

ARTFUL GOOD FAITH: AN ESSAY ON LAW, CUSTOM, AND INTERMEDIARIES IN ART MARKETS

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ABSTRACT

This Essay explores relationships between custom and law in the United States in the context of markets for art objects. The Essay argues that these relationships are dynamic, not static, and that law can prompt evolution in customary practice well beyond the law's formal requirements. Understanding these relationships in the context of art markets requires due attention to two components distinctive to art markets: the role of dealers and auction houses as transactional intermediaries as well as the role of museums as end-collectors. In the last decade, the business practices of major transactional intermediaries reflected a significant shift in customary practice, with attention newly focused on the provenance (ownership history) of objects consigned for sale and on long-standing concerns with an object's condition and authorship. During the same time major museums developed new policies and practices applicable to new acquisitions and objects already in held in collections, focused in particular on archaeological objects and ancient art, as well as paintings present in European countries subject to the Nazi regime between 1932 and 1945. The Essay argues that, in both cases, law furnished the backdrop to significant shifts in customary practice, augmented by heightened public knowledge and concern. Custom evolved in response to salient episodes of enforcement of the law, which furnished further rallying points for newly broadened or awakened public interest and concern.

*The relationships explored in this Essay are relevant to ongoing debate about the merits of the underlying law. In the United States, it has long been true that *nemo dat quod non habet*—no one can give what one does not have—with the consequence that a thief cannot*

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convey good title. The subsequent transferees lack good title and are not insulated against claims by the rightful owner even when the transferees acted in good faith. To be sure, an elapsed statute of limitations may furnish a defense, as may the equitable doctrine of laches. Prior scholarship notes that the United States is unusual, but not unique, because it does not recognize any good-faith purchaser defense in this context and because it does not require that the rightful owner of a stolen object compensate the good-faith purchaser as a condition of obtaining the return of the object. However, this scholarship does not acknowledge (or does not emphasize) the significance of transactional intermediaries within art markets or the operation of customary practices of museums and transactional intermediaries. This Essay thus adds the context requisite to evaluating the merits of the relevant law.

TABLE OF CONTENTS

Introduction	608
I. The Good-Faith Purchaser, the NSPA, and Customs Forfeiture.....	615
II. <i>Nemo Dat</i> , Private-Party Litigation, and Purchasers' Claims Against Intermediaries	618
III. The Good-Faith Purchaser and the Unreliable Intermediary	627
IV. Industry Practice, Legal Variety, and Good Faith	632
V. Evolution in Customary Practice in Art Markets.....	638
Conclusion.....	642

INTRODUCTION

In markets for art objects in the United States, complex relationships tie law to customary industry practices. These relationships are dynamic, not static; law can prompt shifts in customary practice that range beyond what law directly requires. And law may, or may not, defer to established industry practices in determining whether an actor's conduct satisfied the applicable legal standard. Integral to these relationships are the roles within art markets of two distinct sets of actors: dealers and auction houses, which serve as transactional intermediaries; and museums, which serve as end-collectors, as sources of legitimation for objects that enter their collections, and often as the focal points for highly public scrutiny. This Essay argues that practices among these two sets of

actors shifted—not uniformly but perceptibly—in response to highly salient episodes that illustrated the risks of collecting or dealing in art that is later discovered to have been stolen. These shifts in customary practice, which this Essay documents but does not attempt to quantify, should reduce the entrée of stolen art into museums and private collections through established art-market intermediaries. The shifts also illustrate that customary practice may evolve to articulate and enforce conformity to requirements beyond those directly or formally imposed by law.

The fact that art markets sustain and develop practices is also relevant to assessing the merits of backdrop legal rules. In the United States, long-standing rules of property and commercial law embody the *nemo dat quod non habet* principle—no one can give what one does not have—with the consequence that a thief cannot convey good title, not even when stolen property passes through the hands of an intermediary to a good-faith purchaser.¹ To be sure, an elapsed statute of limitations may furnish a defense to a thief’s subsequent transferees, as may the equitable doctrine of laches, but much time may elapse following an initial theft before any time-based defense becomes available. Likewise, under customs law and outside the province of private-law rules, when an art object enters the United States “contrary to law” and “is stolen, smuggled, or clandestinely imported or introduced,” the object is subject to forfeiture by the United States,² and may be returned to its rightful owner.³ An object’s entry would be “contrary to law” in this context under the National

1. See *infra* notes 50–59 and accompanying text.

2. 19 U.S.C. § 1595a(c)(1)(A) (2006).

3. The terms of return typically stem from negotiation with the United States. See Jonathan S. Moore, Note *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 472 n.33 (1988). Jonathan Moore’s note discusses the case of an eighteenth-century monstrance, which was to be returned to Colombia after being fraudulently imported into the United States. *Id.*; see also *United States v. One 18th Century Colombian Monstrance*, 797 F.2d 1370 (5th Cir. 1986). The United States sought forfeiture of the monstrance following a proceeding under 18 U.S.C. § 545 based on the fraudulent importation, but the Republic of Colombia and a third party claiming interest in the monstrance challenged the action. *18th Century Colombian Monstrance*, 797 F.2d at 1373–74. Colombia later agreed to withdraw its claim in exchange for a promise by the United States to return the monstrance to Colombia following an exhibition at the San Antonio Art Museum. *Id.* at 1374. The district court awarded the monstrance to the United States in the absence of other parties “with standing to challenge either the stipulations [establishing probable cause for seizure and forfeiture] or the forfeiture [itself].” *Id.*

Stolen Property Act (NSPA),⁴ which criminalizes the possession or sale of stolen goods in interstate commerce or across a boundary of the United States with knowledge that the goods had been stolen.⁵ Having acquired an object in good faith or, for that matter, consistently with commonly followed trade practices is not a defense to forfeiture under the customs statute,⁶ and the relevant statute of limitations is relatively unbounded because it begins to run at the time that the government discovers the violation.⁷ Art markets are also sensitive to well-publicized incidents of criminal law enforcement, in particular those directed not against thieves, but against otherwise-respectable dealers⁸ or museum professionals⁹ tainted by knowing association with dealings in stolen objects. To be sure, if shifts in practice among museums and reputable dealers exclude objects with problematic—or no—provenance (ownership history), transactions in such objects may migrate to less-visible channels of dealing and collecting.¹⁰ But such a shift would most likely

4. 18 U.S.C. §§ 2314–2315 (2006), *as amended by* Strengthening and Focusing Enforcement To Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. No. 112-186, 126 Stat. 1427.

5. *Id.*

6. *See infra* notes 40–42 and accompanying text. Good faith of the present holder aside, the government must prove that someone involved in the importation knew that the property had been stolen. *See supra* text accompanying note 5.

7. 19 U.S.C. § 1621 (2006).

8. *See United States v. Schultz*, 333 F.3d 393, 395, 416 (2d Cir. 2003) (upholding the conviction of the former president of the National Association of Dealers in Ancient, Oriental and Primitive Art on one count of conspiring to receive stolen property).

9. The best-known instance is the lengthy prosecution in Italy of Marion True, the former antiquities curator at the J. Paul Getty Museum, on the basis of purchases of antiquities sourced from illegal excavations of archaeological sites. *See* Elisabetta Povoledo, *Time Limit Ends Antiquities Case of Ex-Curator*, N.Y. TIMES, Oct. 14, 2010, at C1. During her tenure at the Getty, Ms. True returned several stolen antiquities to Italy, *id.*, and was acknowledged as an effective advocate within museum circles of higher ethical standards for museum acquisitions of antiquities, JASON FELCH & RALPH FRAMMOLINO, *CHASING APHRODITE* 113–19 (2011). The thefts at issue in her prosecution also led to the Italian prosecution of a prominent dealer in antiquities from whom the Getty and other major museums purchased antiquities. Bruce Weber, *Robert Hecht, 92, Antiquities Dealer, Dies*, N.Y. TIMES, Feb. 9, 2012, at A18. According to the dealer's obituary, these cases, "closely watched in the art world, led many museums to institute policies preventing the purchase of ancient artworks with murky provenance." *Id.*

10. Fictional accounts of art theft often feature a wealthy and reclusive collector who commissions the theft of specific objects or a dashing and highly skilled thief who specializes in art theft. *See* SANDY NAIRNE, *ART THEFT AND THE CASE OF THE STOLEN TURNERS* 11, 222 (2011) (discussing, *inter alia*, Dr. No, Captain Nemo, and Thomas Crown). Outside the realm of fiction, criminologists disagree about many characteristics of art theft and acknowledge the lack of empirical data, as well as the paucity of research, on thieves who steal art. JOHN E. CONKLIN, *ART CRIME* 6–7, 128 (1994). On the plotline of art theft commissioned by an individual

come with a severe discount in the price at which an object could otherwise be sold because without clear title the object comes with a legal risk. Relatedly, the supply of stolen art may decrease as demand lessens in high-value markets.¹¹

Prior scholarship characterizes the United States as unusual but not unique among nations in recognizing no good-faith-purchaser defense for a holder of stolen art and in not requiring that a successful claimant reimburse a good-faith purchaser as a condition of obtaining the return of a stolen object.¹² If anything, this scholarship understates the relative severity with which U.S. law may bite a good-faith purchaser of stolen art because it generally ignores the NSPA and the operation of customs statutes.¹³ Focusing on the role of custom in markets for art objects supplements this literature by emphasizing the

collector, “[n]o one knows how many collectors have commissioned the theft of art, but there certainly are some.” *Id.* at 135. But based on available data, “[t]hefts to order are rare.” A.J.G. Tjihuis, *Who Is Stealing All Those Paintings?*, in *ART AND CRIME: EXPLORING THE DARK SIDE OF THE ART WORLD* 41, 49 (Noah Charney ed., 2009). Commentators have discussed the involvement of organized criminal groups in originating art thefts. *Compare id.* at 182–85 (observing the links between art thefts and the Mafia and other traditional criminal organizations), with Giovanni Nistri, *The Experience of the Italian Cultural Heritage Protection Unit*, in *CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY* 183, 184–85 (Stefano Manacorda & Duncan Chappell eds., 2011) (noting that in the experience of the Italian cultural authority, involvement of the Mafia and like organizations “in the direct and continuing organization” of illicit traffic in cultural objects has not been established).

11. Italian authorities report that looting from archaeological sites has declined markedly in the wake of agreements between Italy and museums in the United States for the return of looted antiquities and well-publicized episodes of law enforcement. FELCH & FRAMMOLINO, *supra* note 9, at 310.

12. See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 57–58 (1987) (“Under American law, theft is of course a criminal offense, and an owner may recover the stolen property. The thief never acquires title, and accordingly a purchaser, however innocent, always loses to the owner because the thief was unable to transfer title.” (citation omitted)); John Henry Merryman, *The Good Faith Acquisition of Stolen Art*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA* 275, 287 (John Jackson, Máximo Langer & Peter Tillers eds., 2008) (explaining the zero-sum nature of original-owner protection, in which one party, usually the original owner, prevails and repossesses the artwork while the other party gets nothing); Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1334 (2011) (noting that the “inconsistency in the treatment of original owners and good faith buyers” across jurisdictions “impedes international efforts to solve a significant economic problem . . . [namely,] trade in stolen and misappropriated goods”).

13. For an exception, see Stephen K. Urice, *Elizabeth Taylor’s Van Gogh: An Alternative Route to Restitution of Holocaust Art*, 22 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 36–37 (2011), which examines the means employed by the United States to repatriate works of art, including forfeiture, and potential implications for art dealers, museums, and collectors.

significance to art markets of transactional intermediaries and museums. Both groups of distinct actors develop customary practices, whether or not embodied in formal codes of conduct, and for both groups customary practice is not static. Focusing on custom, and in particular its evolution in response to law, also adds a perspective from which to evaluate whether litigation involving art-ownership questions is wasteful from the standpoint of overall social welfare.¹⁴

Art markets are distinctive in the extent to which transactions are intermediated by nonemployee agents;¹⁵ most sales of objects of more than minimal value are intermediated by a dealer or auction house to which the true or purported owner has consigned or sold the object.¹⁶ Indeed, patterns of intermediation that typify the legitimate market are also observable in markets for stolen art.¹⁷ Ignoring or de-emphasizing the significance of transactional intermediaries slights their potential liabilities to purchasers and donees. More importantly, transactional intermediaries are often knowledgeable and repeat market participants who can better position themselves, through the exercise of diligence, to detect or at least suspect that an object has

14. See Schwartz & Scott, *supra* note 12, at 1338 (characterizing much of the litigation involving ownership disputes between victims of theft and good-faith purchasers as “socially wasteful”).

15. For more on the significance of dealers in the organization and operation of art markets, see, for example, RAYMONDE MOULIN, *THE FRENCH ART MARKET: A SOCIOLOGICAL VIEW* 37–65 (Arthur Goldhammer trans., 1987); Marcia Bystryn, *Art Galleries as Gatekeepers: The Case of the Abstract Expressionists*, 45 SOC. RES. 390, 393, 395 (1978); and Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of Artist-Dealer Relationships*, 8 VILL. SPORTS & ENT. L.J. 99, 103–11 (2001).

16. Even private sales from an owner to a collector may be intermediated by a dealer or auction house although the owner has not consigned the object for sale. For example, after the heirs of Adele Bloch-Bauer recovered five paintings by Gustav Klimt from an Austrian state gallery, the heirs sold the most famous painting—Klimt’s 1907 portrait of Adele—to Ronald S. Lauder in a \$135 million transaction. See Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E1. Mr. Lauder reported that Christie’s auction house “had helped him negotiate the purchase.” *Id.*

17. The market for stolen art may be characterized as either “something besides the legitimate market or really as a part of the legitimate market,” embedded within it, depending on how one defines “legitimate” as well as the sort of art or antiquity in question. A.J.G. Tjijhuis, *The Trafficking Problem: A Criminological Perspective*, in CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY, *supra* note 10, at 88. The process through which art is stolen and sold could be characterized as “socially organized,” that is, as featuring “recurrent patterns of interaction among legitimate and illegitimate members of the art world.” CONKLIN, *supra* note 10, at 13. Although some thieves may be connoisseurs of art who steal to possess objects they admire, most art thefts are believed to be motivated by the prospect of monetary gain. See, e.g., NAIRNE, *supra* note 10, at 61 (“Sooner or later they will want to see if it is possible to gain some return after holding such ‘hot property’.” (quoting Mark Dalrymple, an insurance adjuster)).

been stolen. The bite of legal liability creates incentives to exercise such diligence. Additionally, this Essay argues that incentives to exercise diligence follow from the law's treatment of good-faith purchasers when an intermediary who possesses an object owned by another proves to have been unreliable as the owner's agent. In both cases, the incentive is created by the law's allocation of the risk of dealing with an unreliable intermediary. In the case of a purchaser, liability is allocated to the dealer or other intermediary from whom the purchaser chooses to buy. In the case of an owner, liability is allocated to the intermediary to whom the owner chooses to consign an object. Although other factors, including the operation of statutes of limitations, may weaken the force of these incentives, the starting point of risk allocation is significant.

Furthermore, markets for art in the United States are distinctive because they are geographically concentrated and surprisingly few in number, at least at the high end of monetary value. That is, despite the size of the United States, its wealth, and the number of jurisdictions it includes, markets for major works of art are predominantly localized to New York and California. The development of and evolution in customary practice among art-market intermediaries may be feasible precisely because the relevant markets are geographically concentrated, which makes it more likely that repeat participants will be familiar with their peers' reputations and dealing practices.¹⁸

Customary practice in art markets also reflects the distinct roles played by art museums. Although most significant art museums in the United States are private nonprofit institutions,¹⁹ museums operate subject to public scrutiny—which is intensely focused at times—of museums' collecting practices. Museums own art objects, and thus are potentially vulnerable to thieves, but museums also buy art objects and receive them as gifts. Museums, like transactional intermediaries, are repeat players in art markets and, depending on the museum's

18. Geographic concentration among art-market intermediaries is not unique to the United States. *See, e.g.*, Joaquim Rius Ulldemolins, *Gallery Districts of Barcelona: The Strategic Play of Art Dealers*, 42 J. ARTS MGMT. L. & SOC'Y 48, 49 (2012) (observing that within districts, dealers create "nonformal alliances in order to achieve common goals, that is, attracting buyers and earning prestige within the gallery world").

19. A museum's status as a tax-exempt organization requires that its purposes serve the public. *See, e.g.*, *Commonwealth v. Barnes Found.*, 159 A.2d 500, 505–06 (Pa. 1960) ("The [trustees] have sealed off the art gallery to the public. . . . They may argue that there must be limitations in the public's frequenting of the gallery, but they cannot successfully argue that the public can be shut out as if it were a contagion.").

resources, function as knowledgeable experts in making acquisitions. Museums are also “end-collectors” because an object’s market history usually concludes once it is accessioned into a museum’s collection.²⁰ As this Essay explains, both the law and manifest public concern have sharpened museums’ incentives to attend more effectively and proactively to provenance.²¹ In response, practices in many museums have shifted from acquiring objects with the understanding that claims contesting ownership might follow, to making preacquisition inquiries into provenance at least for art within categories that are likely to raise concerns.²² Although art museums are geographically more diffused than are art-market intermediaries at the high end of value, museums in the United States are organized in a manner that enables the diffusion of changes in practice. In turn, practices among private collectors, who may wish to donate an object to a museum, and among transactional intermediaries who serve collectors, do not develop or continue independently of museums’ practices. Thus, customary practice among museums may shape decisions made by private collectors.

The relevant law is a crucial backdrop to sketching how customary practice evolves in art markets, just as the potential for such evolution is crucial to assessing the merits of the law. This Essay’s exploration of the law is anchored by a series of well-publicized and significant cases that, in addition to applying the law, situate the reader in the distinctive world of high-stakes transactions in art objects. Part I examines the position of good-faith purchasers of stolen art in customs-forfeiture actions, followed in Part II by private-

20. See generally Sue Chen, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART ANTIQUITY & L. 103, 113 (2009) (arguing that deaccession controversies arise out of the larger context of a museum’s role as a cultural steward holding collections for posterity).

21. Indeed, a prominent museum’s acquisition of a sixth-century vase reasonably assumed to have been recently looted from an archaeological site in Italy, plus the vase’s celebrity and the price paid by the museum, furnished an example of “how the looting of antiquities and the destruction of archaeological sites was directly connected to museums: via the art market. Supply and demand.” Robin F. Rhodes, *Introduction*, in THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL, AND ETHICAL PERSPECTIVES 1, 5 (Robin F. Rhodes ed., 2007). The connection, that is, followed from “the *potential* looters and dealers saw for many more future blockbusters.” *Id.*

22. See *infra* text accompanying notes 167–169 and accompanying text. For a museum director’s account of her museum’s decision to accept a gift of antiquities, followed by the museum’s adoption of more stringent acquisition policies, see Kimerly Rorschach, *Scylla or Charybdis: Antiquities Collecting by University Art Museums*, in THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES: PROFESSIONAL, LEGAL, AND ETHICAL PERSPECTIVES, *supra* note 21, at 65, 68–73.

party litigation that applies the *nemo dat* principle and enforces the liabilities of transactional intermediaries to good-faith purchasers and donees of art who have been divested of it. Part III develops the long-standing distinction between good-faith purchasers of stolen art and good-faith purchasers who purchase from an unreliable intermediary chosen by the owner. Part IV underscores the importance of choice of law in stolen-art disputes, as well as variations in potential definitions of “good faith” in this context. Part V documents the evolution in customary practices among art museums and transactional intermediaries. This Essay concludes by emphasizing the centrality of customary practice to the operation of art markets and art museums and to the consequences of the law.

I. THE GOOD-FAITH PURCHASER, THE NSPA, AND CUSTOMS FORFEITURE

In late January 2012, CNN reported that “[m]ore than 30 years after it was stolen from a French museum, an impressionist painting is on its way home,” illustrating the story with a photograph of the painting being surrendered to the French ambassador by a representative of Immigration and Customs Enforcement (ICE).²³ The small painting, stolen from the Faure Museum in Aix-les-Bains in 1981, is a color monotype²⁴ by Camille Pissarro, *Le Marché aux Poissons* (The Fish Market).²⁵ It is rare, representing only one of twelve such works by Pissarro.²⁶ ICE’s director said on the occasion, “I love days like this because they are all about the triumph of right over wrong.”²⁷ Arguably clouding that triumph is a stark illustration of the irrelevance of good-faith-purchaser status when what is purchased is stolen art that has entered the United States in violation of customs law and the NSPA.

On November 16, 1981, the Faure Museum²⁸ suffered two thefts, both reported by the museum to French police. *Le Marché* traveled to

23. Aaron Cooper, *Stolen Impressionist Art Returned After 3 Decades*, CNN (Jan. 26, 2012, 10 AM EST), <http://www.cnn.com/2012/01/25/us/impressionist-art-returned>.

24. A monotype is a unique print, made in the case of *Le Marché* by painting on glass and then transferring the image to paper. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (quoting ICE director John Morton) (internal quotation marks omitted).

28. The Faure Museum is a state museum founded in 1949. *Musée Faure*, VILLE AIX-LES-BAINS, <http://ville-aixlesbains.eu/index.php/cms/890/Bienvenue-sur-le-site-de-la-mairie>

San Antonio, Texas, where a dealer purchased it in 1985 for \$7000.²⁹ The dealer bought the monotype from an individual later identified by the museum guard who was on duty the day of the theft as the man she saw running down the museum's stairs "with something under [his] parka."³⁰ Four years later, the dealer sold the monotype for \$8500 to a business entity controlled by an individual, Ms. Sheryl Davis, who reportedly worked as an assistant in the dealer's gallery.³¹ Ms. Davis took ownership following the entity's dissolution in 1992.³² She displayed *Le Marché* in her home for over ten years until 2003, when she consigned it to Sotheby's for inclusion in an upcoming auction.³³ This consignment made the monotype's whereabouts publicly accessible information, most likely because it was listed in an auction catalog—with an estimated value of \$60,000 to \$80,000³⁴—which brought *Le Marché* to the attention of the Art Loss Register, a database of stolen artifacts.³⁵ Alerted, French police reopened their investigation of the theft to gather enough information to obtain the return of *Le Marché*.³⁶ Sotheby's also withdrew *Le Marché* from the auction, complying with a request from the U.S. Department of Homeland Security, which had been alerted to the monotype's stolen status by the French police.³⁷ In 2006, the United States filed a complaint against Ms. Davis seeking civil forfeiture; in 2011 the Second Circuit affirmed the district court's judgment of forfeiture.³⁸

Underlying the outcome in *United States v. Davis*³⁹ is the irrelevance of any good-faith-purchaser defense to forfeiture of stolen objects that enter the United States in violation of the applicable customs statute, 19 U.S.C. § 1595a, which authorizes forfeiture of

(last visited Nov. 14, 2012). This status, plus the rarity of *Le Marché*, may be relevant to the analysis under French law. See *infra* notes 163–164 and accompanying text.

29. Benjamin Sutton, *Pissarro Monotype Stolen 31 Years Ago Returned to Small-Town French Museum*, BLOUINARTINFO (Mar. 27, 2012), <http://blogs.artinfo.com/artintheair/2012/03/27/pissarro-monotype-stolen-31-years-ago-returns-to-small-town-french-museum>.

30. *United States v. Davis*, 648 F.3d 84, 88 (2d Cir. 2011) (alteration in original) (internal quotation marks omitted).

31. Sutton, *supra* note 29.

32. *Davis*, 648 F.3d at 87.

33. *Id.*

34. Sutton, *supra* note 29.

35. *Id.*

36. *Davis*, 648 F.3d at 87.

37. *Id.*

38. *Id.* at 89, 98.

39. *United States v. Davis*, 648 F.3d 84 (2d Cir. 2011).

“merchandise” that “is introduced . . . into the United States contrary to law” if it is “stolen, smuggled, or clandestinely imported or introduced.”⁴⁰ Although \$8500 might seem a surprisingly low price to a purchaser familiar with Pissarro’s *oeuvre* and his reputation, assuming the object to be genuine and correctly attributed to Pissarro,⁴¹ how expansively to define “good faith” is beside the point in *Davis*.⁴² And, to the extent “good faith” consists of compliance with customary practice, it is also irrelevant under the NSPA whether Ms. Davis’s purchase so complied. Likewise irrelevant would have been conduct consistent with industry practice in 1985 by the dealer who bought *Le Marché*.⁴³ Whether *Le Marché* was stolen for purposes of § 1595a was established by showing a violation of the NSPA, which makes it a crime to possess or sell stolen goods valued at over \$5000 that have moved in interstate or international commerce when the possessor knows that the goods to have been stolen.⁴⁴ This crime encompasses the presumed thief who brought the monotype into the United States and sold it to the San Antonio dealer.

To the Second Circuit, the case placed the court “in the unenviable position of determining who gets the artwork, and who will be left with nothing despite a plausible claim of being unfairly required to bear the loss.”⁴⁵ Justice, in the court’s estimation, was

40. 19 U.S.C. § 1595a (2006 & Supp. IV 2011). For an earlier example of the operation of civil forfeiture when customs forms misstated an object’s origin and value, see *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

41. See *infra* note 162 and accompanying text.

42. Innocent-owner defenses introduced into the realm of civil forfeiture by the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended at 18 U.S.C. §§ 983, 985, 28 U.S.C. §§ 2466–2467), are expressly inapplicable to actions brought to enforce “the Tariff Act of 1930[, ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.),] or any other provision of law codified in title 19,” which includes 19 U.S.C. § 1595a, *Davis*, 648 F.3d at 94 (quoting 18 U.S.C. § 983(i)(2)(A)) (internal quotation marks omitted).

43. Obstacles to establishing such conformity might have arisen. According to a press release issued by the U.S. Attorney’s Office for the Southern District of New York announcing the return of *Le Marché* in 2012, when Sotheby’s asked Ms. Davis for provenance information, she could remember only a man known as “Frenchie,” identified by the gallery owner as Emile Guelton. Press Release, U.S. Attorney’s Office S. Dist. of N.Y., Manhattan U.S. Attorney Announces Return of Stolen Camille Pissarro Work to France (Jan. 25, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/January12/lemarcherepatriation.html>. Although the press release characterizes as a “consign[ment]” the transaction through which the monotype entered the gallery, other accounts describe a sale to the dealer. *E.g.*, Sutton, *supra* note 29. “Frenchie” is reported to have been a “Texas-based Frenchman known to the authorities for having trafficked many suspicious artworks during the 1980s.” *Id.*

44. 18 U.S.C. §§ 2314–2315 (2006).

45. *Davis*, 648 F.3d at 86.

served by “providing the predictable result that Congress intended,”⁴⁶ which is not necessarily the same as the simple “triumph of right over wrong,” as proclaimed by the ICE’s director when *Le Marché* returned to France.⁴⁷ The Second Circuit is not alone in framing a stolen-art dispute as a battle between two parties. Commentators characterize these cases as instances of a “classic zero-sum game,” which leaves one party with nothing while the other emerges with the art,⁴⁸ and as battles between two “innocent victims” of a theft.⁴⁹ However, in evaluating the evident harshness of the outcome in *Davis* and cases like it, the claims that a purchaser may have against the dealer from whom she purchased are relevant, as are the incentives created by these outcomes for dealers, their customers, and their suppliers. This Essay circles back to this point in the next Part, which describes a case in which a good-faith purchaser sued the dealer who sold him a stolen painting, the dealer having purchased the painting allegedly in conformity with customary art-market practices.

II. *NEMO DAT*, PRIVATE-PARTY LITIGATION, AND PURCHASERS’ CLAIMS AGAINST INTERMEDIARIES

In *Menzel v. List*,⁵⁰ the first case in a U.S. court seeking the return of Holocaust-tainted art, the plaintiff, Ms. Erna Menzel, had fled Belgium in 1940 following the German invasion.⁵¹ When she and her husband returned six years later, they discovered that their painting by Marc Chagall, *Le Paysan à L’échelle* (The Peasant and the Ladder) had been removed by German authorities, who had left a receipt.⁵² The painting’s whereabouts remain unknown from 1941 to 1955, when the owners of a New York gallery (Mr. Klaus Perls and his wife) bought the work from a gallery in Paris.⁵³ In 1956, the New York gallery sold the painting to the defendant, Mr. Albert List, for

46. *Id.*

47. *See supra* note 27 and accompanying text.

48. Jeremy G. Epstein, *The Hazards of Common Law Adjudication*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 123, 127 (Kate Fitz Gibbon ed., 2005).

49. Merryman, *supra* note 12, at 287; *see also* STEPHEN E. WEIL, MAKING MUSEUMS MATTER 223 (2002) (characterizing as “a battle between two victims” contests between victims of Nazi thefts of art and subsequent good-faith purchasers).

50. *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969).

51. *Id.* at 743.

52. *Id.*

53. *Id.*

\$4000.⁵⁴ The plaintiff saw a reproduction of *Le Paysan* in an art book in 1962 that identified Mr. List as its owner, demanded its return, and then sued to replevy the painting when List refused her demand.⁵⁵ Mr. List impleaded the Perlses, the jury found for the plaintiff, and List returned the painting to Ms. Menzel.⁵⁶ The jury also found for List on his claim against the Perlses and awarded damages based on the current market value of *Le Paysan* (\$22,500), plus List's costs in his unsuccessful defense of Ms. Menzel's claim.⁵⁷ The trial court, affirmed by an intermediate appellate court, held that the painting was indeed "stolen" for purposes of *nemo dat* under New York law.⁵⁸ The New York Court of Appeals affirmed in 1969, noting that the issue of breach was not before it and determining that the proper measure of damages for the breach of an implied warranty of title was based on current market value.⁵⁹ The rationale for basing List's damages on the current market value of the painting, not the price he paid, is that, had the Perlses transferred good title, List would own a marketable asset that he could sell at its current value.⁶⁰

To the dealers, the measure of damages was excessive. They argued that "it exposes the innocent seller to potentially ruinous liability where the article sold has substantially appreciated in value."⁶¹ Additionally, Mr. Perls argued that he complied with trade custom in buying the painting from the Paris gallery without satisfying himself that he was obtaining good title.⁶² He testified that "to question a reputable dealer as to his title would be an 'insult.'"⁶³ Rejoined the Court of Appeals: "Perhaps, but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 744.

58. *Menzel v. List*, 267 N.Y.S.2d 804, 808 (Sup. Ct. 1966), *modified as to damages*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd in part on other grounds*, 246 N.E.2d 742 (N.Y. 1969). In contemporary commercial law, the *nemo dat* principle applicable to the sale of goods corresponds to UCC § 2-403(1) (2012).

59. *Menzel*, 246 N.E.2d at 743-44. The relevant warranties under section 94 of the New York Personal Property Law are now stated in UCC § 2-312(1)-(3), discussed *infra* text accompanying notes 70-72.

60. *Menzel*, 246 N.E.2d at 745.

61. *Id.*

62. *Menzel*, 267 N.Y.S.2d at 808.

63. *Menzel*, 246 N.E.2d at 745.

risked.”⁶⁴ Moreover, if a purchasing dealer’s inquiries go unanswered, he might refuse to purchase or he might notify his own purchaser that title might be questionable.⁶⁵

By introducing with “[p]erhaps” its assessment of the weight to be given to Mr. Perls’s testimony about trade custom among dealers, the court accepted that he may have accurately described customary dealing practice at the time in an industry often characterized as secretive.⁶⁶ Nonetheless, the dealer’s compliance with custom trumped neither the *nemo dat* principle nor the dealer’s implied warranties to his purchaser. This resolution is consistent with the long-standing treatment of custom in cases applying tort law, following Judge Learned Hand’s oft-cited insight that although “in most cases reasonable prudence is common prudence,” in determining the applicable standard of care, trade custom “strictly . . . is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices” to enhance safety.⁶⁷ Evidence of custom may be “persuasive” of the requisites of due care, but it is not conclusive.⁶⁸ Furthermore, as the facts of *Menzel* illustrate, the consequences of dealers’ practices extend beyond their milieu. Dealers sell to customers who are not themselves dealers, and the way that dealers source their inventories can adversely affect those outside their trade. In a later case, a New York court explicitly implicated dealing practices in illicit transactions, stating that “commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art.”⁶⁹

64. *Id.*

65. *Id.* To be sure, language sufficient to constitute a disclaimer might undermine a sale or reduce the price that a purchaser is willing to pay.

66. In one New York case, for example, the court held that the dealer was not a purchaser in good faith when he failed to inquire into the authority of a heretofore unknown intermediary who appeared at a gallery with a painting while, it seems, purporting to act as the agent of the painting’s owner. *Porter v. Wertz*, 416 N.Y.S.2d 254, 256, 259 (App. Div. 1979), *aff’d*, 421 N.E.2d 500 (N.Y. 1981). The court also held that the dealer’s claim that his failure to inquire was consistent with trade practice “[d]id not excuse such conduct” and only supported the trial court’s observation that “in an industry whose transactions cry out for verification of . . . title . . . it is deemed poor practice to probe.” *Id.* at 259 (alterations in original) (quoting *Porter v. Wertz*, 1978 WL 23505 (N.Y. Sup. Ct. Mar. 13, 1978), *rev’d*, 416 N.Y.S.2d 254 (1979), *aff’d*, 421 N.E.2d 500 (N.Y. 1981)) (internal quotation marks omitted).

67. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

68. *Id.*; accord RESTATEMENT (THIRD) OF THE LAW OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 (Proposed Final Draft No. 1, 2005).

69. *Porter*, 416 N.Y.S.2d at 259.

Four decades after it was decided, *Menzel* supplied a baseline against which to revisit the fairness of the outcome in *Davis*, and the system-wide implications for efficiency of *nemo dat*, and the operation of forfeiture under the NSPA and customs legislation. Breaches by an intermediary seller of the implied warranties of title and quiet enjoyment are now governed by general commercial law, as stated in Articles 1 and 2 of the Uniform Commercial Code (UCC). A dealer's sale of an art object is a sale of "goods" by a "merchant" to which Article 2 applies. Under UCC § 2-312(1), a seller of goods gives an implied warranty that the sale will convey good title and that the transfer is rightful;⁷⁰ under UCC § 2-312(3), a merchant seller who regularly deals in goods of the kind impliedly warrants that the goods will be sold free of rightful claims of third parties.⁷¹ Although an implied warranty may be disclaimed, as the court suggested in *Menzel*, under UCC § 2-312(2) a disclaimer is ineffective unless it specifically informs the buyer that the seller is selling the goods subject to any third-party claims to or against title, or that the seller purports to sell only such title as the seller or a third party—such as a consignee—may have.⁷² To be sure, some art merchants are no longer in business or have few assets by the time a purchaser would have a claim for breach of warranty.⁷³ As *Menzel* itself illustrates, however, some intermediaries remain available as defendants at the time a purchaser is divested of possession. If a purchaser buys from a seller who disclaims the implied warranty of title, the purchaser accepts the risk that a subsequent challenge to title will succeed, as well as the costs of litigation contesting ownership. Further enhancing a purchaser's risk, any suit for breach of warranty of title against an intermediary or other seller may also be cut off by a statute of limitations; in New York the limitation period for breach-of-warranty

70. U.C.C. § 2-312(1) (2012).

71. *Id.* § 2-312(3).

72. *Id.* § 2-312(2).

73. The claim arose in *Menzel* only with "the judgment directing delivery of the painting to [the owner,] Mrs. Menzel, or, in the alternative, paying her the present value of the painting." See *Menzel v. List*, 246 N.E.2d 742, 746 (N.Y. 1969). *But see* *Doss, Inc. v. Christie's, Inc.*, No. 08-cv-10577(LAP), 2009 WL 3053713, at *2 (S.D.N.Y. Sept. 23, 2009) (applying section 2-725 of the New York UCC Law and holding that the claim for breach of warranty must be commenced within four years of tender of delivery of goods). New York's version of the U.C.C. was enacted in 1962 and became effective in 1964, Act of Apr. 18, 1962, ch. 553, § 10-105, 1962 N.Y. Laws 2580, 2767 (codified at N.Y. U.C.C. LAW § 13-105 (McKinney 2002)), following the transactions underlying *Menzel* but not the resolution of the case, see *Menzel*, 246 N.E.2d at 743.

claims under the UCC is four years, which may well have expired before the purchaser's possession is placed in jeopardy.⁷⁴

An intermediary's liability may also extend to a museum that has accepted a donation of a work that turns out to have been stolen. In *Rosenberg v. Seattle Art Museum*,⁷⁵ the U.S. District Court for the Western District of Washington held that it had personal jurisdiction over the New York dealer who allegedly induced Seattle-based purchasers to buy a 1928 painting by Henri Matisse (*L'Odalisque*) by making false statements concerning its provenance.⁷⁶ The heirs of the Paris art dealer who owned the painting at the time the Nazis looted his gallery and home sued the museum to which the purchasers gave *L'Odalisque* through a bequest.⁷⁷ The court found that the connections between the dealer and Washington state sufficed to require the dealer to defend against intentional tort claims in Washington; the dealer's alleged "lies regarding ownership of the Matisse . . . caused [the purchasers] to retain possession of the painting," which the dealer shipped to their home for their evaluation.⁷⁸ Although the court initially dismissed the museum's fraud claim against the dealer on the basis that the museum lacked standing to assert it,⁷⁹ the case was reinstated when the museum acquired assignments of rights from the donors' family.⁸⁰ The dealer and the museum later announced a settlement under which the dealer agreed to transfer either works of art from its holdings or cash equal

74. See *Doss*, 2009 WL 3053713, at *2. The four-year period is not subject to a discovery rule or other mechanism that delays accrual of the cause of action. *Id.* at *3. This argument appears not to have been raised in *Menzel*, perhaps because the case predated New York's adoption of the UCC. Many thanks to Patty Gerstenblith for these points.

75. *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash.), *motion for partial summary judgment and dismissal granted*, 70 F. Supp. 2d 1163 (W.D. Wash. 1999), *vacated*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

76. *Id.* at 1037.

77. *Id.* at 1031–32. In 1999, the museum returned the painting to the heirs of the dealer, Paul Rosenberg. Regina Hackett, *Family Reclaims Art Stolen by Nazis*, SPOKESMAN-REV. (Spokane), June 16, 1999, at B2. The painting's location became known through the intervention of the donors' grandson, who saw it reproduced in a book by Hector Feliciano as an example of art looted by Nazis for which the present location was unknown. *Id.*; see also HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART*, at A6 (Tim Bent & Hector Feliciano trans., 1997) (1995).

78. *Rosenberg*, 42 F. Supp. 2d at 1037.

79. *Rosenberg v. Seattle Art Museum*, 70 F. Supp. 2d 1163, 1166 (W.D. Wash. 1999), *vacated*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

80. *Rosenberg v. Seattle Art Museum*, 124 F. Supp. 2d 1207, 1210–11 (W.D. Wash. 2000).

to the current value of the Matisse.⁸¹ The dealer also agreed to pay the museum's legal costs.⁸²

These cases illustrate the importance of transactional intermediaries in thinking through art-ownership questions, and they suggest that scholarship that treats dealers as generic "purchasers" of art omits an important dimension that is a characteristic of art markets.⁸³ Dealers, as repeat and informed participants in art markets, constitute a sufficiently established community to have customary practices and, if not precisely situated as gatekeepers as the term is used in regulatory contexts,⁸⁴ possess expertise, the ability to decline to deal with a problematic object, and the ability to warn a purchaser by disclaiming warranties. If not "gatekeepers," perhaps art dealers can fairly be analogized to a shipping lock or sluice that can bridge the gap between stolen goods and legitimate markets. As articulated by the criminologist A.J.G. Tjihuis, the lock or sluice metaphor describes actors who, by raising or lowering a barrier in a river or canal, enable the movement of goods from one market, such as that for objects known to have been stolen, into more neutral or legitimate waters.⁸⁵ An actor performing a "lock" function deals with illegitimate as well as legitimate actors, and by operating the lock enables an object, like a ship, to pass "upward" as water enters the closed lock, emerging at a higher level of value and market reputability.⁸⁶ The lock/sluice metaphor is also helpful in thinking about the distinctive relationship between museums and art markets. When an object that has been stolen enters a museum collection, it has completed its

81. Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions*, 33 HASTINGS COMM. & ENT. L.J. 407, 440 (2011).

82. *Id.*

83. In contrast, prior scholarship ignores the presence of intermediaries or slights their significance. *Cf.* Merryman, *supra* note 12, at 277 (characterizing cases as "present[ing] the Eternal Triangle of movable property law: A owns something valuable that B steals, and C eventually buys it in good faith" (citation omitted)); Schwartz & Scott, *supra* note 12, at 1338 (focusing the analysis solely on the original owner and on the ultimate purchaser because "the thief is commonly judgment-proof" and "the merchant is effectively a buyer," because if the original owner succeeds, "the purchaser sues his seller on a title warranty").

84. On gatekeepers generally, see JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2 (2006), which notes that "[t]ypically, the term connotes some form of outside or independent watchdog or monitor—someone who screens out flaws or defects or who verifies compliance with standards or procedures.").

85. A.J.G. TIJHUIS, TRANSNATIONAL CRIME AND THE INTERFACE BETWEEN LEGAL AND ILLEGAL ACTORS: THE CASE OF THE ILLICIT ART AND ANTIQUITIES TRADE 99–101 (2006).

86. *Id.* at 100–01.

transit to a higher level, one in which the object may become exemplary of aesthetic value and historical significance. Moreover, such lock/slucice functions enable stolen objects to move from the site of a theft through a jurisdiction in which good title can be obtained, and then onward, a point that is explored in Part V.

The bite of the liabilities described above enhances an intermediary's incentives to make appropriate inquiry into an object's provenance or to adequately to warn the purchaser. The sharpness of this bite is itself a function of the jeopardy in which law in the United States places purchasers like Ms. Davis, Mr. List, and the purchasers of *L'Odalisque* and their museum-donee in *Rosenberg*. The cases allocate to the purchaser the risk that the dealer from whom she buys will be unavailable as a defendant if problems with an object's title later surface. A subsequent donee, like the museum in *Rosenberg*, bears this risk in turn, unless by contract the donor retains it. So to allocate this risk may seem especially unfair when a buyer is unsophisticated and unaware of the value of making an inquiry into an intermediary's commercial stability and reputation for probity. But for long-enduring intermediaries like the dealers in *Rosenberg*⁸⁷ and *Menzel*, the risk falls finally on them, unless, as *Menzel* notes, warranties of title have been effectively disclaimed and the dealer has not, as allegedly occurred in *Rosenberg*,⁸⁸ induced the sale through fraudulent means.⁸⁹ On the other hand, the bite of liability is weakened when a statute of limitations cuts off a purchaser's claim against a selling intermediary before the purchaser becomes aware that its title to an object is in jeopardy.⁹⁰

Separately, art-market transactions may also be intermediated by auction houses. In contrast to dealers—quintessentially private intermediaries whose transactions create no public record of transfer or sales price—auction houses establish values for many purposes as a

87. Many years later, the dealer in *Rosenberg* suddenly closed the doors of its New York gallery in the wake of well-publicized disputes over the authenticity of paintings sold from the gallery as works of prominent twentieth-century painters. See Patricia Cohen, *A Gallery That Helped Create the American Art World Closes Shop After 165 Years*, N.Y. TIMES, Dec. 1, 2011, at A32.

88. See *supra* note 76 and accompanying text.

89. *Menzel v. List*, 246 N.E.2d 742, 745 (N.Y. 1969).

90. In *Rosenberg*, the museum's claim against the dealer from whom its donors bought *L'Odalisque* sounded in fraud, which would extend the accrual of the cause of action, as opposed to the breach-of-warranty claim in *Doss, Inc. v. Christie's, Inc.*, No. 08-cv-10577(LAP), 2009 WL 3053713, at *2 (S.D.N.Y. Sept. 23, 2009), which was governed by the New York UCC, see *supra* note 73.

result of the transparency of public auction as a mode of sale. Although the prices at which objects sell at the high end of auction transactions attract much interest, dealer sales are generally estimated to account for a substantial portion of the art market,⁹¹ at least in part because they can be consummated privately and much more quickly. The factual narrative in *Davis* underscores the central role occupied by auction houses because Ms. Davis's consignment of *Le Marché* to Sotheby's, followed by its appearance in an auction catalog, alerted the Art Loss Register and through it the French police that the stolen monotype had resurfaced.

In contrast, suppose that the French authorities had not been so alert or prompt in contacting their federal counterparts in the United States, or that Sotheby's had not withdrawn *Le Marché* from the auction upon the Department of Homeland Security's request. Had the monotype sold at auction, and thereafter been subject to forfeiture or recovered via replevin in a private action on behalf of the French museum, the auction house would have breached the warranty of title that New York regulation requires it to give a purchaser at auction.⁹² Unlike the implied warranty of title that a dealer may disclaim under UCC § 2-312(3), the auction house's warranty in New York is mandatory and requires that, if the purchaser is subsequently determined not to have acquired title, the auction house reimburse the amount of the successful bid, plus any buyer's commission paid by the purchaser.⁹³ Auction-house consignment agreements, in turn, customarily require that a consignor represent and warrant possession of title and the right to sell a consigned object and that the consignor indemnify the auction house against its loss if the consignor's representations and warranties turn

91. Estimates of the overall size of the market for art and the allocation of sales as between auction houses and dealers are inconsistent, which is unsurprising given the private character of non-auction sales. Compare Rachel Corbett, *How Big Is the Global Art Market?*, ARTNET, <http://www.artnet.com/magazineus/news/artnetnews/china-the-worlds-top-art-and-antique-market.asp> (last visited Nov. 9, 2012) (summarizing the results of a report issued by the European Fine Art Foundation and estimating the overall size of the global market at \$60.8 billion, with sales about equally split between auction houses and dealers), with David Segal, *The Boom Behind Closed Doors*, N.Y. TIMES, July 22, 2012, at BU1 (quoting another study estimating global sales for 2011 at \$64.1 billion, of which private (non-auction) sales accounted for about 70 percent).

92. See N.Y.C., N.Y., ADMIN. CODE ch. 2, subch. M, § 2-124(a) (2009).

93. *Id.*

out to have been false.⁹⁴ Thus, by contract an auction house may shift ownership-related risks back to the work's consignor. Although it retains the risk that a consignor may resist satisfying an obligation to indemnify,⁹⁵ the auction house may insure its risk of liability to purchasers through third-party insurance.⁹⁶

As it happens, a purchaser may also buy third-party insurance against the risk of defective title.⁹⁷ One insurer, Aris Title Insurance Co., has been selling art-title insurance since 2006 on terms that require an up-front premium to cover the insured's legal costs in ownership disputes and to compensate the owner if the dispute is lost.⁹⁸ Aris has sold only around a thousand policies since 2006, however.⁹⁹ Art title insurance has not displaced customary transactional practice, through which dealers and auction houses rely, as discussed above, on consignors' warranties.¹⁰⁰ Additionally, the demand for art title insurance seems subject to a moral-hazard problem because "the people most likely to seek coverage are those who already know of a title defect," and, if this information is not

94. See, e.g., Christie's Standard Agreement § 5, in 1 RALPH E. LERNER & JUDITH BRESLER, *ART LAW*, app. 4-2, at 410 (3d ed. 2005) ("Consignor represents and warrants to Christie's that: (i) Consignor has the right and title to consign the property for sale; . . . (iii) upon sale, good and marketable title and right to possession will pass to the buyer free of any . . . liens, claims, encumbrances or restrictions . . ."); Sotheby's Standard Agreement § 8, in 1 LERNER & BRESLER, *supra*, app. 4-1, at 401 ("You represent and warrant to us and each purchaser that you have the right to consign the Property for sale . . . that good title and right to possession will pass to the purchaser free of all liens, claims and encumbrances . . .").

95. In *Greenwood v. Koven*, 880 F. Supp. 186 (S.D.N.Y. 1995), for example, the auction house's consignment contract required the consignor to return the sale proceeds to the auction house if the auction house "determine[d] that the offering for sale . . . has subjected or may subject [the auction house] and/or seller to any liability, including liability under warranty or authenticity of title," *id.* at 192 (quoting the Consignment and Limited Warranty Agreement). The court held that the auction house was permitted by its consignment contract to make a good-faith determination that a completed sale of an artwork might subject it to liability and could thus recover the sale proceeds from the dealer who sold the painting to the auction house, *id.* at 188, 203–04, after a successful bidder questioned the catalog's attribution of the work she purchased to an identified artist, *id.* at 189.

96. In *Greenwood*, underwriters of the auction house's errors-and-omissions insurance reimbursed the auction house for its payment to the purchaser at auction, then sued the consignor as subrogees of the auction house's claim. *Id.* at 188.

97. But see William M. Landes & Richard A. Posner, *The Economics of Legal Disputes over the Ownership of Works of Art and Other Collectibles*, in *ECONOMICS OF THE ARTS: SELECTED ESSAYS* 177, 187 (V.A. Ginsburgh & P.-M. Menger eds., 1996) (noting "[t]he absence of title insurance for works of art to emerge").

98. Charles Danziger & Thomas Danziger, *An Ounce of Prevention: Art Title Insurance Can Help Hedge Against an Uncertain Past*, *ART + AUCTION*, Dec. 2011, at 73, 73.

99. *Id.* at 122.

100. See *supra* note 94 and accompanying text.

disclosed to the insurer, it may not cover claims.¹⁰¹ The fact that dealers and collectors—some of them savvy repeat players who spend large amounts of money to acquire art—retain a risk, notwithstanding the availability of a commercial insurance product, may imply the existence of a general practice among collectors of using caution in choosing the intermediaries from or through whom they buy art, a practice that counsels aversion to purchasing from intermediaries about whom little is known. Their risk mirrors the consignor’s risk discussed in Part III.

III. THE GOOD-FAITH PURCHASER AND THE UNRELIABLE INTERMEDIARY

Good faith and compliance with custom in a trade are legally significant when, in contrast to the stolen-art scenarios discussed so far, the art object in question was not stolen but was entrusted by its owner to an intermediary who sold it in the ordinary course of business. As articulated in UCC § 2-403(2), the underlying principle is that “[a]ny entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.”¹⁰² Under UCC § 1-201(b)(9), a buyer in ordinary course of business “buys goods in good faith, without knowledge that the sale violates the rights of another person in the good, and in the ordinary course from a person . . . in the business of selling goods of that kind.”¹⁰³ With an exception not relevant for this discussion, a party acts in good faith by “honesty in fact and the observance of reasonable commercial standards of fair dealing” under UCC § 1-201(b)(20). Good faith, in the case of a merchant, requires “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”¹⁰⁴ A

101. See Danzinger & Danzinger, *supra* note 98, at 122; see also Landes & Posner, *supra* note 97, at 187 (attributing the absence of title insurance for artwork to factors like “adverse selection,” “the difficulty of calculating the risk of defective title to art with actuarial precision,” and, as to insurance against a prior event, the prospect that the insured is “exploiting information known to him but not to the insurer”).

102. U.C.C. § 2-403(2) (2012). Section 2-403(3) of the UCC defines “entrusting” to include “any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties.”

103. *Id.* § 1-201(b)(9).

104. *E.g.*, N.Y. U.C.C. LAW § 2-103(1)(b) (McKinney 2002). A proposed revision of UCC Article 2 would have eliminated this definition, with the consequence that the “good faith” of merchants would have been evaluated only in light of the general definition in § 1-201(b)(20), which does not include “in the trade.” U.C.C. app. T § 2-103(1)(j) (2012). *Id.* App. T at 1995.

sale is in ordinary course when it “comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.”¹⁰⁵

The upshot for immediate purposes is that when a buyer, acting in good faith, acquires an art object from an art dealer—or another merchant in goods of the kind—the buyer’s right to possess the object is that of the person who entrusted it to the dealer, notwithstanding any breach of duties owed by the dealer to the entruster.¹⁰⁶ That the dealer cheated the owner¹⁰⁷ or sold the object in disregard of the owner’s instructions would breach the dealer’s duties as the owner’s agent,¹⁰⁸ but would not defeat a good-faith purchaser’s right to possession. The justification for this outcome is that the owner’s dispossession stemmed from the owner’s voluntary act and not from theft. Overall, in the assessment of the New York Court of Appeals, this outcome “enhance[s] the reliability of commercial sales by merchants (who deal with the kind of goods sold on a regular basis) while shifting the risk of loss through fraudulent transfer to the owner of the goods, who can select the merchant to whom he entrusts his property.”¹⁰⁹

Thus, as between a good-faith purchaser and an art object’s owner, the owner is in a better position to investigate, control, and bear the risk that his chosen intermediary will prove untrustworthy. This allocation of risk is a mirror image of the allocation discussed in the preceding section, which is a good-faith purchaser’s risk that the dealer from whom she buys will be unavailable or otherwise inadequate as a defendant when and if problems with title surface, itself a risk that stems from a purchaser’s choice to deal at all through

The proposed revision was abandoned in 2011. In the Official Text of the UCC, as opposed to the statute as enacted in jurisdictions like New York, § 2-103(1)(b) is designated as “[Reserved.]” U.C.C. § 2-103(1)(b) (2012). A leading scholar comments that including “‘in the trade’ seems to place a limit on the art merchant’s standard of conduct.” PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 434 (3d ed. 2012).

105. U.C.C. § 1-201(b)(9).

106. When an object has been stolen, the buyer would lack the right to possess it because the entruster also lacked this right. Section 2-403(1) of the UCC embodies the *nemo dat* principle.

107. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (“An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.”). For a concrete example, see *infra* text accompanying notes 110–120.

108. See RESTATEMENT (THIRD) OF AGENCY § 8.09(2) (“An agent has a duty to comply with all lawful instructions received from the principal . . . concerning the agent’s actions on behalf of the principal.”).

109. *Porter v. Wertz*, 421 N.E.2d 500, 500–01 (N.Y. 1981).

any particular intermediary. Just as a purchaser freely chooses whether to purchase from a particular intermediary and whether (and at what price) to purchase if the seller disclaims warranties, an owner freely chooses the agent to whom to entrust an art object.

The requisites for good-faith-purchaser status in this context—and the content of customary practices in art markets in the United States—are reasonably well fleshed out in case law. In one example, *Lindholm v. Brant*,¹¹⁰ the plaintiff entrusted a painting by Andy Warhol, *Red Elvis*, to Mr. Anders Malmberg, a Swedish dealer who had previously advised her and her husband and facilitated their joint and individual purchases of art.¹¹¹ When her husband began divorce proceedings, the plaintiff designated Mr. Malmberg as her agent for the purpose of selling several works of art, not including *Red Elvis*. At the time, *Red Elvis* was on display in Europe in a traveling exhibition organized by the Guggenheim Museum; the plaintiff's loan of the painting was facilitated by Mr. Malmberg and the display label accompanying the painting credited it to a "Private Collection, [c]ourtesy Anders Malmberg."¹¹² After *Red Elvis* engaged the defendant's attention,¹¹³ he was told that Mr. Malmberg had purchased the painting from the plaintiff.¹¹⁴ The defendant agreed to pay \$2.9 million to Mr. Malmberg, \$900,000 as a deposit with the remainder to be paid upon the delivery of *Red Elvis* to a bonded warehouse in Denmark.¹¹⁵ Mr. Malmberg was able to deliver the painting, which the plaintiff had not authorized him to sell, because the plaintiff authorized the Guggenheim Museum to release it to him when the exhibit closed. Mr. Malmberg told the plaintiff, untruthfully, that the purpose was to lend the painting for temporary display in another European museum.¹¹⁶ She discovered Mr. Malmberg's treachery after she decided to sell *Red Elvis* to another purchaser willing to pay \$4.6 million.¹¹⁷ But by that point, the defendant, Mr. Peter Brant, had the painting and Mr. Malmberg retained the \$2.9

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

111. *Id.* at 1050.

112. *Id.* at 1051 (quoting the display label) (internal quotation marks omitted).

113. As it happens, he had once before briefly owned *Red Elvis*, having purchased it in 1969 while a college student. *Id.* at 1050 n.4.

114. *Id.* at 1051–52.

115. *Id.* at 1052.

116. *Id.* at 1053.

117. *Id.* at 1053–54.

million sales proceeds.¹¹⁸ Unsurprisingly this transaction led to Mr. Malmberg's conviction in Sweden on embezzlement charges and to the plaintiff's suit alleging that Mr. Brant had converted *Red Elvis*.¹¹⁹

Notwithstanding Malmberg's criminal escapade, the court held that Mr. Brant succeeded in establishing his status as a buyer in ordinary course who thereby took all of the plaintiff's rights in *Red Elvis*.¹²⁰ This holding required Mr. Brant to demonstrate that he followed "usual or customary practices and observed reasonable commercial standards of fair dealing in the art industry" in dealing with Malmberg.¹²¹ The defendant established the content of these standards through expert testimony: When a purchaser has no reason to be concerned about a seller's ability to convey good title, a deal is "completed on a handshake and an exchange of an invoice."¹²² Customarily, sophisticated buyers (like Mr. Brant)¹²³ and dealer/sellers would not obtain a signed invoice between the original seller (in this case, purportedly the plaintiff) and the dealer before concluding a purchase.¹²⁴ Such buyers would also not request information to corroborate a dealer's purported authority to transfer title because buyers rely on representations made by respected dealers about their authority to sell.¹²⁵ And, underscoring the significance of intermediation by dealers, prospective buyers ordinarily make inquiry to a dealer known to work with a particular collector or identified on an exhibit label; they do not contact the owner directly.¹²⁶ This pattern of exclusive dealing through an owner's intermediary dealer would give an owner who so wishes the protection of anonymity as well as the dealer's expertise in assessing prospective buyers and handling negotiations over price. In *Lindholm*, Mr. Brant departed in some respects from the norm because he retained counsel to draft a purchase contract and to

118. *Id.*

119. *Id.* at 1054 & n.8.

120. *Id.* at 1060.

121. *Id.* at 1056.

122. *Id.* at 1056–57 (quoting *Lindholm v. Brant*, 2005 WL 2364884, at *13 (Conn. Super. Ct. Aug. 29, 2005), *aff'd*, 925 A.2d 1048 (Conn. 2007)) (internal quotation mark omitted).

123. At the time, Mr. Brant was a member of the Guggenheim Museum's board of trustees and a lender of works to the exhibition that included *Red Elvis*. *Id.* at 1050–51.

124. *Id.* at 1057.

125. *Id.*

126. *Id.* at 1058.

conduct lien searches.¹²⁷ The court found that these departures—toward greater due diligence and caution—were prompted by Mr. Brant’s concern that the plaintiff’s soon-to-be-former husband might have claims to *Red Elvis*, not that Malmberg lacked authority to sell on the plaintiff’s behalf.¹²⁸

More generally, and consistent with *Lindholm*, customary practice is to inquire further in the presence of “warnings that something is wrong with a transaction.”¹²⁹ When no such warnings are alleged to have been present, a purchaser is protected as a buyer in ordinary course, and courts dismiss complaints by disappointed owners against purchasers through dealers.¹³⁰ The kinds of facts that customarily should elicit inquiry call into question whether a person attempting to sell an art object either owns it or has authority to sell it on behalf of another.¹³¹ Any inquiry, to conform to “reasonable commercial standards,”¹³² must meet a standard of adequacy, to which all the facts and circumstances of a given case are relevant. Thus, in *Lindholm*, although the buyer did not do all he might theoretically have done to resolve his doubts about the ownership of *Red Elvis*, the results of his investigations allayed them.¹³³ In contrast, extreme

127. *Id.* at 1052.

128. *Id.* at 1058–59. The plaintiff’s prior attempt to sell jointly owned artworks from the family home without her husband’s consent, an effort stymied by an injunction from the family court, *id.* at 1051, lent credibility to this focus for Mr. Brant’s concern.

129. *See Morgold, Inc. v. Keeler*, 891 F. Supp. 1361, 1368 (N.D. Cal. 1995) (“[I]t is not the practice in the art industry, in the absence of warnings, for a buyer to require a seller to make disclosures about the chain of title or the prices paid at every link in the chain.”).

130. *See, e.g., Brown v. Mitchell-Innes & Nash, Inc.*, No. 06-cv-7871(PAC), 2009 WL 1108526, at *7 (S.D.N.Y. Apr. 24, 2009) (“[The owner’s] Amended Complaint . . . fails because it does not allege any ‘red flags’ that would create doubt in the [purchaser’s] mind as to the propriety of the sale.”).

131. *See Interested Lloyd’s Underwriters v. Ross*, No. 04-cv-4381(RWS), 2005 WL 2840330, at *5–6 (S.D.N.Y. Oct. 28, 2005) (denying the buyer’s motion to dismiss on the ground that it was an issue of fact whether a four-month delay between contract and delivery, along with a 10 percent differential between the painting’s sale price and its market value, should have prompted additional inquiry by the buyer); *Porter v. Wertz*, 416 N.Y.S.2d 254, 256–58 (App. Div. 1979), *aff’d*, 421 N.E.2d 500 (N.Y. 1981) (emphasizing that the dealer who purchased the painting made no inquiry into whether the purported art dealer who sold it to him—in fact a delicatessen employee—owned or had authority to sell the painting, and that the purchaser apparently had not dealt with the seller before); *Howley v. Sotheby’s, Inc.*, N.Y. L.J., Feb. 20, 1986, at 6 (N.Y. Civ. Ct. 1986) (granting the former owner’s motion for summary judgment in an action for conversion when the dealer purchased the painting from the caretaker of the owner’s property, who had impersonated the owner’s nephew but also told the dealer that the sale would require the owner’s approval).

132. *Lindholm*, 925 A.2d at 1056.

133. *Id.* at 1059.

warnings of irregularity are not reasonably addressed through a cursory inquiry.¹³⁴ As Part IV illustrates, in some jurisdictions outside the United States, whether a purchaser acted in good faith has much broader consequences.

IV. INDUSTRY PRACTICE, LEGAL VARIETY, AND GOOD FAITH

Although the theft of an art object is generally a crime, the civil-law aftermath of a theft notoriously varies among jurisdictions. In particular, in many jurisdictions a good-faith purchaser may obtain good title under certain circumstances, which differ markedly. For example, in England, as in the United States and Canadian provinces other than Quebec, a good-faith purchaser of stolen art does not acquire title. England, for example, repealed an exception for purchases made in *market overt*—that is, purchases through a merchant who displays goods openly.¹³⁵ In contrast, under the laws of several continental European countries, good-faith purchasers may acquire title to a stolen work.¹³⁶ In France, after thirty years, one who acquired possession in bad faith is not subject to claims of the rightful owner.¹³⁷ In France and Switzerland, an owner who seeks recovery of stolen goods from a good-faith purchaser must compensate the purchaser for the price paid for the goods.¹³⁸ And in Switzerland, where a good-faith purchaser acquires good title to stolen property after five years, the law also presumes that the purchaser acted in good faith and imposes on a party seeking to reclaim stolen property

134. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1403–04 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (holding that an art dealer who purchased fragments of a church mosaic originating in Turkish-occupied Northern Cyprus but never contacted Interpol, a disinterested expert in Byzantine art, or any relevant government authority, made “only a cursory inquiry” and so “failed to take reasonable steps to resolve” doubt about the provenance of the artwork).

135. Sale of Goods (Amendment) Act, 1994, c. 32, § 1 (U.K.). An owner may sue to replevy stolen art and antiquities. See *Islamic Republic of Iran v. Barakat Galleries*, [2007] EWCA (Civ) 1374, [2009] Q.B. 22, 30, 65 (Eng.) (allowing Iran’s action to recover artifacts that were allegedly removed from Iran unlawfully and then sold to a London art gallery).

136. See Schwartz & Scott, *supra* note 12, at 1373 n.137.

137. *Warin v. Wildenstein & Co.*, 846 N.Y.S.2d 153, 155 (App. Div. 2007) (discussing Article 2262 of the French Civil Code), *aff’g* 824 N.Y.S.2d 759 (Sup. Ct. 2006).

138. CODE CIVIL [C. CIV.] arts. 2277 (Fr.); SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907, SR 210, arts. 641, 934 (Switz.). For a discussion on the variety of European approaches and ongoing developments, see BEAT SCHÖNENBERGER, *THE RESTITUTION OF CULTURAL ASSETS* 103–11 (Caroline Thonger trans., 2009).

the burden of establishing the purchaser's lack of good faith.¹³⁹ Perhaps unsurprisingly, stolen objects have been moved within Europe from one jurisdiction to another with the objective of cleansing title. In one account, the absence of specific legislation in the Netherlands made it attractive for an art dealer based there to function as a "lock" or "sluice," as defined in Part II, accepting shipments of art stolen in France and Russia, and then channeling the art through a network of international dealers into the legitimate market.¹⁴⁰

Integral to this already complex situation is the choice-of-law rule applicable when stolen art has passed through more than one jurisdiction, at a minimum from the site of theft to the site of the transaction that led to the present holder's possession. The rule of *lex locus situs* applies the law of the jurisdiction in which an art object was located at the time of the transaction that transferred or allegedly transferred title.¹⁴¹ In contrast, the interest analysis generally applied by U.S. courts to determine choice-of-law questions examines the contacts of each of several jurisdictions and applies the law of the jurisdiction having the greatest interest in the litigation.¹⁴² In the

139. See *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010) (noting that the standard of due diligence for buyers in Switzerland is higher for purchases of used luxury automobiles and antiquities, but not for art objects generally). In contrast, New York law imposes on a stolen object's current possessor the burden of proving that the object was not stolen when an alleged victim of theft seeks to replevy the object. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

140. See *Tijhuis*, *supra* note 17, at 92–94 (“[An art dealer] smuggled the objects from Russia to the Netherlands and was able to funnel the illicit art into the legitimate market The differences between the Netherlands and Russia further enabled the successful traffic: the absence of specific legislation in the Netherlands, as well as the lack of effective international registries of stolen and smuggled art, combined with the lack of efficiency in communications between law enforcement agencies across international borders.”).

141. See, e.g., *Kunstsammlungen zu Weimar v. Elicofon (KZW)*, 536 F. Supp. 829, 845–46 (E.D.N.Y. 1981) (applying New York law when the defendant's purchase of paintings stolen in Germany occurred in New York), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *Winkworth v. Christie Manson & Woods, Ltd.*, [1980] 1 Ch. 496 at 501–02, 513–14 (Eng.) (holding that Italian law should be applied to determine the title of goods stolen in England, sold in Italy, and then brought back into England); see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 244(2) (1971) (explaining that “greater weight” will be given, “in the absence of an effective choice of law by the parties,” to the “location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law”).

142. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 6(2), 244(1). In *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010), a Massachusetts resident purchased from a New York gallery an allegedly stolen drawing, which had “passed through” Switzerland when it was purchased by a Swiss gallery in 1956 and then resold to the New York gallery a few months later, *id.* at 139. The

European context, commentators credit *lex locus situs* with facilitating transactions that legitimate title to stolen art.¹⁴³ To the extent that practices among dealers are influenced by the law and the prospect of liability, one prediction is that customary practices would vary among jurisdictions and would generate greater caution in dealings situated in the United States or other jurisdictions with comparable law. At a minimum, and independent of the choice-of-law methodology used by the court, the application of United States law cautions purchasers in the United States to take care to assure themselves that the art they buy has not been stolen.¹⁴⁴

In the United States, cases have not fleshed out the meaning of “good faith” in the context of purchases of stolen art or other goods, in contrast with the body of cases discussed in Part III applying concepts of good faith when a purchaser buys from an unreliable intermediary to whom the owner has entrusted art. Relatedly, a holder’s claim to have purchased in good faith may simply be conceded because it is immaterial to the outcome. Were the question to matter, as it does under UCC § 2-403(2) when a holder purchases from an unreliable intermediary, good-faith determinations would encompass “honesty in fact” and “the observance of reasonable commercial standards of fair dealing” under UCC § 1-201(b)(20).¹⁴⁵ Compliance with custom would be relevant but not dispositive because a customary practice might fall short of what a “reasonable commercial standard” would require for “fair dealing.”¹⁴⁶

court applied New York law instead of Swiss law after finding that New York, where the plaintiff bought the drawing, had a stronger interest in the action. *Id.* at 139, 144–46.

143. See Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 22–25 (1993) (“It is not lost on sophisticated traffickers that the situs rule, combined with *bona fide* purchaser laws in continental Europe, can prevail even against a rightful owner. These traffickers possess the contacts and capital to shoulder the costs of transferring stolen art across borders in order to legitimate them.”); Tjihuis, *supra* note 17, at 92 (“In other cases, where theft might be proven, it often sufficed to make sure the antiquities were sold through a legitimate dealer. After that, the civil code in most cases ensures that the antiquities involved cannot be claimed back.”).

144. See *Bakalar*, 619 F.3d at 145 (“The application of New York law may cause New York purchasers of artwork to take greater care in assuring themselves of the legitimate provenance of their purchase.”). And *Bakalar* predicts a follow-on consequence: “This, in turn, may adversely affect the extra-territorial sale of artwork by Swiss galleries.” *Id.*

145. See *supra* text accompanying notes 104–108.

146. See *supra* text accompanying note 104. As the UCC now stands, the requisites of good faith may demand less from “merchants” than from other parties because Article 2 focuses the merchant standard on “in the trade.” See *supra* note 106. A “merchant” is “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction,” either indirectly or through

Stolen-art cases also implicate the nature of art objects, which tend to be indivisible and to endure for a long time.¹⁴⁷ As in several of the cases discussed in this Essay, art may surface and become subject to claims long after a theft. Thus, the relevant jurisdiction's limitations period is important, as are the time when that period begins to run, the circumstances under which it may be tolled, and the availability of the equitable defense of laches against claims that are made within the applicable limitations period.¹⁴⁸ Answers to these questions vary among jurisdictions, even within the United States. In New York, the limitations period does not begin to run until the owner of a stolen art object has made a demand on its present holder and the demand has been refused.¹⁴⁹ To make a demand requires that the owner know that holder's identity. Although New York courts recognize the applicability of laches when an owner's delay has been unreasonable and has prejudiced the present holder, an owner of stolen art is not subject to a duty to use diligence in searching for the art.¹⁵⁰ The limitations doctrines in other jurisdictions seem harder on claimants; most significantly in California, the limitations period generally begins to run when the owner became able to discover the identity of the person in possession of the stolen object.¹⁵¹ Finally, the NSPA and customs-forfeiture actions are effectively not subject to a limitations period.¹⁵² In contrast, European jurisdictions protective of good-faith purchasers have limitations periods that tend to operate

the merchant's employment of an employee, agent, or other intermediary. U.C.C. § 2-104(1) (2012).

147. See Urice, *supra* note 13, at 38 ("Generally cultural property is non-fungible; is not consumed; has no measurable useful life; tends to be possessed through time; does not become obsolete through wear, tear, or innovation; and often maintains or increases in value through time.").

148. For a recent example of the application of laches, see *Bakalar v. Vavra*, 819 F. Supp. 2d (S.D.N.Y. 2011), *aff'd*, 2012 WL 4820801 (2d Cir. Oct. 11, 2012), which held that laches barred the claims of heirs of a rightful owner of a drawing although the heirs had such notice before they knew of the drawing's specific whereabouts, *id.* at 304. For general treatments, see Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1989); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 977-1002 (2001).

149. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991).

150. *Id.* at 430. *But cf. Bakalar*, 819 F. Supp. 2d at 303 (finding that laches bars a claim when the holder of an object establishes that the claimant failed to show due diligence in locating the object and showing that the claimant should have known of the claim suffices to establish the claimant's knowledge of claim).

151. See CAL. CODE CIV. PROC. § 338(c) (West 2006).

152. See Urice, *supra* note 13, at 39.

less favorably to claimants than do the counterpart doctrines in the United States.¹⁵³

Time's implications also bear on whether an actor's conduct was in good faith. In assessing whether a purchaser acted in good faith, it is unfair to evaluate the purchaser's conduct in light of what may now be generally known but was not known at the time of the purchase. On the other hand, what we now know may necessarily bias how we assess earlier conduct. For example, in *Kunstsammlungen zu Weimar v. Elicofon (KZW)*,¹⁵⁴ the defendant purchased two portraits by Albrecht Dürer, stolen from a castle in Germany in 1944, for \$450 from an American ex-serviceman who appeared in 1946 at the defendant's Brooklyn home, claiming to have purchased the portraits in Germany.¹⁵⁵ The defendant did not recognize the unsigned Dürers as priceless (and stolen) early-fifteenth-century masterpieces until 1966, when a friend saw them displayed in the defendant's home and recalled seeing the portraits listed in a book about German art stolen during and in the aftermath of World War II.¹⁵⁶ The court, applying New York law, did not have occasion to consider whether under German law the defendant might have been a purchaser in good faith who under the German law doctrine of *Ersitzung*¹⁵⁷ could have title to the paintings as their holder following ten years of uninterrupted good-faith possession.¹⁵⁸

Viewed from today's perspective, the history of massive art thefts in German-occupied Europe by Nazis and others is well-known.¹⁵⁹

153. See Schwartz & Scott, *supra* note 12, at 1334–35.

154. *Kunstsammlungen zu Weimar v. Elicofon (KZW)*, 678 F.2d 1150 (2d Cir. 1982).

155. *Id.* at 1156.

156. *Id.*

157. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], 2011, BUNDESGESETZBLATT [BGBl] §§ 937–945 (Ger.).

158. *KZW*, 678 F.2d at 1165–66. For another example of an unsuccessful effort to persuade a court to apply the law of a civil-law jurisdiction (Switzerland) to insulate a purchaser of stolen art, see *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990), which found under an Indiana state-law analysis that any connection of stolen art to Switzerland was not strong enough to justify applying Swiss law, *id.* at 1394.

159. Two publications in particular heightened public awareness. See FELICIANO, *supra* note 77 (examining the history of Nazi art theft in World War II, which occurred by the Nazis' confiscation of private art collections owned by French Jewish families and art dealers); LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994) (detailing Nazi art theft in countries across Europe and subsequent protection and recovery efforts). On the art-recovery work undertaken by Allied forces following the German defeat, see, for example ROBERT M. EDSSEL WITH BRET

Moreover, is it reasonable to assume that even unsigned art of the quality of the Dürers would legitimately be offered for sale at one's doorstep? Today we may assume that such art, if authentic, would most likely be in a museum. Finally, hypothetically resituating the defendant in *KZW* into Germany in 1946, his assumed base of local knowledge surely would shape any determination of whether he purchased the Dürers in good faith.¹⁶⁰

Other dimensions of assessing good faith are suggested by the facts of *Davis*. Should it matter how much Ms. Davis or the dealer from whom she bought *Le Marché* knew about the work of Camille Pissarro and the significance of the monotype within it? And, hypothetically resituating their purchases to France, just how notorious was the fact of the theft a few years earlier from the Faure Museum? Moreover, recall that the estimated value of *Le Marché* when consigned to auction in 2003 was in the range of \$60,000 to \$80,000 and that Ms. Davis paid \$8500 for the monotype in 1985, which represents a more than eight-fold difference in value.¹⁶¹ Assuming that the work was believed in 1985 to be authentic and that the esteem accorded Pissarro has not varied appreciably, the disparity might call the purchasers' good faith into question.¹⁶² Additionally, and formally separate from issues concerning purchasers' good faith, the French state has the power to deem stolen art "inalienable" and to prohibit its removal from France by its owner.¹⁶³ Moreover, France

WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* (2009). Indeed, the fact that the Matisse at the heart of the *Rosenberg* case had been stolen in Paris from an art dealer came to light through Feliciano's book. See *supra* note 77. Separately, the structure of dealings in illicitly excavated antiquities detailed in PETER WATSON & CECILIA TODESCHINI, *THE MEDICI CONSPIRACY: THE ILLICIT JOURNEY OF LOOTED ANTIQUITIES, FROM ITALY'S TOMB RAIDERS TO THE WORLD'S GREATEST MUSEUMS* (2006), became general knowledge.

160. *But see* Merryman, *supra* note 12, at 276–77 (characterizing defendant as “the American good-faith purchaser”).

161. See *supra* text accompanying notes 30–34.

162. In a recent example, a purchaser of a painting purportedly by Willem de Kooning paid \$4 million in 2007, but, the purchaser alleges, the gallery that sold the painting to him bought it for \$750,000 only a few days before. Kevin Flynn, *Another Suit Against Knoedler & Company*, N.Y. TIMES, July 7, 2012, at C3. The purchaser claims that the painting was a fake, stating that “[n]o genuine work of art by de Kooning with a \$4 million retail sale value could be purchased in good faith for \$750,000.” *Id.* (quoting the plaintiff's lawyers) (internal quotation marks omitted). The gallery denies the allegations, as does the dealer from whom it bought the painting. *Id.*

163. A recent dispute concerns a seventeenth-century painting by Nicolas Tournier, *Christ portant la croix* (Christ Carrying the Cross), which vanished from a museum in Toulouse in 1818. John Lichfield, *France Bars Removal of ‘Stolen’ Painting*, INDEPENDENT (Nov. 8, 2011),

has often exercised its less extraordinary power to prohibit the export of significant works of art.¹⁶⁴ To be sure, these possibilities cannot be given their due within this Essay, but they suggest the complexity of the legal environments in which art markets operate and in which practices evolve.

V. EVOLUTION IN CUSTOMARY PRACTICE IN ART MARKETS

Many authorities describe a major change in art-market practices over the last ten years. Focusing on transactional intermediaries, Professor Patty Gerstenblith wrote in that “[d]ealers and auction houses have become considerably more scrupulous in recent years about attempting to determine whether they or their consignors can, convey good title to the art works which they sell.”¹⁶⁵ In particular, both of the major auction houses (Christie’s and Sotheby’s) “maintain written policies concerning the requirement of ascertaining that a seller has good title before the auction house will accept a work of art,” including requiring relevant warranties and representations from the consignor.¹⁶⁶ For museums and private collectors of antiquities, Professor Jennifer Kreder notes a “dramatic shift in significant segments,” in which “present acquisitions invite a whole host of more complex issues to consider,” including the circumstances under which an antiquity was discovered and removed from its site.¹⁶⁷ Led by policies adopted by the Association of Art Museum Directors (AAMD) and the American Association of Museums (AAM), many museums have committed as a matter of formal museum policy to limit new acquisitions of antiquities to those with documented provenance establishing that an antiquity was removed with the

<http://www.independent.co.uk/news/world/europe/france-bars-removal-of-stolen-painting-6258709.html>. The painting, commissioned for a church in 1630, entered the museum’s collection after it was pillaged from the church during the French Revolution in 1794 and then presented to the museum. *Id.* The painting was sold in 2009 by Sotheby’s as part of a collection assembled by an Italian collector and purchased by a French dealer, who offered it for sale in 2010 at a Maastricht art fair. *Id.* After it was purchased by a London-based dealer in old-master paintings, the French culture ministry declared the painting stolen goods and an “inalienable part of French culture,” barring its removal from France. *Id.*

164. See, e.g., JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 113 (3d ed. 2007) (noting that French legislation to control the export of cultural treasures is not restricted to French-made art, nor are English restrictions limited to English art).

165. GERSTENBLITH, *supra* note 104, at 484.

166. *Id.* at 486; *cf. supra* note 84 and accompanying text.

167. Jennifer Anglim Kreder, *The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities*, 64 U. MIAMI L. REV. 997, 1020, 1027–28 (2010).

consent of the site's jurisdiction or was outside that jurisdiction no later than 1970.¹⁶⁸ Similarly, many museums now have formal policies concerning artwork present in German-occupied Europe between 1933 and 1945.¹⁶⁹ These policies, albeit not formally required by law, are consistent with it and responsive to salient episodes of law enforcement, including those discussed in this Essay. Additionally, the ethos of museum professionals and trustees may well shape museum practices toward norms of conduct that exceed the law's formal requirements.

To be sure, it can be difficult to determine how fixed or sticky a shift to a new customary practice may be. A recent incident nonetheless confirms that these shifts in museum and intermediary practices are not ephemeral and that relevant participants in art markets acknowledge them. In March 2011, the National Conference of Commissioners on Uniform State Laws announced that it had "convened a committee to study the need for . . . a uniform act on private rights of action to recover stolen cultural or artistic property and cultural artifacts and illegally exported artifacts."¹⁷⁰ The prospectus noted the inconsistency among states' laws on disputed title to art, in particular concerning the due diligence of parties to transactions, and proposed uniform legislation to standardize statutes of limitations and codify "major elements of due diligence," including whether a purchaser should have a duty to investigate before buying

168. See, e.g., J. PAUL GETTY MUSEUM, POLICY STATEMENT: ACQUISITIONS BY THE J. PAUL GETTY MUSEUM (2006), available at http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf. This policy determines that no object be acquired "without assurance that valid and legal title can be transferred." For the acquisition of any ancient work of art or archaeological material, museums will require documentation that the object was in the United States or out of its country of origin before November 17, 1970, or that it was legally exported from its country of origin or will be legally imported into the United States. *Id.* at 1–2. The cut-off date corresponds to the date of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971).

169. See, e.g., WALTERS ART MUSEUM, THE WALTERS ART MUSEUM ACQUISITIONS AND ACCESSIONS POLICY § 4.2, available at <http://thewalters.org/about/policy/acquisitions-accessions-policy.pdf> (outlining specific steps required to resolve Nazi-era (1933 to 1945) provenance of objects consistently with the AAM guidelines for Nazi-era art); *id.* § 4.2.5 (determining that if credible evidence of unlawful appropriation without subsequent restitution is discovered, a museum should notify the seller or donor of the nature of the evidence and should not proceed with an acquisition until the issues are resolved).

170. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, PROSPECTUS FOR A UNIFORM ACT ON CIVIL RESOLUTION OF ART OWNERSHIP DISPUTES 1 (2011), available at http://www.uniformlaws.org/Shared/Docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/Art%20Ownership%20Disputes_Prospectus%20Memo_031411.pdf.

or whether the seller should have a duty of disclosure.¹⁷¹ The uniform statute might have furnished a vehicle for art-market participants to push back against the liability regime described thus far. Although the prospectus stated that underlying law concerning ownership would not be altered,¹⁷² little imagination is required to see possibilities through which to mitigate its rigor, in particular through rules and doctrines that determine the period during which owners may assert claims. Alternatively, claimants and their representatives might have perceived the uniform-law project as an occasion to relax present barriers to recovery.

However, only four months later, the Executive Committee of the Conference's Program Committee discharged the study committee with a letter of thanks for its work on the basis that all of the stakeholder organizations that had been asked to comment on the proposal were unanimous in concluding "that uniform state legislation in this area is not needed."¹⁷³ Stakeholders who responded included representatives of Sotheby's, the AAM, the AAMD, organizations focused on preservation of cultural heritage, and organizations that work on behalf of Holocaust claimants.¹⁷⁴ In the Study Committee's own assessment, the stakeholders' responses demonstrated "remarkable unanimity" in concluding that a uniform law was not needed, would be difficult to draft, was unlikely to be enacted in New York and California, "and would not be likely to make a positive contribution."¹⁷⁵ Such unanimity was significant because "many of the stakeholders have opposing interests in art ownership disputes."¹⁷⁶

The comments submitted on behalf of individual stakeholders are revealing, and are consistent with a noticeable evolution in customary practices. For example, counsel to the AAMD noted that the circulated proposal asserted that "[s]tolen art and antiquities

171. *Id.* at 2.

172. *Id.* at 1-4.

173. UNIF. LAW COMM'N, ANNUAL MEETING OF THE COMMITTEE ON SCOPE AND PROGRAM 2 (2011), available at <http://www.uniformlaws.org/Shared/Minutes/scope070811mn.pdf>.

174. *Id.* at 2.

175. UNIF. LAW COMM'N, STUDY COMMITTEE ON AN ACT ON THE RECOVERY OF STOLEN CULTURAL AND ARTISTIC PROPERTY, FINAL REPORT 3 (2011), available at http://www.culturalheritagelaw.org/Resources/Documents/RSCAP_Art%20Ownership%20Study%20Committee%20Final%20Report_053111.pdf.

176. *Id.* at 4.

inundate the art and antiquities market,”¹⁷⁷ but objected to this claim because it was “based on *no* reliable data and has garnered credence simply by repetition.”¹⁷⁸ He added that the committee may have been unaware that “over the past several decades, large museums have led the way in adopting and implementing procedures to avoid acquisitions of stolen or illegally exported cultural property.”¹⁷⁹ Counsel to the Art Dealers Association of America (ADAA) noted that the bulk of recent cases involved art tainted by the Holocaust and predicted that “the passage of time will diminish the number of such disputes,” while drafting a uniform statute and obtaining its state-by-state enactment might take even longer.¹⁸⁰ The ADAA’s counsel challenged the proposition that a uniform statute would aid in achieving certainty in art-ownership disputes because many in the New York art community would oppose it and, in fact, the law is already relatively certain in New York “and the few other states where proceedings involving title to works of art have been brought.”¹⁸¹ Two senior officers writing on behalf of Sotheby’s characterized the existing law as “predictable and static” and saw no need for new uniform legislation.¹⁸² And counsel for the Commission for Art Recovery, which promotes restitution efforts on behalf of art works tainted by the Holocaust, characterized state-by-state differences as “adaptations to evolutionary pressures on individual states’ legal systems,” stemming from the recognition by courts of the roles they play in art markets.¹⁸³ Overall, in the commentators’ view

177. Letter from Stephen J. Knerly, Jr., Special Counsel, Ass’n of Art Museum Dir., to John Sebert, Exec. Dir., Unif. Law Comm’n 3 (May 2, 2011), *available at* http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip (quoting the project proposal).

178. *Id.*

179. *Id.*

180. Letter from Gilbert S. Edelson, Admin. Vice President and Counsel, Art Dealers Ass’n of Am. 1 (undated), *available at* http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip.

181. *Id.*

182. Letter from Jane A. Levine, Senior Vice President, Worldwide Dir. of Compliance, Sotheby’s, & Jonathan A. Olsoff, Senior Vice President, N. Am. Gen. Counsel, Sotheby’s, to John Sebert, Exec. Dir., Unif. Law Comm’n 1 (May 4, 2011), *available at* http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip.

183. Memorandum from Herrick, Feinstein LLP, to Recovery of Stolen Cultural and Artistic Prop. Comm., Care of John Sebert, Exec. Dir., Unif. Law Comm’n 3 (Apr. 26, 2011), *available at* [http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%](http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip)

customary practices among museums evolved, but so did the law in response to market developments. And, as end-collectors, museum practices are surely relevant to choices made by individual collectors—who may anticipate giving an art work to a museum at some point—and the transactional intermediaries from or through whom they buy art.¹⁸⁴

A separate challenge well beyond the compass of this Essay is to identify the institutional and social processes through which customary practice is formed and through which it may shift over time. On this score as well, reactions to the proposed uniform law are informative. In particular, the comment from former counsel to the Philadelphia Museum of Art (PMA) describes an institutional mechanism through which some stakeholders assessed the proposed statutory project and that may in other respects shape customary practice among museums. According to the PMA's former counsel, the uniform-law proposal was discussed at a recent meeting of the Museum Attorney's Group (MAG), a standing group of attorneys who serve or have served as the in-house or external counsel to many major art museums.¹⁸⁵ In the assessment of the PMA's former counsel, at the MAG's meeting "there was nearly unanimity" that no uniform act was needed and that drafting any uniform act "should be opposed."¹⁸⁶

CONCLUSION

This Essay sketches the evolution of customary practice in a specific context in which relationships between law and custom are complex. Practices among transactional intermediaries and art museums are integral to the operation of art markets, and patterns of intermediation that typify legitimate transactions are also observable when stolen art is sold. Any assessment of the efficiency or fairness of

20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip.

184. For specifics of private collectors of antiquities who make subsequent gifts to museums, see FELCH & FRAMMOLINO, *supra* note 9, at 124–34.

185. Letter from John J. Lombard, Jr., Special Counsel, McCarter & English, LLP, to John Sebert, Exec. Dir., Unif. Law Comm'n 6 (Apr. 27, 2011), available at http://www.uniformlaws.org/shared/docs/Recovery%20of%20Stolen%20Cultural%20and%20Artistic%20Property/RSCAP_Comments%20to%20Prospectus_Apr%20&%20May11.zip. The MAG meets twice a year "to consider current legal issues facing museums" and organizes an annual conference on legal problems of museum administration. *Id.* at 4.

186. *Id.*

a legal rule—in particular rules relevant to stolen-art claims—should take into account the significance to art markets of transactional intermediaries and museums, as well as the significance of customary practice and how it may evolve. Developments recounted in this Essay suggest that the relatively unforgiving quality of legal rules applicable to holders of stolen art encouraged shifts in practice among transactional intermediaries and art museums that the law did not directly or formally require. Although the practical bite of these rules may be mitigated or undercut in some circumstances, such as by the operation of statutes of limitations, the development of customary practice does not proceed oblivious of legal rules. Additionally, as this Essay demonstrates, customary practice among museums and transactional intermediaries defines the texture of art markets and the “art world” more generally. It may evolve to impose restrictions and requirements that the law formally does not.