfully forfeited to the US government.⁴⁸⁶ Thus, the deterrence created by even the most effective of the import statutes is at most, limited.

E. Common Law Replevin Actions, Their Inadequacies, and a Proposed Solution

a. Replevin Actions in the State of New York et al. as a Lawsuit of Last Resort

Common law replevin actions under state law provide a more effective, yet still inadequate, alternative to the federal statutes used in the recovery of looted antiquities. Due to the difficulty in proving the elements to sustain a federal claim, most countries have to resort to state courts for a private replevin action.⁴⁸⁷ Under U.S. common law, a *bona fide* purchaser of stolen personal property does not have a superior title to the property *vis a vis* the property’s original owner.⁴⁸⁸ Where a state or institution lacks a bilateral treaty with the U.S., is unable to overcome the burden of establishing that the object was knowingly stolen under the NSPA, or finds that U.S. customs statutes fail to provide adequate relief, the source nation will sometimes pursue a replevin action in a state court.⁴⁸⁹ In a replevin action, the source nation has the burden to prove, by a

⁴⁸⁶ Marlene Alva Gonzalez, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 Colum. J. Trans’l L.316, at 317-18 (1973).

⁴⁸⁷ *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (S.D.N.Y., 1990).

⁴⁸⁸ Hoffman, *supra* note 8.

Common Law treats antiquities as “personal property.”

⁴⁸⁹ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (C.A.7 (Ind.),1990). *See also* Nafzinger, *supra* note 812

preponderance of the evidence, that it holds superior title to the object *vis a vis* the current possessor.⁴⁹⁰

A civil law replevin action is usually a lengthy and expensive process where a multitude of issues need resolution prior to a judgment on the merits.⁴⁹¹ Even in cases which have a minimal amount of issues and complexity, a plaintiff is required to place, at minimum, a \$10,000 retainer by most law firms to commence the action.⁴⁹² For a source nation that lacks adequate funds in the cultural sector, even a replevin action, which has a minimum amount of attorney's fees, poses a large expense.⁴⁹³

Before commencing any civil action of replevin for a stolen antiquity, the source nation/institution sends a letter to the current possessor with a request for the return of the item.⁴⁹⁴

⁴⁹⁰ Barbara Hoffman, *ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE* 173, (Cambridge Univ. Press, 1st ed. 2006).

⁴⁹¹ *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (S.D.N.Y., 1990) is an example where the defense of laches is put up, and statute of limitations. Eventually, once the court determined the applicable law, the Metropolitan Museum of Art settled with the Republic of Turkey and returned "the Lydian Treasure".

⁴⁹² Thomas R. Kline, *Counsel of in Washington office of Andres Kurth and Professional Lecturer at George Washington University*, interview at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium (Oct. 16, 2015). Mr. Kline represented the Kanakaria Church against Peggy Goldberg in *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (C.A.7 (Ind.),1990).

⁴⁹³ Mali, The CIA World Factbook. (Nov. 19, 2015), *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html>

⁴⁹⁴ Kevin Ray, *Greenburg Traurig LLP, attorney, lecture at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium WHEN OBJECTS GO BACK (OR NOT) – ISSUES IN CULTURAL PROPERTY RESTITUTION AND RETURN* (Oct. 16, 2015); *See also* Charles A. Goldstein, Yael M. Weitz, *Claim by Museums of Public Trusteeship and their Response to Restitution Claims: A Self-Serving Attempt to Keep Holocaust-Looted Art*, 16 *ART ANTIQUITY AND LAW JOURNAL*. 215 (Oct. 2011).

In certain instances, it is in the interests of the current possessor to refuse this request.⁴⁹⁵ The source entity will then need to meet its burden of proof to establish ownership of the property and the fact that the property was actually stolen, as opposed to being gifted or sold.⁴⁹⁶

During replevin actions, the defendant often raises various defenses including the choice of law, laches, and statute of limitations.⁴⁹⁷ In the case of the Lydian Horde, the Metropolitan Museum of Art exhausted all possible procedural defenses before entering into a settlement agreement with Turkey to return the items.⁴⁹⁸ The Republic of Turkey had to first prove, through photographs of the looting, eye-witness testimony, and confessions, that the items displayed in the museum were actually stolen from the tombs of Lydian nobles in the vicinity of a small Turkish village in the late 1960s.⁴⁹⁹ Despite the lack of publically available information on the costs, the amount was considerable for 1990.⁵⁰⁰ The museum eventually returned the items. In a similar vein, Autocephalous Greek-Orthodox Church of Cyprus filed a replevin action against an Indiana dealer

⁴⁹⁵ Especially when certain factual assertions and case law are unclear on whether the source nation will prevail, it is in the interest of the defendant to refuse, and go to court to at least clarify factual questions. ⁴⁹⁵ Kevin Ray, *Greenburg Traurig LLP, attorney, lecture at John Marshall Law School 22nd Belle R. & Joseph H. Braun Memorial Symposium WHEN OBJECTS GO BACK (OR NOT) – ISSUES IN CULTURAL PROPERTY RESTITUTION AND RETURN* (Oct. 16, 2015).

⁴⁹⁶ ”. Patricia Youngblood Rayhan. *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-faith Purchasers of Stolen Art*. 50 Duke L.J. 955, 984 (2001).

⁴⁹⁷ *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278 (C.A.7 (Ind.), 1990).

⁴⁹⁸ *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (S.D.N.Y., 1990).

⁴⁹⁹ *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (S.D.N.Y., 1990); see also Sharon Waxman, *LOOT: THE BATTLE OVER THE STOLEN TREASURES OF THE ANCIENT WORLD* 150 (Henry Holt & Co., 1st ed. 2008).

⁵⁰⁰ HOFFMAN, *supra* note 8, at 169.

who acquired a mosaic stolen from the Kanakaria Church in the town of Lythrankomi during the 1974 Turkish invasion of the island.⁵⁰¹ The photographic evidence, as well as the current possessor's suspicious circumstances surrounding the acquisition of the mosaic, led the church to recover the item after a lengthy lawsuit.⁵⁰² At the time of the litigation, the cost of litigation well exceeded the value of the mosaic.⁵⁰³ In some suits, the Republic of Cyprus lacked the means to recover the item, and thus other mosaics stayed within the United States despite the existence of irrefutable evidence that they originated and were stolen from a known site in Cyprus.⁵⁰⁴ Even common law replevin statutes provide too much protection for the current possessor, and thus remain ineffective at reducing the black market for looted antiquities in the United States.

b. A Proposed Statutory Solution to Inadequacies within Current Common Law Replevin Actions

⁵⁰¹ See *Autocephalous*, 917 F.2d at 280-81. “When the priests evacuated the Kanakaria Church in 1976, the mosaic was still intact. In the late 1970s, however, Church *281 of Cyprus officials received increasing reports that Greek Cypriot churches and monuments in northern Cyprus were being attacked and vandalized, their contents stolen or destroyed.”

⁵⁰² Goldberg acquired the mosaic from a dealer, Michel van Rjin who was convicted of forgery and other unclean practices in the past. A sum of over a three hundred thousand exchanges hands between Goldberg and a dealer in a Swiss Airport – where Goldberg sees the mosaics for the first time. The mosaics are of a style unique to Byzantine churches found in Cyprus. *Id.* It is worthy to mention that Cyprus now has an effective bilateral agreement with the United States to cooperate on the recovery of looted objects to prevent similar problems associated with replevin action from occurring. See Memorandum of Understanding between the UNITED STATES OF AMERICA and CYPRUS, U.S. – Cyprus, July 16, 2002, 02 U.S.T. 716.2. *available at* http://eca.state.gov/files/bureau/20022007mou_tias.pdf.

⁵⁰³ Kline, *supra* note 41.

⁵⁰⁴ *Id.*; see also Meropi Moiseos, “The Mosaics of Kanakaria Changed the Attitude Towards the Return of Antiquities”, *POLITIS NEWSPAPER*. (Nov. 2012) *available at* https://www.andrewskurth.com/assets/htmldocuments/12018_KlineArticleEng1.pdf.

In light of the failure of current statutes to stem the growing market for looted antiquities in the United States, it is necessary to attach additional civil penalties to the current possessor upon a finding by the court that the possessor must forfeit the antiquity to the U.S. or the plaintiff. In the previous sections, the inadequacies of current laws invoked to facilitate recovery of stolen cultural property are duly explored – in aggregate; they fail to stem the demand for (looted) antiquities because these laws mainly target smugglers and middlemen.⁵⁰⁵ The middlemen are driven by profits, which well exceed the punishments which U.S. law can impose upon their person, in the rare instances of conviction.⁵⁰⁶ Civil replevin actions under state law have proven too expensive for most source nations to pursue, and therefore have rarely served as a deterrent to collectors who acquire unprovenanced antiquities.⁵⁰⁷ Meanwhile, the increased demand among private collectors has increased the destruction of the world’s archeological sites and museums.⁵⁰⁸

Fortunately, deterrence for the “end purchasers” can be far more easily achieved than for that of middlemen. As the “end purchasers” are often public figures within a tightly knit community, they are quick to react to any potential legal ramifications that may affect their interest

⁵⁰⁵ All the leading cases discussed in this article involve middlemen other than the Lydian treasure lawsuit. In that case, the museum was also well involved in this trade and the evidence clearly showed complicity in acquiring more such objects from the Lydian Horde.

⁵⁰⁶ Gerstenblith, *supra* note 6, at 170-71.

⁵⁰⁷ Shyllon, *supra* note 9, at 220.

⁵⁰⁸ Damaris Colhoun, *Ill-Gotten Treasures of Ancient Crimea Are Flooding Ebay*, ATLAS OBSCURA (Nov. 30, 2015), <http://www.atlasobscura.com/articles/ill-gotten-treasures-of-ancient-crimea-are-flooding-ebay>. *see also* Gerstenblith, *supra* note 6, at 170-71

by altering their behavior.⁵⁰⁹ As a result of vocal opposition from the antiquities and museum councils towards any increase in penalties upon the collectors of such items,⁵¹⁰ any changes to current law must also be as minimal and as uncontroversial as possible to survive intense opposition by these interest groups.

Proposed Language to State Statutes which Govern Replevin Actions:

- A. In a Civil Replevin Action for stolen cultural property, the current possessor shall be liable for reasonable attorney's fees incurred by the other party when:**
 - 1. The other party prevails in the restitution action on the merits, and**
 - 2. The property's aggregated fair market value in the US exceeds \$35,000.**
- B. The current possessor shall not be liable for attorney's fees in excess of twice the fair market value of the property for which replevin is sought.**
- C. A bona fide purchaser defense will not serve to absolve the current possessor of liability for attorney's fees incurred by the opposing party.**
- D. Provisions A-C of this statute are non-applicable to the following categories of current possessors: Museums, universities, libraries, and other cultural institutions.**

The proposed legislation will result in the decline of the market for stolen cultural property.

By exposing the current possessor to liability this is up to twice the fair market value of the property (in addition to forfeiting the property in question), the current possessor will realize the increased risk associated with the purchase of an unprovenanced antiquity.⁵¹¹ As the statute does not provide

⁵⁰⁹ It is worth noting how quickly museums left the marketplace and began to revise their acquisition practices after the U.S. began to enforce the customs statutes more severely – which in turn resulted in costly litigation and bad publicity for these museums.

⁵¹⁰ WAXMAN, *supra* note 13, at 177.

⁵¹¹ Investors are less likely to invest in the same investments if risk increases. Jason Van Bergen, *Basic Investment Objectives*, INVESTOPEDIA (2016), <http://www.investopedia.com/articles/basics/04/032604.asp>.

a bona fide purchaser defense, it targets the population whose demand is responsible for the existence of the market in stolen cultural property in the first place – the bona fide purchaser/current possessor. As a result of closing this loophole, investors of unprovenanced antiquities will seek less risky avenues of investment.⁵¹²

The proposed legislation will enable countries and museums with limited funds to commence actions for their stolen cultural property. When successful actions for the replevin of cultural property previously resulted in the item's forfeiture by the current possessor, certain source institutions later had to sell the item to cover the expenses associated with litigation.⁵¹³ The reimbursement of expenses associated with litigation to the source institution will then serve as the main impetus to encourage such nations and museums to pursue looted objects.⁵¹⁴ Furthermore, the items will return to the entity from which they were originally looted, and finally allow scholars to study such items, as well as allow the public to appreciate them.⁵¹⁵ Part of the wrong that resulted from the initial looting will thus be corrected.⁵¹⁶

⁵¹² An investor's main focus is to receive a return on his or her investment. If the investment is illiquid because it cannot be sold without violation to law or carries excessive risk, investors would be deterred from making such a purchase. Gerstenblith, *supra* note 6, at 182-85.

⁵¹³ See *Autocephalous*, 917 F.2d at 280-81.

⁵¹⁴ Shyllon, *supra* note 9, at 220; see also Nafzinger, *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 482 (Cambridge Univ. Press., 1st ed. 2010).

⁵¹⁵ WAXMAN, *supra* note 13, at 245.

⁵¹⁶ Although a permanent loss of archeological knowledge occurs after an item is taken out of the ground without noting its context, the fact that the item is once again available for the public to study and admire at least returns the object to the public sphere. In this way, it can still educate the public in the future and thus some of its archeological value is restored.

Although this legislation will encourage countries to pursue replevin actions to recover stolen cultural property, it will also increase the percentage of disputes that are settled. Many replevin actions usually result in settlement after the defenses, such as question of law, are addressed by the court.⁵¹⁷ Even, the knowledge of increased liability, through the introduction of the plaintiff's attorney's fees to the current possessor in case the plaintiff prevails, will further encourage settlement due to the threat of incurring of such liability. Many source entities first send a letter which requests the return of the object and which states reasons for why the source entity has superior title.⁵¹⁸ In many cases, litigation follows as a result of the current possessor's refusal to return the item.⁵¹⁹ If current possessors know that they will lose funds in excess of their own attorney's fees and the value of the item in question, they are more likely to settle and thus avoid litigation. Settlement can avoid public embarrassment and bad publicity.⁵²⁰ Our courts will also be less burdened with litigation as a result of this incentive to settle.

The proposed rule is significantly narrow enough to pass without much controversy. This rule will limit the scope of change in common law replevin actions to "Cultural Property" as

⁵¹⁷ Sharon Waxman, *Chasing the Lydian Hoard: Author Sharon Waxman Digs into the Tangle over Looted Artifacts between the Metropolitan Museum of Art and Turkish Government*, SMITHSONIAN.COM (Nov. 14, 2008), <http://www.smithsonianmag.com/history/chasing-the-lydian-hoard-93685665/#bPARksOryRtsyiz0.99>.

⁵¹⁸ *see also* Naftzger v. Am. Numismatic Society, 499 Cal. Rptr. 2d 784, 788 (Ct. App. 1996). *see also* Meropi Moiseos, *The Mosaics of Kanakaria Changed the Attitude Towards the Return of Antiquities*, POLITIS NEWSPAPER (Nov. 2012); *see also* Meropi Moiseos, "The Mosaics of Kanakaria Changed the Attitude Towards the Return of Antiquities", POLITIS NEWSPAPER. (Nov. 2012) available at https://www.andrewskurth.com/assets/htmldocuments/12018_KlineArticleEngl.pdf.

⁵¹⁹ HOFFMAN, *supra* note 8, at 169.

⁵²⁰ DeAngelis, *supra* note 34, at 52.

defined by the Hague Convention.⁵²¹ Therefore, antiquities which are considered significant to the understanding of the world's cultural heritage will fall in the category of items for which attorney's fees shall be reimbursed to the source institution. Not only will the rest of replevin common law remain unaltered, but such laws will not impact items of antiquity that do not hold much cultural value. It is arguable that most pottery pieces from ancient transport vessels, and certain numismatic items, would fall outside the definition of cultural property as noted by this statute and the UNESCO Convention.⁵²² This limitation will leave many collectors who collect insignificant items out of the purview of this statute and thus limit opposition from certain dealer and collector associations that have opposed more extensive reforms in the past.

The monetary benchmark of \$35,000 protects collectors of generally unimportant archeological items from bearing the costs of increased liability. While some countries never pursue antiquities which were looted from within their borders and placed on the market in the U.S., some countries have pursued even the most insignificant pieces – Italy being a major example.⁵²³ The U.S. is not only the largest market for stolen antiquities, but also the largest art

⁵²¹ The Hague Convention to which the US is a party to, defines cultural property as: movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above. *See The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 358 (Int'l Bureau of the Permanent Court of Arbitration ed., 2004).

⁵²² Yani Herreman, *The Role of Museums Today: Tourism and Cultural Heritage*, in ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 420-21 (Hoffman ed., 2006).

⁵²³ Steven Litt, *Sicily Cancels a Major Exhibition of Ancient Treasures at the Cleveland Museum of Art*, THE PLAIN DEALER (July 10, 2013), http://www.cleveland.com/arts/index.ssf/2013/07/sicily_cancels_major_exhibitio.html.

market in the world.⁵²⁴ Since 80-90% of all antiquities on the market lack provenance, there is a perceived threat that increasing liability to the possessors of every little item may serve to either bring the market fully underground or destroy the market for legitimately traded antiquities as well.⁵²⁵ By increasing liability for collectors of items whose fair market value exceeds the \$35,000 benchmark, the statute will encounter only limited opposition on the legislative floor – since only a small percentage of collectors will be affected. More importantly, this benchmark will provide an incentive to marginalize those individuals whose demand fosters the greatest incentive to conduct looting, as the greatest profits within that trade are made by satisfying the demands of a few “high end buyers.”⁵²⁶ The value proposed is less than the \$75,000 benchmark for commencing a federal action as there are many items of cultural significance whose value exceeds \$35,000 but is less than \$75,000.⁵²⁷ The spirit of the law requires the legislature to address the market for stolen cultural property, and thus it should include most of the items that fall within the definition.⁵²⁸

⁵²⁴ Gerstenblith, *supra* note 7, at 22.

⁵²⁵ Bator, *supra* note 61, at 311.

⁵²⁶ WAXMAN, *supra* note 13, at 136-98.

⁵²⁷ *See generally* Herreman, *supra* note 155, at 420-26. While this article does not cite the realm of when art becomes significant, it does not that there are plenty of objects which are not museum quality on the market.

⁵²⁸ The commitments of the United States to the Hague and Geneva Conventions would be merely token if the US laws only focused on 5% of the black market in antiquities. It can be argued that our laws are currently rather token when it comes to the restitution of stolen antiquities from the hands of “current possessors” who made a bona fide purchase. As discussed, our laws currently have the slightest impact and deterrence on a huge portion of possessors of such property. This legislative language would serve to make US laws effective and result in respect for the Geneva and Hague conventions.

By limiting the amount to which the current possessor will be liable for attorney's fees to twice the value of the item, the reform will provide some predictability to the liability which the current possessor may incur as a result of acquiring an item of questionable provenance. While the increased liability through attorney's fees will serve as a deterrent to collectors who previously wished to acquire inadequately provenanced antiquities, the limit to attorney's fees will avoid potential surprises such as prolonged litigation accompanied by excessive attorney's fees.⁵²⁹ This provision aims to provide equitable results for both the current possessor and the source entity of the item's origin.

The statute aims to avoid this increased liability for museums that currently possess an antiquity in question. Most museums have already left the market for unprovenanced antiquities as a result of local pressure, bad publicity, potential risk for individual criminal liability, and the expense associated with the restitution of such items in question.⁵³⁰ The statute seeks to address a current wrong – the looting of cultural heritage sites and museums in source countries. Its incorporation into US law will result in better adherence to the spirit of the 1970 UNESCO Convention.⁵³¹ Thus, the statute's focus must be on the individuals and institutions, such as private businesses with a desire to decorate their headquarters, whose demand has fueled the illicit market. Since museums are no longer seen as entities that encourage the market for stolen cultural property,

⁵²⁹ Commentators have expressed fears of unlimited liability for purchases and note the existence of a legitimate market for antiquities which may inadvertently suffer. The legitimate market should not be destroyed as it helps the US economy.

⁵³⁰ Geoffrey Lewis, *The Universal Museum: A Case of Special Pleading*, in ART AND CULTURAL HERITAGE LAW, POLICY, AND PRACTICE 52 (Hoffman ed., 2006).

⁵³¹ The aim of UNESCO is to commit market and source nations to stem the trade in stolen cultural property so as to limit the looting of cultural heritage sites. *The World Heritage Convention*, UNESCO, <http://whc.unesco.org/en/convention/> (last accessed Nov. 29, 2015).

they should not be exposed to this increased liability.⁵³² This provision will also ensure that opposition from museum groups to the passage of this statute will remain minimal.

Conclusion

The New York state legislature as well as other states should increase liability for the current possessor of stolen cultural property by requiring the reimbursement of the prevailing plaintiff's attorney's fees. As a result of this legislation, the U.S. will be one step closer to fulfilling its treaty obligations under the 1970 UNESCO Convention.⁵³³ The introduction of attorney's fees in civil replevin actions for cultural property will first correct part of the wrong committed by the looting. The source entity will at least be able to afford to possess the item and display it for the education and appreciation of the public. This provision will also encourage countries to pursue worthwhile claims when budgetary constraints have long prevented such actions.⁵³⁴ This legislation will also expose current collectors to greater liability upon their purchase of an unprovenanced antiquity. The increase in liability for the current possessor will discourage the market by making this a riskier investment⁵³⁵ and will also result in increased scrutiny into an antiquity's provenance by potential buyers.⁵³⁶ As a result, a law will finally address the current

⁵³² As mentioned, museums have left the stolen antiquities market. Thus, the focus should be on private collectors.

⁵³³ US COMMITTEE OF THE BLUE SHIELD, <http://uscbs.org/> (last visited Nov. 29, 2015).

⁵³⁴ *See* *Autocephalous*, 917 F.2d at 653.

⁵³⁵ The precautions needed to minimize the risk of litigation and additional liability will most likely result in less returns for the investor as a result of added costs associated with protecting themselves from increased liability.

⁵³⁶ Even during the past ten years, as museums began to implement internal policies to which require them to only purchase items which have a provenance dating back to at least 1973, the art market has reluctantly become more accepting of inquiries into the provenance of objects.

end possessor in the black market for stolen property. Following a decline in the demand by this market for stolen property in the United States, there will be less financial incentives to loot cultural heritage sites.⁵³⁷

The introduction of additional civil liabilities for current possessors of looted antiquities is the most reasonable and effective option to address the black market in stolen cultural property within the United States.

Darlene Fairman, *New Guidelines for the Acquisition of Archaeological Materials and Ancient Art*, ART & ADVOCACY, Winter 2009, at 3, <http://www.herrick.com/siteFiles/Publications/F027BC8FD3C8711321137984C4E86B34.pdf>. If other end possessors also are required to inquire into the provenance of such objects (or at least have the incentive), the art market may become more transparent and the inadvertent purchases of stolen cultural property may decline.

⁵³⁷ *Works of Art*, INTERPOL, <http://www.interpol.int/Crime-areas/Works-of-art/Works-of-art> (last accessed Dec. 2, 2015).

