

# Notes

## The Case Against Statutes of Limitations for Stolen Art

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In the mid-1960's, a mailroom clerk at the Guggenheim Museum in New York City stole a Marc Chagall watercolor entitled *The Cattle Dealer*. Museum officials did not notify the police, the FBI, Interpol, or other museums or galleries of the theft. In 1967, Jules and Rachel Lubell bought *The Cattle Dealer* from a reputable New York gallery and displayed it in their home for over two decades. After learning of the painting's location in 1985, museum officials demanded its return. When Mrs. Lubell refused, the museum began a lawsuit that dragged on for years.<sup>1</sup> Mrs. Lubell claimed ownership as an adverse possessor and under the statute of limitations.<sup>2</sup> In 1991, the New York Court of Appeals sent the case back to the trial court for a determination of the relative blameworthiness of the parties, further prolonging the litigation.<sup>3</sup>

The balancing-test approach adopted by the New York Court of Appeals in *Guggenheim* exemplifies one of several tangled threads in the law of stolen

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1. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 427-28 (N.Y. 1991) (noting that lawsuit began on Sept. 28, 1987); Richard Pérez-Peña, *Suit Over Chagall Watercolor Is Settled Day After Trial Starts*, N.Y. TIMES, Dec. 29, 1993, at B3 (noting that lawsuit was settled on Dec. 28, 1993).

2. *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 619 (App. Div. 1990), *certified question answered and aff'd*, 569 N.E.2d 426 (N.Y. 1991).

3. *Guggenheim*, 569 N.E.2d at 431. After the trial on remand began, the parties finally settled the lawsuit on December 28, 1993. Under the settlement, Mrs. Lubell will keep the painting, but she and the two dealers who sold the painting will pay the Guggenheim Museum an undisclosed sum of money. Pérez-Peña, *supra* note 1.

chattels.<sup>4</sup> Many of the commentators who have written about statutes of limitations for personal property advocate adverse possession, a doctrine borrowed from land law.<sup>5</sup> Other authors endorse a multi-factor balancing of the equities called the discovery rule, an approach similar to the one adopted in *Guggenheim*.<sup>6</sup> Related doctrines, such as the due diligence and laches rules, also balance the relative equities of the parties.<sup>7</sup>

All of these approaches are flawed. Adverse possession, a doctrine that works well for real estate, is not suited to the very different realm of movable, concealable personal property. Because it ignores an owner's diligence, adverse possession doctrine hurts diligent owners who have reported thefts but are unable to find their property. Since multi-factor balancing tests do not automatically award title to theft victims, they do not adequately deter trafficking in stolen goods. Adverse possession law and balancing tests do not automatically reward theft reporting, nor does either doctrine routinely penalize the purchase of stolen property. Thus, neither approach creates adequate

4. Though the term "chattel" technically does not include intangible personal property, for the sake of readability this Note uses "chattel" and "personal property" interchangeably because the distinction is not important for this Note's purposes.

5. See *infra* Part I.B. Each author stresses a different justification for adverse possession of chattels. See Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 163 (1988) (underscoring need to protect good faith and commercial certainty); R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U. L. REV. 1221, 1235-36 (1986) (stressing importance of quieting title); Nicholas D. Ward, *The Georgia Grind: Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J.C. & U.L. 533, 554 (1981-1982) (relying on "the need for repose"); Comment, 14 RUTGERS L. REV. 443, 444-45 (1960) (stressing need to quiet titles and bar stale claims). These recent articles have not moved beyond the older literature, which relied on similar reasons in support of adverse possession of chattels. See J.B. Ames, *The Disseisin of Chattels* (pt. 2), 3 HARV. L. REV. 313 (1890) (assimilating adverse possession of chattels to adverse possession of land); John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875, 897-901 (1933) (favoring protection of reliance interests); William F. Walsh, *Title by Adverse Possession* (pt. 1), 16 N.Y.U. L.Q. REV. 532, 536 (1939) (emphasizing need to bar stale claims).

6. See *infra* Part I.D; see also Paula A. Franzese, "Georgia on My Mind"—Reflections on O'Keefe v. Snyder, 19 SETON HALL L. REV. 1 (1989) (implicitly endorsing discovery rule); John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1151 (1980) (advocating discovery rule that would balance defendant's interest in repose, plaintiff's interest in meritorious claim, problems of proof, and hardship to faultless plaintiff).

7. Laches and due diligence doctrines temper statutes of limitations by taking into account the owner's diligence and other factors relevant to the fairness of returning the chattel. See *infra* Part I.D; see also Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 942 (1989) (endorsing demand-and-refusal rule as qualified by laches); Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1100-01 (1991) (endorsing version of due diligence rule); Stephen L. Foutty, Recent Development, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839, 1841 (1990) (endorsing due diligence rule); Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 374-83 (1993) (endorsing demand-and-refusal rule as qualified by laches); Charles D. Webb, Jr., Note, *Whose Art Is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883, 895 (1990-1991) (endorsing version of due diligence rule). Though these commentators treat the differences between laches and due diligence as significant, Part I.E notes similarities between the two and Part II.D argues that both rules are far too vague. Thus, neither rule adequately deters the buying of stolen art.

incentives to report thefts and deter the buying of stolen art.<sup>8</sup> Judges and academics have been too preoccupied with ex post dispute resolution to see the ex ante impact of their rules upon future behavior. Therefore, current approaches fuel the market for stolen goods and encourage more thefts.

This Note's thesis is simple: victims of art thefts who promptly report the thefts to the police and to a computerized theft database should never be legally barred from recovering their property. In other words, statutes of limitations should not apply to actions brought by owners who have promptly taken two simple steps to protect their legal titles. Often, a so-called bona fide purchaser (BFP) is negligent when investigating title to an artwork. Now that an international computerized art-theft registry is available, buyers should be encouraged to check the registry and should be held liable if they fail to do so.

Part I of this Note surveys the arguments commentators have marshalled in support of statutes of limitations for personal property and considers the judicial trend toward restricting protection of BFP's. Courts have gradually offered more protection to owners but have done so ad hoc, suggesting that the time is ripe for wholesale legislative reform. Part II criticizes the arguments for protecting BFP's from diligent owners' claims. Part III outlines an alternative legal regime that would protect a BFP if and only if the owner had not reported the theft. This Note concludes that protecting owners by abolishing limitation periods for many types of personal property would be both economically efficient and morally just.

## I. LIMITATION PERIODS FOR CHATTELS: COMMENTATORS AND COURTS

To understand why the current law is unsatisfactory, one must understand what the law is and how it arose. Adverse possession, for instance, is a land law doctrine that courts first imported into cases involving stolen animals. Adverse possession may have suited stolen horses in the late nineteenth century, but it works poorly for small, concealable objects (such as artworks) in a highly mobile society. Recognizing that this real-property doctrine is inappropriate for most personal property, courts and commentators have moved toward case-by-case balancing of the relative diligence and blameworthiness of each theft victim and each buyer. Judges and academics have gradually recognized that theft victims often deserve to recover their art from buyers of stolen goods. But because no one has advocated bright-line rules, the law has perpetuated perverse incentives for buyers not to investigate title and has failed to encourage victims to report thefts, as Part II argues.

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8. The Cultural Property Implementation Act already covers cultural, archaeological, or ethnological property stolen from another country's museums, monuments, or public institutions. 19 U.S.C. §§ 2601, 2607 (1988). See generally Paige L. Margules, Note, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values, Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609 (1992). Therefore, this Note does not deal with works that fall under that Act.

Section A lays out the common law rule that protects an original owner's title to stolen goods. More than a century ago, American courts and commentators began supporting adverse possession of chattels, a doctrine that favors buyers. Section B explores this approach. More recently, courts have drifted away from protecting buyers by tempering limitation periods in various circumstances. In art theft cases in particular, they have been less willing to find for possessors than most academics would be. Sections C and D consider doctrines the courts have used to curtail protection for buyers of stolen art: the demand-and-refusal rule, the laches rule, the due diligence doctrine, and the discovery rule. Section E considers the reasons behind the gradual erosion of protection for possessors. When courts face real cases involving real people, judges and juries intuitively blame the possessor because he<sup>9</sup> is usually the least cost avoider and is at least as negligent as the theft victim. Courts have increasingly favored owners, but they have done so in an ad hoc fashion. As Part III argues, Congress should replace this ad hoc judicial approach with an explicit, bright-line rule that would deter art theft.

#### A. *The Common Law of Stolen Property*

At common law, a thief's title is void.<sup>10</sup> The thief cannot give a buyer, even a BFP, good title.<sup>11</sup> Thus, a buyer does not take title if somewhere back in the buyer's chain of title a claim rests on theft.<sup>12</sup> Over the past century, the various doctrines of limitation periods described below have carved out exceptions to this rule. Nevertheless, the Uniform Commercial Code perpetuates the common law rule: unless one of the limitation doctrines applies, title remains in the original owner.<sup>13</sup>

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9. This Note uses male pronouns for buyers and possessors and female pronouns for owners and theft victims.

10. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*145 (describing rationale underlying actions for replevin and detinue: "For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simpleminded part of mankind (which is by far the most numerous division) could never be secure of their possessions.")

11. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982); *Ward*, *supra* note 5, at 549 & n.94.

12. *Suburban Motors v. State Farm Mut. Auto. Ins.*, 268 Cal. Rptr. 16, 19 (Ct. App. 1990); *Schrier v. Home Indem. Co.*, 273 A.2d 248, 250-51 (D.C. 1971); *Inmi-Etti v. Aluisi*, 492 A.2d 917, 923 (Md. Ct. Spec. App. 1985).

13. See U.C.C. §§ 1-103 (stating that pre-U.C.C. common law still applies except where displaced by particular U.C.C. provisions), 1-201(32), (33) (defining purchase and purchaser in terms of passage of title via voluntary transactions), 2-403(1) (stating that purchaser acquires all title that transferor had) (1988); see also *Webb*, *supra* note 7, at 884 & n.12 (citing these U.C.C. sections). The U.C.C. does protect a BFP who buys from a seller with voidable title. U.C.C. § 2-403(1) (1988). But a voidable title, which arises, for instance, when a check is dishonored, is very different from a thief's void title. *Ward*, *supra* note 5, at 549-50. Since a thief has no title to transfer, not even a voidable title, a purchaser from a thief acquires no title.

## B. *Adverse Possession of Chattels*

### 1. *Academic Literature*

Under adverse possession doctrine, a possessor who has actual, exclusive, open, notorious, continuous, and hostile possession of land under a claim of right for the statutory period can take good title and thereby defeat the original owner's claim.<sup>14</sup> Academics have long argued that adverse possession of chattels is desirable for precisely the same reasons that adverse possession of land is: namely, to punish the original owner's delay, to protect the possessor's settled expectations, and to avoid the evidentiary problems caused by stale claims.<sup>15</sup>

Some authors have recognized differences between realty and personalty but have nonetheless supported adverse possession for both. John Dawson, for instance, noted that the usual requirement of open and notorious possession does not fit chattels well because chattels are movable and often inconspicuous.<sup>16</sup> Nonetheless, he supported adverse possession of chattels as a way of protecting a BFP's reliance interest.<sup>17</sup> Similarly, Patty Gerstenblith notes that even if a possessor uses personal property openly, notoriously, and visibly, a diligent owner may still have no notice of her property's whereabouts.<sup>18</sup> Thus, Gerstenblith says, courts face a difficult choice between two innocent parties.<sup>19</sup> Nevertheless, she supports adverse possession of chattels because it protects commercial expectations and rewards possessors' good faith.<sup>20</sup> In her opinion, an adverse possession rule that relies on possessors' good faith is a clear, predictable, fair substitute for the requirement of open and notorious possession.<sup>21</sup>

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14. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 100 (2d ed. 1988). See generally CHARLES C. CALLAHAN, *ADVERSE POSSESSION* (1961). Note one important difference between land and chattels: Many jurisdictions require that an adverse possessor have color of title, i.e., title resting on a document. See DUKEMINIER & KRIER, *supra*, at 104. Title deeds exist for land, making the color of title requirement useful for weeding out undocumented claims. In contrast, because there are no standard documents of title for most chattels, it is impossible to apply the color of title test to chattels.

15. See, e.g., Ames, *supra* note 5, at 323-25; Walsh, *supra* note 5, at 535-36. Several works treat adverse possession of chattels only briefly and make the analogy between land and chattels in passing, taking it for granted that the two deserve like treatment. See, e.g., 3 *AMERICAN LAW OF PROPERTY* § 15.16, at 837 (A. James Casner ed., 1952); Comment, *supra* note 5, at 444-45.

16. Dawson, *supra* note 5, at 898-99.

17. *Id.* at 897-901.

18. Gerstenblith, *supra* note 5, at 124.

19. See *id.*

20. *Id.* at 163.

21. *Id.* at 162-63.

## 2. Case Law on Adverse Possession

By barring untimely suits by owners to recover property, statutes of limitations indirectly defeat the common law rule that a thief cannot pass title. Though most statutes of limitations for recovering personal property do not mention the requirements for adverse possession of land, courts have read such standards into the statutes.<sup>22</sup> This approach was firmly settled by the first quarter of this century. The majority of reported cases on adverse possession of chattels between 1870 and 1930 involved horses, cattle, sheep, and mules.<sup>23</sup> This case law, crafted to fit stolen animals that remained in one state, did not work nearly as well when it was later extrapolated to cover smaller, concealable goods (such as artworks) that had been transported to a different state or nation. Because adverse possession of chattels unfairly penalizes theft victims who cannot find their goods, many jurisdictions have replaced adverse possession law with various balancing-test doctrines.<sup>24</sup>

In the seminal case of *Dragoo v. Cooper*,<sup>25</sup> Cooper sued to recover a stolen horse from Dragoo, a BFP who had held the horse for four years. The court held for Dragoo. “[W]e perceive no valid reason why the rule of construction adopted in suits relating to realty [i.e., adverse possession] shall not be applied in actions for the recovery of personalty.”<sup>26</sup> The court claimed that the policies of quieting titles and preventing lawsuits apply equally to chattels and land.<sup>27</sup> The *Dragoo* scenario recurred in different states, with different animals, over the next six decades. Courts gradually imported more and more of the land law tests into the law of chattels. One court, for example, stressed that a possessor had held openly and notoriously.<sup>28</sup>

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22. *O’Keeffe v. Snyder*, 405 A.2d 840, 847 (N.J. Super. Ct. App. Div. 1979), *rev’d and remanded on other grounds*, 416 A.2d 862 (N.J. 1980).

23. Another recurring case involved fixtures of which former owners or occupants of land retained ownership, but which they left behind and only belatedly returned to claim. Courts recognized that such fixtures were personal property but nonetheless applied adverse possession doctrines. *See, e.g.*, *Isham v. Cudlip*, 179 N.E.2d 25 (Ill. App. Ct. 1962) (applying adverse possession to house sold as chattel); *Chapin v. Freeland*, 8 N.E. 128 (Mass. 1886) (applying adverse possession to counters in general store); *Preston v. Briggs*, 16 Vt. 124 (1844) (applying adverse possession to barn). Applying adverse possession to fixtures makes sense, because fixtures share many characteristics of land: durability, high value, responsiveness to investment, and locational stability. The owners could have returned to claim their fixtures at any time; their delay was thus blameworthy.

24. *See infra* Part I.C-D.

25. 72 Ky. (9 Bush) 629 (1873).

26. *Id.* at 632.

27. *See id.*

28. *Dee v. Hyland*, 3 P. 388, 388 (Utah 1883) (awarding title to BFP of horse even though owner had notified sheriff, ranchers, and cattle drovers of theft). Another court noted that a BFP had been “claiming and holding [a mare] notoriously and adversely.” *Hull v. Davidson*, 25 S.W. 1047, 1047 (Tex. Civ. App. 1894). One case stressed a BFP’s “open, notorious, and undisputed possession [of a stolen mare] under an honest claim of right.” *Leavitt v. Shook*, 83 P. 391, 391 (Or. 1905). Another case rested its decision on a possessor’s having held openly, notoriously, peaceably, and exclusively. *Adams v. Coon*, 129 P. 851, 852 (Okla. 1913). Several cases expressly permitted tacking. *E.g.*, *Gaillard v. Hudson*, 8 S.E. 534, 534 (Ga. 1889); *Gatlin v. Vaut*, 91 S.W. 38, 40 (Indian Terr. 1905), *aff’d sub nom. Vaught v. Gatlin*, 120 P. 273 (Okla. 1911). Tacking is a doctrine that permits a possessor to add the length of time his seller possessed

Animals are mobile and thus hard to find. To address this problem, some courts interpreted the open-and-notorious test to require that the possessor hold the property openly and notoriously in the vicinity of the theft: “[I]t has been uniformly held that the two-year statute of limitation is applicable to an action for the recovery of stolen property, where the property is held in open and notorious possession *and within the jurisdiction of the court.*”<sup>29</sup> Likewise, the *Dragoo* court declared that “departing from the state” would toll the statute of limitations.<sup>30</sup> This doctrine guaranteed the owner a reasonable chance to find her animal and bring suit.<sup>31</sup> In contrast, where a possessor held a mare openly and notoriously in the locale of the theft, he deserved title because of the owner’s “utter lack of diligence” in finding and recovering the mare.<sup>32</sup>

With this refinement of the open-and-notorious test, adverse possession may have worked well for livestock in the late nineteenth century. Animals, like land, are durable, valuable, and responsive to investment, such as feeding and medical care. The requirement of open and notorious possession in the jurisdiction insured locational stability. Animals grazed on open land and were visible to the public. Many animals bore brands or distinguishing marks that uniquely identified them from a distance.<sup>33</sup> Communities were much smaller and word of mouth much more potent. If a stolen horse stayed in the owner’s community for several years without being found, it was relatively likely that the owner had neither actively looked for it nor alerted her neighbors. Punishing an owner’s laziness might have made sense in small rural communities—adverse possession law barred stale claims and rewarded the possessor for feeding and caring for the animal.<sup>34</sup>

But this reasoning was plausible only when one could blame delay on an owner’s laches (i.e., lack of diligence). Over time, communities grew larger, people grew more mobile, and courts extended adverse possession to less noticeable goods. Furthermore, the tolling of statutes of limitations for property outside the jurisdiction disappeared from the case law.<sup>35</sup> These changes made it increasingly implausible to blame owners for not bringing suit sooner.

Courts that had to assign the loss to one of two innocent parties split in their approaches. Most interpreted open and notorious use to mean using

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a piece of property to the length of his own possession in computing whether the adverse possession period has run.

29. *Torrey v. Campbell*, 175 P. 524, 525 (Okla. 1918) (emphasis added).

30. *Dragoo v. Cooper*, 72 Ky. (9 Bush) 629, 631 (1873).

31. *Gatlin*, 91 S.W. at 40.

32. *Luter v. Hutchinson*, 70 S.W. 1013, 1014 (Tex. Civ. App. 1902).

33. See *Torrey*, 175 P. at 525 (noting that cow had distinguishing marks, so anyone looking for her could have identified her).

34. Note that rewarding possessors for caring for animals is analogous to rewarding maritime salvagers for salvaging the property of another. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 532 (2d ed. 1975).

35. This author has found no cases decided after 1918 that tolled a statute of limitations because property was outside the jurisdiction (except where there had been affirmative fraudulent concealment).

property as openly as an ordinary owner would; these courts usually sided with possessors. For example, one case held that using a typewriter in plain view in a business counted as open and notorious possession.<sup>36</sup> Another case treated use of a violin in a possessor's house and at music lessons as sufficiently open and notorious.<sup>37</sup> In a third case, having a piano in one's house sufficed as "public" use, even though two witnesses testified that they had not known about the piano.<sup>38</sup> Another court treated the use of bonds for loan collateral as sufficient because the possessor "h[e]ld the bonds as openly and notoriously as the nature of the property would permit."<sup>39</sup>

A small minority of courts read "open and notorious" as requiring use that an owner was likely to discover; these courts usually sided with owners. The Supreme Court of California held that using a piano in one's house "was not open and notorious, but clandestine, and the owner was without the means of knowing in whose possession it actually was."<sup>40</sup> An Oklahoma court asked whether the possessor held a diamond ring "openly and notoriously . . . within plaintiff's vicinity so that plaintiff had a reasonable opportunity of knowing the ring's whereabouts."<sup>41</sup> Utah law went even further and tolled the statute until an owner had actual knowledge of facts that should have put her on notice.<sup>42</sup> These cases began the trend toward insuring fairness to owners. This focus on the owner's knowledge and culpability presaged the laches and discovery rules, discussed below in Part I.D. As a result of these concerns, such major jurisdictions as New York and New Jersey have abandoned adverse possession law in favor of balancing-test doctrines.<sup>43</sup>

### C. *The Demand-and-Refusal Rule*

One line of cases holds that an owner's cause of action against a BFP does not accrue until the owner demands that the BFP return her property and the

36. *Burroughs Adding Machine Co. v. Bivens-Corhn Co.*, 119 P.2d 58, 59 (Okla. 1941).

37. *Reynolds v. Bagwell*, 198 P.2d 215, 217 (Okla. 1948); *cf.* *United States v. One Stradivarius Kieserwetter Violin*, 197 F. 157, 159 (2d Cir. 1912) (keeping violin on table at home and showing it to guests prevented tolling of statute of limitations for concealment; not an adverse possession case, however).

38. *Connor v. Hawkins*, 9 S.W. 684, 685 (Tex. 1888). The reported opinion sheds no light on who these witnesses were. Presumably, they were called to testify because they were acquainted with the possessor.

39. *Joseph v. Lesnevich*, 153 A.2d 349, 357 (N.J. Super. Ct. App. Div. 1959). While the paragraph from which the quotation comes discusses the lack of fraudulent concealment, the preceding paragraph makes clear that possession need only be open and notorious enough to negate a charge of fraudulent concealment, regardless of an owner's ignorance.

40. *San Francisco Credit Clearing House v. Wells*, 239 P. 319, 321 (Cal. 1925).

41. *Riesinger's Jewelers, Inc. v. Roberson*, 582 P.2d 409, 413 (Okla. Ct. App. 1978) (holding that owner's opportunity to know ring's whereabouts was substantial question of fact precluding summary judgment).

42. *Madsen v. Madsen*, 269 P. 132, 134 (Utah 1928).

43. *See infra* Part I.C-D.



BFP refuses.<sup>44</sup> In contrast, a cause of action arises at once against a thief or other wrongdoer, and so no demand is necessary.<sup>45</sup> For example, the demand requirement protects a BFP from criminal prosecution for possession of a stolen car until the owner has demanded its return and the BFP has refused. The rationale for demand and refusal, in contexts other than limitation periods, is that the BFP, unlike the thief, does no intentional wrong by holding the property and therefore should not be liable until made aware of the owner's claim.<sup>46</sup> The requirement fosters private dispute resolution and immunizes a BFP from civil and criminal liability for the taking (though he must still return the property).<sup>47</sup> In other words, the rule is supposed to protect a BFP by postponing liability until after he learns of the theft victim's claim and refuses to honor it.

Without examining the policies behind the rule, several courts have applied the demand-and-refusal requirement to toll statutes of limitations until the owner makes a demand and the possessor refuses to return the property.<sup>48</sup> Though this version of the rule extends to all types of chattels, a number of these cases have involved stolen art or artifacts.<sup>49</sup> Since this rule allows the owner to bring suit no matter how much time has elapsed between the theft and her demand, courts that sympathize with owners use the rule "as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors."<sup>50</sup>

Though sympathy for theft victims is understandable, the method chosen to protect these victims is not. The pure demand-and-refusal requirement eviscerates limitation periods by allowing owners to postpone making a demand indefinitely. It helps thieves, for whom the statute of limitations runs

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44. See, e.g., *Gillet v. Roberts*, 57 N.Y. 28 (1874). Note that demand-and-refusal cases come primarily from New York courts.

45. See, e.g., *O'Connell v. Chicago Park Dist.*, 34 N.E.2d 836, 840 (Ill. 1941) (holding that, where possession was tortious at outset, limitation period began running at once and later demand did not start it running again); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991); *Gerstenblith*, *supra* note 5, at 139 n.61.

46. *Gerstenblith*, *supra* note 5, at 132-33.

47. *Id.* at 133-34.

48. E.g., *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982) (dealing with art stolen in World War II); *Goodbody & Co. v. McDowell*, 530 F.2d 1149, 1151 (5th Cir. 1976) (shares of stock); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990) (artifacts stolen from Turkish burial mounds); *Interstate Mfg. Co. v. Interstate Prods. Co.*, 408 P.2d 478, 481 (Mont. 1965) (machinery and power wagon); *Guggenheim*, 569 N.E.2d at 429 (stolen Chagall watercolor); *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) (Chagall paintings plundered by Nazis), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969); see also *Duryea v. Andrews*, 12 N.Y.S. 42, 43 (Sup. Ct. 1890) (holding that statute of limitations began to run upon demand for return of stolen horse, but not mentioning refusal).

49. See, e.g., cases cited *supra* note 48. Many of the cases cited in that footnote are from New York. Because New York is an art mecca and many museum plaintiffs are there, many stolen art cases fall within the demand-and-refusal rule.

50. *Menzel*, 267 N.Y.S.2d at 820; see also *Kunstsammlungen zu Weimar*, 678 F.2d at 1156 (ruling on suit by plaintiff who made demand 21 years after theft).

at once,<sup>51</sup> while harming innocent buyers. And far from serving its original goal of protecting a BFP from lawsuits, it makes him perpetually vulnerable to suit.

Because of these problems, most courts have abandoned the pure form of the rule. Some cases have addressed these problems by running the limitation period from the time when an owner first gained the right to make a demand (i.e., the time of the theft or conversion).<sup>52</sup> This change effectively abolishes the demand requirement. Other cases, as the next Section shows, have used laches and due diligence doctrines to soften the demand-and-refusal requirement.

#### D. *Laches, Due Diligence, and the Discovery Rule*

Courts in chattel replevin cases have adopted doctrines variously labeled as laches, due diligence, and the discovery rule, all of which rest on ad hoc balancing of myriad relevant factors. Cases such as *Guggenheim* have applied the doctrine of laches to insure that an owner does not delay in locating the possessor and making a demand.<sup>53</sup> This approach involves a multi-factor balancing of all the equities, including the owner's diligence, the buyer's behavior, and prejudice to the buyer.<sup>54</sup> For instance, though the Guggenheim Museum never reported the theft, the court left open the possibility that the museum could recover if other factors weighed in its favor.<sup>55</sup> This balancing method resembles the discovery rule discussed below.

One Second Circuit case, *DeWeerth v. Baldinger*, interpreted New York law as requiring an owner to use reasonable diligence to locate and demand the return of stolen property.<sup>56</sup> The court laid down no guidelines for how much diligence would suffice, saying only that diligence "depends upon the circumstances of the case."<sup>57</sup> Because the owner had neither publicized the theft nor used post-World War II mechanisms for recovering stolen art, the Second Circuit reversed the district court's finding of diligence as erroneous.<sup>58</sup> As a federal court sitting in a diversity action, the Second Circuit

51. See *supra* note 45 and accompanying text.

52. See, e.g., *Al-Roc Prods. Corp. v. Union Dime Sav. Bank*, 425 N.Y.S.2d 525, 526 (App. Div. 1980); *Federal Ins. Co. v. Fries*, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974); see also *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 n.5 (S.D.N.Y. 1976) (dictum).

53. See, e.g., *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46-47 (S.D.N.Y. 1990); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991). Two commentators advocate this approach. See *Drum, supra* note 7, at 942-43; *Hayworth, supra* note 7, at 373.

54. See, e.g., *Guggenheim*, 569 N.E.2d at 431.

55. See *id.* at 431.

56. 836 F.2d 103, 108-09 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988). Several commentators endorse this approach. See *Eisen, supra* note 7, at 1100; *Foutty, supra* note 7, at 1860; *Webb, supra* note 7, at 895.

57. *DeWeerth*, 836 F.2d at 110; see also *Foutty, supra* note 7, at 1860 ("[D]etermination of due diligence is fact sensitive and must be made on a case-by-case basis . . .").

58. *DeWeerth*, 836 F.2d at 109-12.

purported to predict how New York courts would rule.<sup>59</sup> But shortly thereafter, the New York Court of Appeals, in *Guggenheim*, rejected the due diligence rule as a misunderstanding of New York law.<sup>60</sup> Indeed, because the facts of each case differ, the *Guggenheim* court rejected the very idea of codifying what actions constitute laches or diligence.<sup>61</sup>

Several courts have explicitly adopted a so-called discovery rule for the recovery of chattels, usually in cases involving stolen art.<sup>62</sup> Under the rule, courts balance all the equities of the case,<sup>63</sup> including when a diligent owner would have located the chattel, in deciding whether it would be fair to toll the statute of limitations. In *O'Keeffe v. Snyder*, for example, Georgia O'Keeffe sued a BFP for replevin of three stolen paintings.<sup>64</sup> The intermediate court applied adverse possession law and held that a possessor could not gain title without displaying art openly and notoriously in a museum.<sup>65</sup> The New Jersey Supreme Court eschewed adverse possession law because it ignores an owner's actions and because the test for open and notorious use of land does not fit most chattels.<sup>66</sup> Instead, the court adopted an equitable discovery rule, focusing on the owner's diligence but also considering "the equitable claims of all parties."<sup>67</sup> Unlike adverse possession, the discovery rule places the burden on owners to justify deferring the limitation period.<sup>68</sup> The court refused to lay down rules about how diligent theft victims should be.<sup>69</sup> The two other art cases applying the discovery rule have likewise interpreted the

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59. *Id.* at 106, 108.

60. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429-30 (N.Y. 1991).

61. *Id.* at 430-31.

62. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288-89 (7th Cir. 1990) (applying discovery rule to stolen mosaics), *cert. denied*, 112 S. Ct. 377 (1991); *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So. 2d 1157, 1162 (Fla. Dist. Ct. App. 1984) (applying discovery rule to stolen money); *O'Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980) (applying discovery rule to action for replevin of stolen paintings); *see also Mucha v. King*, 792 F.2d 602, 611-12 (7th Cir. 1986) ("Although the tide in Illinois is running strongly in favor of the discovery rule . . . it must remain a matter of speculation whether an Illinois court would apply it in a case such as this . . ."); CAL. CIV. PROC. CODE § 338(c) (West Supp. 1993) (adopting discovery rule for stolen artworks and scientific and historical artifacts); PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS art. 3(3) (Int'l Inst. for the Unification of Private Law 1993) (Unidroit Study LXX—Doc. 40) (proposing harmonization of countries' laws, under which statute of limitations for cultural objects would run from when owner knew (or, alternatively, should have known) of object's whereabouts).

63. This rule's vagueness is the fault of the courts, which have never enumerated lists of what factors matter in this inquiry or how heavily to weight each one. They merely tell the finder of fact to determine what would be fair in all the circumstances, including the circumstance of when a reasonably diligent owner would have found her art.

64. 416 A.2d at 864-65.

65. *O'Keeffe v. Snyder*, 405 A.2d 840, 845-46 (N.J. Super. Ct. App. Div. 1979), *rev'd and remanded*, 416 A.2d 862, 863 (N.J. 1980).

66. 416 A.2d at 871-72.

67. *Id.* at 872.

68. *Id.* at 873.

69. *See id.*

rule as requiring a fact-specific inquiry into the equities and the amount of diligence required.<sup>70</sup>

Despite the profusion of labels, the laches, due diligence, and discovery rules are similar if not equivalent. These flexible balancing tests weigh the owner's diligence and delay, the buyer's innocence and reliance, the existence of prejudice, and other equitable factors. For instance, the discovery rule looks at when the owner knew or should have known of the art's location. One cannot, however, assess when an owner should have known without first asking what steps a diligent owner should have taken, and so the discovery rule is akin to due diligence.

Two commentators advocate a due diligence approach based on guidelines for what buyers and owners must do to preserve their rights.<sup>71</sup> They claim that the law cannot set out definitive standards for evaluating due diligence in all circumstances.<sup>72</sup> Instead, courts should develop "rebuttable presumption[s]" based on a buyer's checking theft registries and buying from established dealers.<sup>73</sup> These rules of thumb would also require theft victims to publicize searches, check catalogues of an artist's work, and notify the police. Neither author, however, proposes any bright-line standards.<sup>74</sup> Likewise, the discovery rule is quite flexible. Three commentators endorse the discovery rule because of its equitable, flexible multi-factor balancing test.<sup>75</sup>

Note that the laches, diligence, and discovery doctrines are much more favorable to theft victims than is adverse possession. These new rules give victims some power over when they lose their rights to sue. The increasing prevalence of these rules is evidence of a trend toward protecting many theft victims at the expense of BFP's. The next Section speculates about why courts have moved in this direction.

70. See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 289 (7th Cir. 1990) ("[T]he due diligence determination is . . . highly 'fact-sensitive and must be decided on a case-by-case basis.'" (quoting *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1389 (S.D. Ind. 1989)), *cert. denied*, 112 S. Ct. 377 (1991); *Mucha v. King*, 792 F.2d 602, 611 (7th Cir. 1986) (noting that courts will not apply discovery rule "if problems of proof created by the passage of time outweigh the hardship to a plaintiff who could not as a practical matter have sued any earlier than he did.").

71. See Webb, *supra* note 7, at 896-98; Eisen, *supra* note 7, at 1092.

72. See Webb, *supra* note 7, at 897 ("[N]o exhaustive standards for what constitutes due diligence could be set out to cover every situation . . ."); Eisen, *supra* note 7, at 1092.

73. Webb, *supra* note 7, at 897.

74. *Id.*; Eisen, *supra* note 7, at 1092.

75. See Petrovich, *supra* note 6, at 1156-57; see also Franzese, *supra* note 6, at 22 (obliquely praising discovery rule); Ward, *supra* note 5, at 541 (endorsing discovery rule in passing). Because the discovery rule sometimes subordinates a possessor's repose to a diligent owner's rights, the leading proponent of adverse possession for chattels criticizes this rule. In Gerstenblith's view, *O'Keeffe* "significantly undermines the policy of the statute of limitations" favoring repose and unfairly assimilates an innocent possessor to a wrongdoer. Gerstenblith, *supra* note 5, at 144. She prefers adverse possession because it focuses on the possessor's acts and good faith rather than the owner's diligence. *Id.* at 145.

### E. *Why Courts Have Gradually Restricted Protection for Buyers*

Interestingly, though most academics endorse limitation periods for chattels, courts have been much less enthusiastic. As noted, courts have increasingly tempered statutes of limitations in ways favoring owners. In the ten reported cases involving art or artifacts in which possessors invoked the statute of limitations, the only two that held for the possessor relied on the owner's utter lack of diligence in locating the art.<sup>76</sup> Five of the cases ruled for the owner outright.<sup>77</sup> Three other cases proceeded for further factfinding, despite evidence of the owner's lack of diligence in two of them.<sup>78</sup>

This judicial drift favors diligent owners and even some not-so-diligent owners out of sympathy for theft victims. Courts have become increasingly uncomfortable with awarding title to possessors because possessors often buy under suspicious circumstances without investigating title. For instance, one buyer bought two priceless fifteenth-century Dürer paintings for \$450 from a former soldier who showed up at the buyer's home and claimed to have bought the paintings in Germany.<sup>79</sup> In another case, an art dealer purported to believe a seller's story that an unnamed ailing archaeologist had suddenly decided to sell rare Byzantine mosaics. Though the mosaics were in Munich, the American dealer rushed to close the transaction in Switzerland, a country to which buyers of stolen art flock in order to claim Swiss law's protection of buyers.<sup>80</sup> Even when there are no affirmative hints of theft, buyers often do little to investigate title, relying solely on a seller's word.<sup>81</sup>

Some courts have given owners leeway even when they have not been diligent. Although the *O'Keefe* court backed away from an extreme pro-victim doctrine, it left open the possibility of recovery despite the owner's failure to

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76. *DeWeerth v. Baldinger*, 836 F.2d 103, 111-12 (2d Cir. 1987), cert. denied, 486 U.S. 1056 (1988); *Desiderio v. D'Ambrosio*, 463 A.2d 986, 988-89 (N.J. Super. Ct. Ch. Div. 1983).

77. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990), cert. denied, 112 S. Ct. 377 (1991); *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Redmond v. New Jersey Historical Soc'y*, 28 A.2d 189 (N.J. 1942); *Menzel v. List*, 267 N.Y.S.2d 804 (Sup. Ct. 1966), modified on other grounds, 279 N.Y.S.2d 608 (App. Div. 1967), modification rev'd, 246 N.E.2d 742 (N.Y. 1969).

78. *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990); *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980) (noting evidence of owner's lack of diligence); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) (same).

79. See *Kunstsammlungen zu Weimar*, 678 F.2d at 1155-56.

80. See Stanley Meisler, *Art & Avarice*, L.A. TIMES, Nov. 12, 1989, Magazine, at 8, 10-11. The facts described in the text gave rise to the *Autocephalous Greek-Orthodox Church* case. 917 F.2d at 279-84.

Even Pablo Picasso was guilty of ignoring hints of theft. When a friend sold him stolen Iberian sculptures that Picasso had seen in the Louvre, "deny it though he might, Picasso must have realized exactly what he was being offered." John Richardson, *Picasso Among Thieves*, VANITY FAIR, Dec. 1993, at 198, 204. Nevertheless, because "he had to possess these objects," Picasso "delud[ed] himself" into accepting the thief's story. *Id.* at 204, 224.

81. E.g., *Porter v. Wertz*, 416 N.Y.S.2d 254, 257, 259 (App. Div. 1979) (noting that buyer did not inquire about seller's reputability nor his title to painting, in keeping with custom among buyers that "it is deemed poor practice to probe" into title).

search for the paintings until twenty-six years after the theft.<sup>82</sup> In the *Guggenheim* case, the museum had not notified law enforcement agencies, nor had it notified other museums, galleries, or artistic organizations.<sup>83</sup> On the other hand, the buyers could have discovered Guggenheim's ownership by consulting a catalogue of Chagall's work, but they had neglected to do so.<sup>84</sup> Noting that the equities did not favor either party, the court decided not to bar the owner's claim despite its lack of diligence. Giving too much protection to buyers, and placing the burden of locating stolen art on owners, "would, [the court] believe[d], encourage illicit trafficking in stolen art."<sup>85</sup> The court cited Governor Cuomo's fears that crafting a rule too favorable to buyers would make New York a haven for stolen art.<sup>86</sup> Accordingly, the court "place[d] the burden of investigating the provenance of a work of art on the potential purchaser" and remanded the case for an equitable balancing of the parties' claims.<sup>87</sup>

The *Guggenheim* case is revealing. Even where the owner could have done much more to recover the art, the court refused to favor the buyer for fear of encouraging theft. The court recognized that buyers have the power to investigate provenance and, by doing so, can curtail the market for stolen art. It therefore saw no moral reason to favor buyers and treated both parties as equally guilty. Note that the gallery that sold the painting to the Lubells bought it from a dealer who had bought it from the suspected thief.<sup>88</sup> Evidently, neither the dealer nor the gallery had thoroughly verified the art's title. If the law placed the loss on buyers, a buyer could still recover the value of the art from the gallery by suing for breach of warranty of title.<sup>89</sup> Art dealers, as repeat players, are well-suited to investigate title and to spread the risk of loss, which suggests that the law should ultimately place losses on dealers. Part II develops these ideas further.

Judges and juries have felt the need for change, but they still operate within a framework of outmoded doctrines. The next Part explores the themes of fairness and ability to investigate and shows how they undermine the arguments for favoring buyers over diligent owners under any circumstances. Because courts have chipped away at statutes of limitations for buyers, the law is in flux and thus breeds litigation. The flaws exposed in the next Part support a wholesale retreat from statutes of limitations. It is time to crystallize the

82. O'Keeffe v. Snyder, 416 A.2d 862, 866 (N.J. 1980).

83. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991).

84. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 623 (App. Div. 1990), *certified question answered and aff'd*, 569 N.E.2d 426 (N.Y. 1991).

85. *Guggenheim*, 569 N.E.2d at 431.

86. *Id.* at 430.

87. *Id.* at 431.

88. *See id.* at 428; Pérez-Peña, *supra* note 1.

89. *See, e.g.*, Menzel v. List, 267 N.Y.S.2d 804, 808 (Sup. Ct. 1966) (noting that buyer who had to return painting to owner recouped its market value from gallery that sold painting to buyer), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

courts' vague intuitions into a rule clear enough to provide guidance to buyers and theft victims.

## II. THE CASE AGAINST PROTECTING BUYERS OF STOLEN ART

The gradual judicial shift in favor of theft victims suggests that current rules protecting buyers of art and other chattels are unsatisfactory. Proponents of statutes of limitations rely on three related arguments: limitation periods increase the marketability of chattels by obviating burdensome title investigation; they protect morally blameless possessors; and they prevent courts from becoming mired in evidentiary problems raised by very old, so-called stale claims. First, this Part rebuts these three arguments. Section A argues that, though limitation periods are touted as fostering marketability of chattels, maximum marketability is not a virtue but a vice because it facilitates art theft. Section B refutes the moral arguments for protecting buyers. Section C contends that values of justice, efficiency, and international comity outweigh the problems raised by stale claims and that, in any event, old claims do not cause many evidentiary problems. In addition to rebutting the three arguments listed above, this Part raises one independent objection to the current law. Section D criticizes the discovery rule, laches, and due diligence doctrines as too vague and thus too unpredictable to generate proper incentives.

### A. *Facilitating Art Sales Encourages Theft*

Many commentators argue for limitation periods by noting that they increase marketability of chattels by quieting title.<sup>90</sup> In other words, statutes of limitations foster commerce by limiting or obviating any title search that a buyer must undertake before buying an artwork. This argument rests on the unstated, flawed premise that the law should always maximize marketability. But the law's goal should not be to maximize marketability per se, but rather to achieve *optimum* marketability by inducing buyers to weigh the costs of investigation against its benefits.<sup>91</sup> If art has a readily discernible, honorable provenance, there is no impediment to its sale. The cloud over an artwork's title arises when its provenance is unclear or questionable. But this is precisely where the law should make buyers cautious and encourage them to investigate. In some cases, buyers buy under suspicious circumstances.<sup>92</sup> Buyers often

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90. See, e.g., Gerstenblith, *supra* note 5, at 160-61, 163; Helmholz, *supra* note 5, at 1235-36; Comment, *supra* note 5, at 444-45.

91. Courts should not, however, employ vague, case-by-case balancing tests to weigh these costs and benefits. See *infra* Part II.D. A bright-line rule placing liability on buyers would make buyers internalize the costs of searching and the costs of not searching, producing an optimal amount of investigation. See *infra* text accompanying note 153.

92. See *supra* notes 79-80 and accompanying text. The inquiry into a possessor's good faith necessarily relies on his testimony and version of the events. As Part II.D argues, this makes it difficult in

rely on a gallery's reputation without requesting any other evidence of title.<sup>93</sup> "[I]n an industry whose transactions cry out for verification of . . . title . . . it is deemed poor practice to probe . . . ."<sup>94</sup> Even reputable auction houses such as Sotheby's have been known not to investigate title.<sup>95</sup>

Statutes of limitations may have been necessary to achieve optimum marketability in a bygone era when investigation was difficult, costly, time-consuming, and incomplete. But today, buyers and merchants can readily investigate title. They can consult a *catalogue raisonné* of an artist's work to determine the lineage and most recent ownership of each work.<sup>96</sup> And, since 1991, they have been able to consult an international computerized database of stolen art.<sup>97</sup>

Because statutes of limitations promote maximum marketability rather than optimum marketability, they increase the profitability of art theft and thus encourage more thefts. As of 1990, art theft was second only to drug smuggling as the most lucrative crime in the world,<sup>98</sup> involving two to six billion dollars worth of art each year.<sup>99</sup> One quarter of these thefts happen in America.<sup>100</sup> Thieves operate according to the law of supply and demand; the demand for stolen art fuels thefts.<sup>101</sup> Logic and anecdotal evidence suggest

many cases for courts to discern *ex post* when a possessor could and should have done more to investigate. Therefore, it is better to create incentives by placing the risk of loss on possessors *ex ante*.

93. See, e.g., *Menzel v. List*, 246 N.E.2d 742, 743 (N.Y. 1969) ("The [defendants] knew nothing of the painting's previous history and made no inquiry concerning it, being content to rely on the reputability of the Paris gallery as to authenticity and title.")

94. *Porter v. Wertz*, 416 N.Y.S.2d 254, 259 (App. Div. 1979) (quoting district court opinion) (noting that buyer did not investigate seller's reputability or verify claim of ownership); see also *O'Keefe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980) ("[P]aintings worth vast sums of money sometimes are bought without inquiry about their provenance."); James Walsh, *It's a Steal*, TIME, Nov. 25, 1991, at 86, 87 (stating that, according to New York Police art detective Richard Volpe, art thieves succeed only through negligence or complicity of galleries and collectors).

95. See Grace Glueck, *Who Owns Stolen Artifact? College Confronts a Museum*, N.Y. TIMES, Apr. 30, 1991, at A1, B3 (implying that, though Sotheby's sold artifact and checked for possible illegal exportation, it did not investigate possibility of theft); Carol Vogel, *Museum Keeps Stolen Artifact, College Gets Cash*, N.Y. TIMES, Apr. 11, 1992, at A14 (same); see also *Menzel v. List*, 267 N.Y.S.2d 804, 808 (Sup. Ct. 1966) ("Art galleries of such standing assume, without the necessity of inquiry, that an offer of sale constitutes a representation of authenticity and good title."), *modified on other grounds*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

96. A *catalogue raisonné* is a definitive listing (usually by a prominent art expert) of every known artwork by a particular artist. For each work, the catalogue usually contains a physical description (including an illustration), a history of exhibitions of the work, the work's provenance, and published references to the work. Usually, one catalogue becomes the definitive reference work on which scholars and merchants rely when discussing an artist's works. See *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987); Mary McKenna, Comment, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 104 n.89 (1991).

97. *International Art Loss Register Opens for Business*, ARTNEWSLETTER (Int'l Found. for Art Research, New York, N.Y.), Feb. 5, 1991, at 1; see also *infra* Part III (advocating solution based on international databases).

98. Don L. Boroughs et al., *The Hidden Art of Theft*, U.S. NEWS & WORLD REP., Apr. 2, 1990, at 13.

99. Walsh, *supra* note 94, at 86-87.

100. Maria Puente, *Art Thefts: Bold Strokes Turn a Profit; FBI Cracks Down as Crimes Rise*, USA TODAY, June 29, 1993, at 8A.

101. *Id.* ("[B]ecause art still fetches good money, . . . '[t]heft is increasing for one reason: greed' . . .") (quoting Donald Mason, ex-FBI art theft investigator); *Picassos and Braques Stolen from Museum*,



that laws protecting buyers have encouraged theft and created havens for laundering stolen art.<sup>102</sup> Because buyers presently bear the costs of investigating title but do not internalize the costs of failing to investigate, they do too little title searching and buy too much stolen art.

Instead of maximizing marketability by protecting buyers of stolen goods, the law should create incentives for buyers to investigate provenance.<sup>103</sup> But adverse possession law, by focusing solely on a possessor's acts of possession after purchase, maximizes marketability at the cost of failing to create incentives to investigate. And the discovery rule, laches, and due diligence tests are so unclear that, as Part II.D argues, they do not guide behavior. Because these rules do not strongly encourage investigation, they also create too much marketability. By facilitating art sales, the law facilitates art theft.

### B. *Buyers Do Not Merit Repose Because Owners Who Report Thefts Have Morally Stronger Claims*

Some authors argue that limitation periods for chattels are good because they protect possessors' repose.<sup>104</sup> These commentators seem to be arguing that a possessor morally deserves repose. This argument rests on the fallacious premise that a possessor has a stronger moral claim than an owner who has reported a theft.

First, because a buyer can easily investigate an artwork's provenance, he is negligent if he fails to investigate fully. When the owner has notified authorities and theft databases, a buyer is more culpable even if this blame

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N.Y. TIMES, Nov. 9, 1993, at C20 ("[A]s the price of masterpieces has soared, the black-market demand has kept pace, inspiring thefts . . ."); Walsh, *supra* note 94, at 86 ("[I]nsatiable demand for artworks and antiquities" has raised prices and so encouraged theft); see Meisler, *supra* note 80, at 37 ("If someone wants to own [pre-Columbian art] in the United States, people will bring [the art] to the United States.") (quoting Mexican official Marentes).

102. For instance, Switzerland harbors "notorious auctions . . . whose main purpose is to establish credentials for a dubious work" of art. BONNIE BURNHAM, *THE ART CRISIS* 45 (1975). In the case of the stolen Cypriot Byzantine mosaics discussed above, the sale took place in a Geneva airport, presumably because of Switzerland's lax laws. Meisler, *supra* note 80, at 11. Britain's anachronistic protection of those who buy stolen goods from a few statutorily designated "marchés ouverts" has made those markets "clearing houses for stolen goods. So blatant is this abuse that a Danish tour company advertises coach trips to Bermondsey [in London] in the early hours, to buy stolen goods." Harriet Crawley, *Forget the Video, It's Your Paintings They're After*, DAILY TELEGRAPH (London), June 16, 1992, at 16. Many other countries have lax laws that protect buyers and so encourage art laundering. See Boroughs et al., *supra* note 98, at 13 (decrying Japan's lax laws); Constance Lowenthal, *The Japanese Connection*, WALL ST. J., Mar. 23, 1990, at A13 (same); Walsh, *supra* note 94, at 87 (noting laxity of laws in Switzerland, Liechtenstein, and Cayman Islands); cf. Irvin Molotsky, *3 U.S. Agencies Urge Veto of Art-Claim Bill*, N.Y. TIMES, July 23, 1986, at C15 (reporting that State Department, Justice Department, and United States Information Agency urged Gov. Mario Cuomo to veto short statute of limitations for recovering art for fear of making New York a haven for stolen art and encouraging theft).

103. The law should also increase incentives for owners to report thefts so that buyers can find out about stolen artworks. See *infra* Part III.A-B.

104. See Dawson, *supra* note 5, at 897 & n.63; Gerstenblith, *supra* note 5, at 160-61, 163; Ward, *supra* note 5, at 554, 558; see also Helmholz, *supra* note 5, at 1236-37 (endorsing security of possessor's title).

does not amount to bad faith. Commentators oversimplify the situation by talking about two innocent parties; a buyer is likely to be several shades more culpable than an owner who has reported the theft.

Buyers often buy through art dealers and galleries. Those buyers claim to be innocent because they rely on the advice of reputable professionals. This, however, is an insufficient reason to exonerate buyers. The issue is not only whether buyers *in fact* rely on merchants, but also whether we think that buyers *should* rely on merchants without seeing evidence of a title search. In other words, the efficiency and practicality of title investigation should influence the law's assessment of innocence. Current law does not give a buyer enough incentive to make sure that his seller has verified title. Furthermore, in deciding where to place the loss, one must consider the actual incidence of the loss: who will actually wind up paying the bill? If the loss falls on the buyer, the buyer can recover an indemnity from the vendor for breach of warranty of title under the Uniform Commercial Code.<sup>105</sup> Thus, the real choice is between placing responsibility on the theft victim and placing it on the merchant (or the buyer if there is no solvent merchant).<sup>106</sup> As knowledgeable repeat players, merchants can spread the risk of loss, insure against it, and develop routine title search procedures. In addition, merchants are more blameworthy than theft victims because they have bought (directly or indirectly) from a thief. When buying art from a nonmerchant, a buyer could spread the risk of loss by purchasing title insurance.<sup>107</sup> The cost of such insurance would be proportional to the size of the cloud around the title, thus making stolen artworks much less marketable. These factors all suggest that the law ought to place the loss on the buyer in order to encourage merchants to verify title and to encourage art buyers to buy from reputable, solvent merchants who investigate.

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105. See U.C.C. § 2-312(1)(a) (1988) (stating that every sale contract includes warranty of title); Deborah D. Hoover, Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 449-50 (1983).

106. One might ask why the law should place losses on buyers if the law's ultimate aim is to make losses rest on merchants. There are good reasons to place liability on buyers even though they will usually recover indemnities from merchants. If only merchants were held liable, buyers would have an incentive to bypass art dealers, because dealers would have to increase purchase prices to reflect the risk of being held liable. In contrast, placing liability on buyers would encourage them to deal with reputable, solvent merchants who investigate. Buyers would have strong incentives not to buy from fly-by-night or insolvent merchants because, if they did so, they might be unable to recover indemnities. By serving as self-insurers or taking out title insurance on behalf of all their customers, merchants would perform a risk-spreading function. To protect themselves from liability and disrepute, these merchants would investigate artworks' provenance. In short, placing liability on merchants to the exclusion of buyers would drive buyers into shady back-alley transactions; placing liability on buyers but providing for indemnities from merchants would bring art sales aboveground, facilitating the kind of scrutiny that would make the sale of stolen art difficult and unprofitable.

107. Title insurance may not have arisen yet because international art-theft databases are a very recent phenomenon. See Gregory Jensen, *Worldwide Registers Battle Art Theft Epidemic*, WASH. TIMES, June 14, 1990, at E3. Now that they exist, it should be possible to use these databases to estimate risk and set a premium.

As Part II.D argues, case-by-case determination is unreliable and costly, inadequately deters thefts, and creates collective action problems. Thus, the law should place the risk of loss on that class of persons more likely to be blameworthy, namely possessors. Doing so would create the certain, predictable, ex ante incentives needed to deter carelessness.<sup>108</sup>

Finally, one can draw an analogy between an innocent owner's ignorance and disabilities such as infancy, insanity, and imprisonment, all of which toll the running of adverse possession of land.<sup>109</sup> In these cases, the law subordinates a possessor's repose to an owner's fair chance to bring an action. Likewise, where an owner cannot bring suit out of blameless ignorance of who has her chattel, the law should treat her ignorance as a disability and so toll the limitation period.

It is important to distinguish owners who report thefts from owners who do not. The latter, by sleeping on their rights, may have induced detrimental reliance by an innocent purchaser. They may have less than honorable motives for not reporting, such as trying to evade state, inheritance, and capital gains taxes upon recovery and trying not to provoke a tax audit.<sup>110</sup> Even honest motives for not reporting are often selfish, such as a desire to avoid drying up the market for a stolen artwork and thereby driving it further underground.<sup>111</sup> As Part II.D argues, this motive is rational for individuals but collectively encourages art theft because not publicizing has the ex ante effect of encouraging future thefts. The law should solve this collective action problem by pressuring all theft victims to report thefts and by rewarding them for doing so.

### C. *Stale Claims*

Limitation periods are often justified as a way of foreclosing stale claims.<sup>112</sup> According to this argument, old claims present thorny evidentiary problems. Witnesses die; memories fade; receipts disappear. Rather than allowing a theft victim to sue a BFP's heir who has no knowledge about the deceased BFP's purchase, or trying to reconstruct missing evidence, the law should avoid these vexing questions. By refusing to hear suits brought after the statute of limitations has run, the law promotes judicial economy, insures fairness to possessors, and deters delay in bringing suit.

Even if abolishing limitation periods would induce more old claims, other values outweigh the costs of staleness. First, abolishing limitation periods

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108. See *infra* Part II.D.

109. CALLAHAN, *supra* note 14, at 75.

110. See Judd Tully, *Hot Art, Cold Cash*, J. ART, Nov. 1990, at 1, 4 (suggesting that art theft victims, to avoid scrutiny by tax collectors, do not report thefts).

111. See *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

112. See *supra* note 15, sources cited therein, and accompanying text.

would abolish the perverse incentive to drive art underground for the statutory period. Second, we have increasingly accepted problems of staleness as the price of justice. Many tort victims cannot discover their injuries or the causes of those injuries for many years. In such cases, fairness to innocent victims and deterrence of tortfeasors support relaxation of statutes of limitations. For example, asbestosis and medical malpractice cases that arise fifty years after the alleged torts present proof problems, but competing values (such as fairness and deterrence) require us to tolerate staleness.<sup>113</sup> Likewise, in adverse possession of land, we tolerate stale claims brought by an owner suffering a disability against a possessor; fairness to the disabled trumps staleness.<sup>114</sup> An owner's inability to find her stolen art is analogous to a disability. When an owner has reported a theft, staleness is a price worth paying for justice.<sup>115</sup>

Furthermore, very stale claims are not a large problem for the law of replevin. Even without limitation periods, an owner would not bring a century-old claim, since her evidence would have decayed to the point that she would

113. See, e.g., *Fernandi v. Strully*, 173 A.2d 277 (N.J. 1961) (extending limitation period out of fairness to patient who did not immediately discover wing nut that surgeon had left in her abdomen).

114. See *supra* text accompanying note 109.

115. For example, the values of justice and international comity should outweigh the problems of stale claims in suits by foreign nations to recover their national treasures. Many plaintiffs in U.S. art cases have been nations seeking to recover treasures plundered from their museums, graves, and churches. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990) (allowing Republic of Cyprus and church to recover mosaics stolen from church), *cert. denied*, 112 S. Ct. 377 (1991); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (allowing Federal Republic of Germany to recover paintings apparently stolen by American GI from museum during World War II); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (allowing Turkey to sue to recover artifacts excavated from burial mounds); William H. Honan, *It's Finally Agreed: Germany To Regain a Stolen Trove*, N.Y. TIMES, Feb. 26, 1992, at C15; Mark Rose, *Greece Sues for Mycenaean Gold*, ARCHAEOLOGY, Sept.-Oct. 1993, at 26; see also *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987) (holding untimely suit by West German national to recover painting stolen from home by American GI during World War II), *cert. denied*, 486 U.S. 1056 (1988); John Darnton, *Repatriating the Inventory of History*, N.Y. TIMES, Sept. 19, 1993, § 4 (Week in Review), at 1.

Limits on plundered nations' rights to recover might harm relations with these countries. For example, New York considered enacting a short statute of limitations for art in museums to replace its demand-and-refusal rule. *Molotsky*, *supra* note 102, at C15. But the U.S. State Department, Justice Department, and United States Information Agency all strongly urged Governor Mario Cuomo to veto the bill. *Id.* He did veto the measure, citing inadequate notice to other countries and the State Department's fears that New York would become a haven for looted art. The strenuous objections of the three federal agencies suggests that restricting foreign countries' rights to recover stolen art would strain diplomatic relations. Cf. LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW* 120 (1977) (notify that nations "feel obligated to aid a friendly nation in recovering one of its displaced national treasures").

For similar reasons, Congress refused to pass the Cultural Property Repose Act, which would have established a five-year statute of limitations for foreign governments. S. 1523, 99th Cong., 1st Sess. (1985); 131 CONG. REC. E2249 (daily ed. May 16, 1985) (statement of Rep. Gephardt, discussing H.R. 2389); see Drum, *supra* note 7, at 919. The Cultural Property Implementation Act already protects other nations' rights to recover stolen cultural, archaeological, and ethnological property. See *supra* note 8. Protecting nations' right to recover stolen art would further the comity concerns that the Act partially addresses.

While a longer statute of limitations would ameliorate these problems, it would not completely solve them. Any artificial limitation period would cut off a nation's right to recover after an arbitrary number of years (except for a balancing test, which would be subject to the objections in Part II.D). As the cases cited above show, decades often elapse before nations locate stolen artworks. Thus, limitation periods would unfairly penalize nations that diligently attempt to recover their art, resulting in diplomatic friction. Compared to the twin values of fairness and comity, staleness is a minor concern.

be unable to bear her burden of going forward with the evidence.<sup>116</sup> Thus, even without a doctrine of de jure limitation periods for chattels, proof problems would often result in de facto limitation periods. In those cases in which a victim can satisfy her burden of proof, however, statutes of limitations arbitrarily foreclose suits that are not truly stale. Additionally, an owner's desire to get art back as soon as she locates it, before her evidence decays, should discourage delay.<sup>117</sup> To protect a BFP whose evidence has decayed, a court could take these proof problems into account in its decision on the merits, instead of using a statute of limitations to foreclose the suit as a threshold matter. Furthermore, if all thefts were reported to a computerized art-theft database, the database would serve a recordkeeping function by preserving theft reports and evidence of title investigations by BFP's.<sup>118</sup> Finally, clear rules requiring immediate reporting of thefts and immediate suit upon discovery of an artwork's location (as proposed in Part III) would further deter delay by theft victims.

#### D. *Discovery Rules, Laches, and Diligence Tests Are Too Unclear*

Courts that use the discovery rule for recovery of chattels have adopted a flexible version that relies on a multi-factor balancing of the equities and culpabilities of the parties.<sup>119</sup> Likewise, courts have softened the demand-and-refusal rule by importing a laches inquiry that balances the relative blameworthiness of the parties.<sup>120</sup> Several commentators endorse multi-factor balancing instead of adverse possession because the former is more flexible.<sup>121</sup> One court that applied a due diligence test refused to lay out standards.<sup>122</sup> Even the two commentators who favor clearer versions of due

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116. Granted, old suits would still have some nuisance value; plaintiffs might therefore seek lucrative settlements by bringing meritless strike suits. Courts could alleviate this problem by using summary judgment aggressively to weed out suits lacking evidentiary support.

117. One could argue that a fraudulent claimant ("pseudo-owner") might wait many years and then come forward after a purchaser's evidence of ownership had decayed. But there is little reason to think that many pseudo-owners would come forward. Even if pseudo-owners did make claims, they would face multiple legal obstacles under the rule advocated in this Note. Most importantly, a theft victim's recovery of property from a BFP would be barred if the victim had not immediately reported the loss to registries and to the police, who could investigate claimed losses. Second, pseudo-owners would need to adduce other evidence of ownership, such as a receipt, testimony of others, or an insurance company listing. These pieces of evidence would be subject to adversarial testing, which should weed out perjury and forgery. Third, art changes hands periodically, and at each sale buyers would check theft registries under this Note's plan. See *infra* Part III.A. Thus, the issue of theft is likely to be resolved within a decade or two of a theft listing. The one exception is for art held by museums, but museums keep good records and should therefore be able to refute spurious allegations. Fourth, the law could impose civil and criminal penalties for fraudulent claims.

118. The Art Loss Register, a computerized art-theft database, keeps a record of all searches. See *infra* note 146. This record would allow a BFP to verify that he had used the database to investigate title.

119. See *supra* text accompanying notes 62-70.

120. See *supra* text accompanying notes 53-54.

121. See *supra* note 75 and accompanying text.

122. *DeWeerth v. Baldinger*, 836 F.2d 103, 110 (2d Cir. 1987) ("The question of what constitutes

diligence likewise shy away from bright-line rules. Under Charles Webb's and Leah Eisen's approaches, the law would require art theft victims to use "the best help available" but would give no definitive guidance as to what methods are best.<sup>123</sup>

Flexibility is intuitively appealing. Supple guidelines allow judges and jurors to take account of the equities in individual cases, enabling courts to mete out individuated justice. Furthermore, for many years there was no single best way of reporting thefts and investigating title, so the law was unable to prescribe a hard-and-fast rule for all cases.

Nevertheless, the flexibility of these tests is a liability, not an asset, because they are too vague. Under laches and discovery rules, courts must gaze at the entire set of facts and pick the more deserving party. This approach gives parties no guidance *ex ante* about what they are supposed to do. For instance, the *Guggenheim* court, in the name of flexibility, refused to set out any "common standard[s]" of diligence for owners to follow.<sup>124</sup> Vague balancing tests fail to create clear incentives for an owner to track down her goods and for a possessor to investigate an artwork's provenance before buying. For deterrence to work, sanctions must be predictable and certain. These muddy rules do not assure that a possessor will pay for his neglect, and therefore do not deter a possessor's negligence in investigating title. The murkiness of these rules breeds litigation. It makes settlement less likely and summary judgment impossible because of the need for a full trial on the equities upon remand.<sup>125</sup> And vagueness can breed subjectivity and arbitrariness.

Even the clearest proposals that have been offered are not clear enough. Webb's and Eisen's proposals for rebuttable presumptions and guidelines would be an improvement over current standardless doctrines. However, Webb and Eisen still insist that "no exhaustive standards for what constitutes due diligence could be set out to cover every situation."<sup>126</sup> By requiring victims to "seek the best help available" while refusing to specify which methods would be necessary and sufficient,<sup>127</sup> these proposals are vulnerable to the

unreasonable delay in making a demand . . . depends upon the circumstances of the case."), *cert. denied*, 486 U.S. 1056 (1988).

123. Webb, *supra* note 7, at 897; *see also* Eisen, *supra* note 7, at 1092.

124. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991) (holding that during further proceedings, trial court would have to balance all equities and circumstances, but refusing to lay out guidelines as to how diligent owner must be).

125. *See id.*

126. Webb, *supra* note 7, at 897; *see also* Eisen, *supra* note 7, at 1092.

127. Webb, *supra* note 7, at 897. A charitable reading of Webb's argument might stress that because information technology will evolve, judges should be able periodically to update the steps owners and buyers should take. Even so, this Note's approach would work better. First, updating of reporting duties should occur through clear legislation rather than ad hoc cases so that owners and buyers have adequate notice. Consider an analogy to land registration: if the law told buyers to register in "the best systems available" rather than in the county clerk's office, the unclearness would breed confusion—even if courts had the power to make ad hoc determinations of which system would be best. Second, even if registries

same unclearness objections made above.<sup>128</sup> Because of the advent of a computerized art-theft database, it is now possible to spell out exactly what steps theft victims and art buyers should take. As Part III argues, the law should craft a clear rule that relies on this new technology.

It might seem that trial courts would appropriately penalize a possessor's negligence and reward an owner's relative innocence in most cases. But this argument ignores the problems with *ex post* adjudication. Balancing tests are unreliable because they force courts to rely on a possessor's self-serving testimony about his state of mind and the steps he took to investigate.

Furthermore, and most important of all, theft victims suffer from a collective action problem. For each individual owner, it may be a rational "tactical decision" not to publicize the theft and thereby avoid driving the stolen art "further underground."<sup>129</sup> According to this reasoning, publicizing a theft makes a stolen artwork dangerous to try to sell. This danger keeps the art in the thief's hands for a long time until the "hot" art cools down, thus delaying the owner's recovery.<sup>130</sup> The *Guggenheim* court, looking at an isolated case, made the mistake of using this *ex post* perspective in its balancing test.<sup>131</sup> But the calculus changes when we move from *ex post*, individual, tactical decisions to *ex ante*, societal, strategic choices. From the societal point of view, it makes sense to require publicity and theft reporting in one case so that future thefts become less lucrative and thus less likely to occur.<sup>132</sup> The situation is analogous to ransom: though paying ransom may

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improve technologically, an owner's duty to report specified information will remain the same. Data from old registries could presumably be imported into new ones. Even if better methods come along, the basic databases will remain serviceable and solve the problems of information exchange.

128. A note by Deborah Hoover suggests that, to qualify as good faith purchasers, art merchants should be required to investigate title "whenever the circumstances of a transaction call for further inquiry." Hoover, *supra* note 105, at 464. This remedy suffers from three flaws. First, it places no explicit obligation on theft victims to report losses. If reporting is not required or strongly encouraged, a buyer's inquiry may be useless. Second, the remedy apparently applies only to merchants. *See id.* at 463. This proposal could create a perverse incentive that would drive art sales out of the hands of reputable dealers and into back-alley transactions. Instead of being lax about private transactions, the law should encourage scrutiny by reputable dealers. Third, this unclear proposal would require investigation "whenever the circumstances of a transaction call for further inquiry." As argued, the law needs bright-line standards to deter theft, reduce litigation, and create clear incentives for both victims and buyers. This vague formula is subject to all the objections to unclear doctrines made above.

129. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428, 431 (N.Y. 1991).

130. Steven F. Grover, Note, *The Need for Civil-Law Nations To Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1436 (1992) ("[M]ost owners fear that by reporting the thefts they would eliminate the thief's market for the stolen art and thereby force their art underground.").

131. *See Guggenheim*, 569 N.E.2d at 431.

132. *See Franklin Feldman & Bonnie Burnham, An Art Theft Archive: Principles and Realization*, 10 CONN. L. REV. 702, 723 (1978) (arguing that, once word gets out that a large computerized database exists and that victims are using it, the database's existence will deter art theft); *see also* Grover, *supra* note 130, at 1439 (noting that one major reason that theft databases might not deter art theft is that many victims do not report thefts).

Art dealers face an analogous collective action problem under a regime that does not penalize sellers of stolen art. If an individual art dealer inquires about the provenance of an artwork that he wants to buy, he must bear the cost of investigation. If he discovers that the artwork was stolen and refuses to buy it, the

benefit an individual owner, it winds up harming future owners because the expectation of ransom encourages more thefts.<sup>133</sup> But judges miss this point because they act *ex post* and case by case, as the *Guggenheim* court's misguided reasoning exemplifies. Therefore, we cannot count on case-by-case inquiry to generate an optimal amount of deterrence.

In sum, flexibility is a liability when one is trying to generate predictable incentives and deterrence. Instead of flexibility and vague admonitions to be diligent, we need bright-line rules. Because buyers are, as a class, better able to avoid losses and more blameworthy than owners who have reported thefts, the law should place the burden of investigation on possessors.

We have almost come full circle. In the nineteenth century, courts abandoned the common law's absolute protection of owners by adopting adverse possession of chattels. That rule has eroded ever since, as courts have become increasingly concerned with fairness to theft victims and discouraging theft. The current doctrinal muddle, however, is unsatisfactory. It is time to return to a rule as clear and simple as the common law, but one that creates strong incentives for buyers and owners to use modern information technology. The next Part sets out such a rule.

### III. ABOLISHING PROTECTION FOR BUYERS OF REPORTED STOLEN ART

Congress should clean up the muddled state of the law by adopting a bright-line rule.<sup>134</sup> Though state legislatures or courts could adopt reforms, congressional legislation would assure clarity and uniformity.<sup>135</sup> This Note's proposal is simple: If an owner has promptly notified the police and the art-theft database, she should face no legal bars to recovering her art. If an owner has not done so, her claim should be barred against a BFP but not against a bad faith holder. These two rules are prospective ones designed to generate incentives. For thefts that have occurred before these rules are adopted, diligent owners should be able to recover.

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seller may just sell it to another, less scrupulous dealer. Thus, investigation is unprofitable and honest merchants labor under a competitive disadvantage. To overcome this disincentive, the law should impose liability on sellers of stolen art. *See supra* text accompanying notes 105-07.

133. *See* 3 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE MOVEMENT 382 (1989).

134. *See supra* Part II.D for an explanation of the need for clear rules.

135. Legislative action is preferable to judicial action because of the need to modify federal and state statutes of limitations. Also, a legislature is better able to hold hearings for all interested parties and to announce a detailed prospective rule applicable to all cases, rather than just a retrospective rule for the case at hand. Federal action is preferable to state action because trafficking in stolen art is interstate and international. Without a federal law, disparate state laws might induce forum shopping and might encourage art buyers to flock to the state with the most lax laws. Furthermore, divergent state laws might affect diplomatic relations with plundered nations seeking to recover their national treasures from American buyers.



A. *Owners Who Report Thefts to Police and the Database Should Automatically Win*

Owners who report thefts to the police and the theft database should face no legal bars to recovery.<sup>136</sup> The law's prescription for owners would be clear and simple, as opposed to an imprecise command to be diligent. This rule would strongly encourage owners to report thefts to the police and the database. It would strongly encourage buyers to investigate an artwork's provenance, since an owner could always reclaim her art if the art had been reported stolen, regardless of the buyer's good faith. In addition, the clarity of the law would reduce litigation costs by enabling owners to get summary judgment and by encouraging possessors to settle out of court.<sup>137</sup>

This proposal would work because a possessor can protect himself by checking the theft registry and an owner can report her loss to the registry. Good registry systems obviate the need for limitation periods. For instance, the Torrens system of land title registration abolishes adverse possession.<sup>138</sup> Ideally, one would want a title registration system for all art, not just stolen art.<sup>139</sup> But that system would require passing legislation<sup>140</sup> and negotiating international treaties. It would require potential victims to register their artworks before thefts, which many are reluctant to do.<sup>141</sup> It would also incur huge startup costs, anathema in this era of fiscal frugality. The Torrens system has not taken root because of its cost and inconvenience.<sup>142</sup> There is little

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136. An owner, however, would still be subject to the statute of limitations after she discovered the artwork's possessor and its whereabouts. This proposal does not license delay in bringing suit once an owner actually has all the facts needed to sue.

137. Compare this proposal to the current cloudiness of the law, under which many adverse possession cases have been litigated for years. *See, e.g.,* *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1153 (2d Cir. 1982) (deciding in favor of owner in 1982 in suit filed in 1969); *DeWeerth v. Baldinger*, 836 F.2d 103, 106, 112 (2d Cir. 1987) (ruling in favor of possessor in 1987 in suit filed in 1983), *cert. denied*, 486 U.S. 1056 (1988); *O'Keeffe v. Snyder*, 416 A.2d 862, 864, 867 (N.J. 1980) (remanding suit filed in 1976 for additional fact-finding in 1980); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 428-29 (N.Y. 1991) (remanding suit filed in 1987 for additional fact-finding in 1991); *Pérez-Peña*, *supra* note 1 (noting that *Guggenheim* case went back for trial and was settled in December 1993).

138. *See* Myres S. McDougal & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 *YALE L.J.* 1125, 1130 (1939). Under the Torrens system, a proceeding analogous to a quiet title action is used to require all who may have claims to a piece of land to assert their claims. After this proceeding, the registry issues a conclusive certificate of title listing all interests in the parcel of land. All later claims must be registered, whereupon the registry issues an updated certificate. The law does not recognize unregistered interests, such as adverse possession that begins after the quiet title action. To sell a registered piece of land, the seller must surrender the old certificate of title, and a new one is then issued to the buyer. *See id.* at 1129-31.

139. *See* Hoover, *supra* note 105, at 458-59.

140. *See id.* In contrast, states without limitation period statutes could adopt this Note's proposal via common law development, because theft registries are already in place.

141. Many art owners try to hide their assets to avoid estate taxes, for example. Thus, a title registry would be incomplete and would fail. Telephone Interview with Dr. Constance Lowenthal, Executive Director, Int'l Found. for Art Research (Jan. 24, 1994) [hereinafter Lowenthal Interview]. Museums and governments, however, are tax-exempt and usually do not try to hide their assets, so a title registry might work for those entities.

142. *See* DUKEMINIER & KRIER, *supra* note 14, at 769. For an explanation of the Torrens system, see

reason to think that a Torrens system for art would succeed either. Granted, artworks, unlike land, are created every day and could be registered by their artists without having proceedings to adjudicate the rights of third parties. But registering art already in circulation would require giving worldwide notice to all potential third party claimants and holding judicial proceedings to protect those claimants. Thus, a title registry for art would face the same costs and inertia that have stalled the Torrens scheme.

In contrast to a title registry, a theft registry requires only that theft victims report art thefts. The advent of computer networks and high-quality digitized color images has made possible the recent creation of an international theft registry.<sup>143</sup> A major international computerized database, The Art Loss Register, has been operating for three years.<sup>144</sup> The database stores descriptions and photographs of thousands of stolen items in a central computer.<sup>145</sup> For a small fee, buyers can search the registry.<sup>146</sup> The Art

*supra* note 138.

143. See Telephone Interview with Rayburn B. Dobson, Chief Executive Officer, Int'l Registry of Antiques & Fine Arts (Jan. 26, 1994) [hereinafter Dobson Interview] (explaining that registries were not feasible until recent advent of optical storage systems on computers).

144. See ARTNEWSLETTER, *supra* note 97, at 1. In addition, certain law enforcement agencies keep databases of stolen art. The FBI maintains a National Stolen Arts File, Interpol keeps a database called Art Program, Italy's Carabinieri (the equivalent of the FBI) has a large database, Canada runs the Canadian Heritage Information Network (CHIN) for art in Canadian museums, and the German Bundeskriminalamt police unit at Wiesbaden keeps a database. Grover, *supra* note 130, at 1440 (discussing FBI); Telephone Interview with Caroline Wakeford, The Art Loss Register (Feb. 4, 1994) [hereinafter Wakeford Interview] (discussing Bundeskriminalamt); Lowenthal Interview, *supra* note 141 (discussing FBI, Interpol, and Carabinieri). None of these law enforcement databases is accessible to the public. *Id.* Another private art-theft database called Lasernet Theftline began operation in 1990, Jensen, *supra* note 107, but went out of business in August, 1992, Wakeford Interview, *supra*.

The Art Loss Registry is a for-profit enterprise run by the International Foundation for Art Research, Lloyd's of London, and the British Institute for the Protection of Cultural Property. ARTNEWSLETTER, *supra* note 97. Other backers of the database include Christie's, Sotheby's, the British Antique Dealers Association, and the venture capital company 3i. *Id.* There is no reason to supplant this private database with a public one, given fiscal constraints and the responsiveness of private enterprises to their clients' needs. Cf. Dobson Interview, *supra* note 143 (advocating private registries as way of heading off government regulation of the art market, which could be cumbersome and costly and might even open door for government reallocation of art).

Because the law would require victims to use the registries, one might worry about controlling excessive fees. One approach would be to have a public board regulate fees, much as commissions regulate utilities' fees. This approach, however, is only necessary when there is no competition to regulate prices. Even competition between two databases is sufficient to regulate prices and terms of service. Lexis and Westlaw, for instance, hold a duopoly over on-line databases for legal research and yet have strong incentives to compete for market share by innovating and offering free use to students. Another approach would require The Art Loss Register to accept theft listings for a modest set fee, but would allow it to set its own prices and terms of service for searches by buyers. To generate competition, the FBI would expand its network into a full-service database accessible to the public. Because theft victims would have to report their losses to both databases, the price of reporting thefts would require regulation. But since thefts would be listed with both registries, buyers would need to check only one registry, and thus competition would regulate the price of buyer searches.

145. Lowenthal Interview, *supra* note 141 (stating that The Art Loss Register has 50,000 records, including many color images; each record contains victim's name and address, insurer, police report number, date of theft, location of theft, value (which must be greater than \$1000), artist, date of creation, medium of the artwork, measurements, and any inscriptions). If, as this Note urges, the law required registration of thefts and encouraged buyers to consult the registries, insurers would have a strong incentive to require the insured owner to file photographs and descriptions with the insurer. Cf. Russ Banham, *Here*

Loss Registry automatically searches auction catalogues for Sotheby's, Christie's, and Phillips,<sup>147</sup> thus protecting those who buy from these auction houses. Likewise, galleries could offer this service to their buyers as part of closing the sale. The existence of a theft registry will enable insurers to assess risk and thus offer inexpensive title insurance.

Under the Uniform Commercial Code, a sales contract includes a warranty of good title.<sup>148</sup> If an owner reclaims her stolen art, a buyer can use this warranty to recover his loss, i.e., the market value of the art, from the merchant.<sup>149</sup> Thus, once the law guaranteed the owner's recovery of her art and the buyer's receipt of an indemnity, galleries and auction houses would investigate title for buyers.<sup>150</sup> As noted, merchants are well-placed to investigate, spread losses, and insure against losses.<sup>151</sup> Therefore, the law should place the risk of loss on buyers because the actual incidence of that loss will fall on merchants and because doing so will encourage buyers to buy from reputable, solvent merchants who investigate.<sup>152</sup>

One might argue that checking title in all circumstances would be unduly burdensome and costly. However, there is little reason to believe that this is true, given that The Art Loss Register automatically checks every item offered for sale at major galleries and auction houses. Moreover, the law would not directly require buyers (or merchants) to investigate; but, by imposing strict liability upon them, it would give them extremely strong incentives to

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*Today, Gone Tomorrow: Fine Art Losses Can Be Mitigated by Upgrading Security and Recording the Identity of Each Piece*, INS. REV., Oct. 1990, at 53, 58 (citing Dr. Constance Lowenthal, who argues that good recordkeeping "would so improve the chances of recovery that insurance companies could consider giving discounts to those who do it"). Indeed, insurance companies could go further and demand color photographs of all insured items.

146. ARTNEWSLETTER, *supra* note 97, at 1. Individual theft victims can register thefts in The Art Loss Register for \$40 per item. Prospective buyers can request searches for \$50 per item. Insurance companies negotiate contracts providing for unlimited use of the database for \$4000 to \$40,000 per year. The auction houses of Sotheby's, Christie's, and Phillips pay an undisclosed fee for automatic searching of their auction catalogues for paintings and drawings. Lowenthal Interview, *supra* note 141. Note that the registry keeps track of "when, why, and by whom any inquiry is made. Tracking a stolen artwork even through people who refuse to handle it for sale is key to its recovery . . ." ARTNEWSLETTER, *supra* note 97, at 1.

147. Lowenthal Interview, *supra* note 141.

148. U.C.C. § 2-312(1)(a) (1988); see Hoover, *supra* note 105, at 449-50.

149. *E.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 807-08, 820 (Sup. Ct. 1966) (announcing jury verdict awarding possessor \$22,500 market value, not \$4000 purchase price, from gallery that sold painting to him), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969). Statutes of limitations should not impede such claims, as long as the limitation period does not begin running until discovery of the defect in title. *Cf.* DUKEMINIER & KRIER, *supra* note 14, at 649 (noting that, in contract for sale of land, statute of limitations for covenants of general warranty and quiet enjoyment does not begin to run until some future act, such as assertion of superior title, disturbs buyer's ownership).

150. See generally Hoover, *supra* note 105.

151. See *supra* text accompanying notes 105-07. One might argue that placing liability on buyers who will get indemnities from merchants would drive a wedge between the two, souring their relationship. This fear is unfounded. Both buyers and merchants would want to insure that art has not been stolen. Merchants, by making title searches a routine part of closing sales, would safeguard both themselves and their customers. It would be in merchants' economic interests to keep their customers happy and to avoid the liability that would attach to selling stolen art.

152. See *supra* notes 105-07 and accompanying text.

investigate.<sup>153</sup> Buyers (or merchants) could then weigh the costs and benefits of searching through databases. If a painting had come directly from the artist, and the artist verified its title, the costs of checking would outweigh the benefits and so merchants would not check databases. In most circumstances, however, provenance is sufficiently unprovable to justify a merchant's adopting a prophylactic rule requiring a search for virtually every piece of art sold.

Indeed, this Note's proposal would be cheaper than those that do not specify what steps theft victims must take. Webb, for instance, says that theft victims should have to "seek the best help available," suggesting that they should avail themselves of a plethora of methods.<sup>154</sup> In contrast, this Note's proposal, by laying out two necessary and sufficient steps for owners to take, would avoid needless duplication of reporting. By concentrating data in one or two repositories, this proposal would tell buyers and owners exactly where to share information and so would minimize the costs of investigating and reporting.

The *Guggenheim* case<sup>155</sup> highlights one problem that registries would face. In that case, the museum was uncertain of the date of the theft because the painting was stolen from storage.<sup>156</sup> Large museums, which may have millions of artworks, display only about one tenth of their collections at any one time. The rest often stays in storage for years, where thefts may go unnoticed.<sup>157</sup> Thus, before an inventory revealed a theft, a thief could resell a stolen artwork to a BFP, who would be unable to find out about the theft (unless a *catalogue raisonné* noted the museum's ownership).

The blameless BFP seems to deserve protection in this case, especially if no *catalogue raisonné* lists the painting. Nevertheless, sound policy reasons favor giving theft victims a grace period in which to discover and report a theft. First, if the law protected a BFP, it would create an incentive for thieves to set up collusive transfers to launder art quickly before an owner could report a theft. It might be difficult *ex post* to distinguish blameless buyers from opportunistic fencers. A grace period, on the contrary, would chill hasty and suspicious purchases. Second, art merchants could carry insurance, protecting buyers against the possibility of a recent theft and spreading the costs of theft.

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153. In practice, as the rest of the paragraph in the main text argues, the distinction would not be terribly important. My point is that buyers would be free to undertake an economically efficient level of investigation, which in practice would generally amount to routine investigation. Note also that the liability is not perfectly strict; as Part III.B argues, buyers who do not investigate should prevail over victims who do not report their losses.

154. See Webb, *supra* note 7, at 897.

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

156. See *id.* at 428. While the theft must have occurred between 1965 and 1967, the museum claimed that it did not know of the theft until it completed its decennial inventory in 1970. *Id.*

157. Telephone Interview with Elizabeth Reynolds, Chief Registrar, Brooklyn Museum (Jan. 20, 1994) [hereinafter Reynolds Interview]. It is, however, reasonable to expect individual theft victims to report thefts within a few weeks. Likewise, once a victim has learned that a theft has occurred, that victim needs only a very short time, perhaps one or two weeks, to report the theft. The only problem is guaranteeing that institutional victims have enough time to discover their losses before the limitation period expires.

Giving owners a short grace period would create incentives for them to inventory collections frequently and report thefts promptly. Given the advent of bar code systems that facilitate computer-aided inventories, a six-month or one-year grace period for museums might be reasonable.<sup>158</sup> (A better way to solve this problem would be to computerize museum catalogues and link them to theft databases, effectively creating a title registry for museums. One company, the International Registry of Antiques and Fine Arts, is trying to catalogue museum collections.<sup>159</sup> As argued, however, such title registries may not be practicable or widespread in the near future.)<sup>160</sup>

In short, theft registries allow an owner to publicize her loss and enable a buyer to check the title to his purchase. Placing liability on buyers and thus effectively on merchants would encourage merchants, the least cost avoiders, to stop trafficking in stolen art.<sup>161</sup> And by depressing demand for stolen art, this Note's proposal would diminish the incentives to steal and hence reduce art thefts.

#### B. *Owners Who Do Not Report Thefts to Police and the Database*

There are three possible scenarios in which owners do not report thefts. In the first, the BFP has checked theft databases, found no listing of the theft, and so went ahead and bought the art. The buyer should win in this situation. He has detrimentally relied on the owner's failure to report the theft and has acted prudently in checking the database. In contrast, the theft victim has been too slothful even to take two simple steps to notify buyers. Thus, the owner in this

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158. Large museums currently inventory their collections at most once every five to ten years. Lowenthal Interview, *supra* note 141. However, technology exists that would permit inventories far more frequently. Computerized bar code inventory systems are widely available that make it possible for even the largest museums to inventory their collections once every six months. The systems are simple enough that night guards could inventory objects each night as they made their rounds. One system on the market uses tamper-proof, forgery-proof bar codes that frustrate attempts to remove a bar code and place it on another object. Bar code tape that contains a hologram of the picture being coded will soon be available. Dobson Interview, *supra* note 143. Only a minority of museums currently use bar code inventory systems. Reynolds Interview, *supra* note 157. Because such systems are available and could solve the problem of delayed notification of buyers, the law should encourage their use by imposing a grace period as short as is feasible, namely six months to one year for museums. Alternatively, museums could set up their own title registries and link them to the databases, obviating the need for constant inventories.

159. Dobson Interview, *supra* note 143 (stating that International Registry of Antiques & Fine Arts is setting up catalogues for the Clark Art Museum, the Museum of American Indian Art, and the Brandywine Museum and is negotiating with other museums; however, that company's focus is on Europe, where European Union law will soon require national registration of art).

160. See *supra* note 141 and accompanying text (noting problems that title registries face but also noting that tax-exempt museums may have fewer disincentives to register than tax-dodging private individuals have).

161. Note that merchants are only the least cost avoiders when an owner has already reported a theft or the merchant buys under suspicious circumstances. When an owner has reported a theft, it becomes relatively simple for a merchant or buyer to investigate and avoid buying that stolen artwork; hence merchants (or buyers in sales without merchants) are the least cost avoiders. When a merchant buys in good faith, an owner's failure to report a theft is just as much a factor in promoting stolen art as a buyer's or merchant's failure to investigate.

situation is more culpable and is the least cost avoider. To make a registry system effective, the law must punish those who fail to file.<sup>162</sup>

The second possible scenario is one in which the possessor is a thief, fencer of stolen goods, or other bad faith holder. For reasons of morality and discouraging theft, bad faith holders should not be able to assert the statute of limitations as a defense.<sup>163</sup> Thieves deserve no repose from the rightful owner's claim.

The third, toughest case is the one in *Guggenheim*, where an owner who did not report a theft sued a BFP who did not investigate title. Because both parties are equally guilty of not taking action, and because the owner's failure to report did not induce the purchase, fairness does not lean one way or the other. In the case of two lazy parties, Webb advocates penalizing the buyer because he lacks good faith and probably has not detrimentally relied on having the chattel.<sup>164</sup> But the lazy buyer seems no less culpable than the lazy owner. Furthermore, the buyer may well have relied on having the chattel. This line of reasoning does not distinguish lazy owners from lazy buyers.

Favoring lazy owners would undercut this Note's policy of forcing owners to register thefts. Purely by chance, some lazy owners would recover their chattels while others would not. Because of the collective action problem discussed above,<sup>165</sup> owners might take their chances and not report thefts in the hopes that doing so would keep the artwork from being driven underground. If a significant number of owners did so, the incentives for buyers to investigate would diminish. Because buyers' incentives hinge on owners' reports, strengthening the incentive for owners to report would encourage both parties to take appropriate steps. In other words, the situation is asymmetric: Placing losses on buyers would discourage reporting by owners. In contrast, placing losses on owners would encourage owner reporting. And because owners who report losses would automatically win against buyers, placing losses on owners who fail to register would encourage buyer investigation. Therefore, to strengthen incentives for both parties, the law

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162. U.C.C. § 9-301 cmt. 9 (1988) (noting that U.C.C.'s subordination of unperfected security interests has "a purpose—in common with similar rules in all filing and recording systems—to impose sanctions for not adhering to filing or recording requirements," for otherwise registry systems would be ineffective).

163. See *supra* Part I.A (discussing common law rule that thieves do not take good title). For these purposes, bad faith must mean more than a mere failure to check theft databases or other acts of simple negligence. Bad faith must embrace reckless and willfully blind acts, for otherwise the law would protect collusive transactions designed to fence stolen goods. To determine bad faith, then, courts should look at a series of objective factors that suggest affirmative blindness to suspicious circumstances, such as: whether a painting has been cut out of its frame; whether the buyer bought at a price so far below market value as to be suspicious; whether the buyer took no steps whatsoever to investigate title; whether the seller's story about title was implausible; whether the seller was an established art merchant; and whether the sale was hurried or took place in a suspicious location (such as the Geneva airport, which was used to gain the protection of lax Swiss laws in a sale of Byzantine mosaics, *supra* text accompanying note 80).

164. See Webb, *supra* note 7, at 896 (arguing that persons lacking good faith deserve no protection, and stipulatively defining buyers who fail to investigate title as persons lacking good faith).

165. See *supra* text accompanying notes 129-33.

should place losses on owners by foreclosing a suit by a lazy owner against a lazy BFP.

### C. *Dealing with Art That Was Stolen in the Past*

The impetus behind the clear rules described above is to generate strong incentives to investigate and report thefts. One cannot, however, influence transactions that have already taken place. Thus, the *ex ante* focus of this Note is inappropriate for dealing with past thefts.

It is, however, important to clarify the future duties of victims of past thefts. To put future buyers on notice, victims who wish to retain their rights to recover should be required to register their thefts with the police and the database within one year of the enactment of this proposal.<sup>166</sup>

Next, one must ask who should win as between a victim of a past theft and a BFP who has bought stolen art before the enactment of this proposal.<sup>167</sup> For reasons of morality and efficiency, victims should usually win. As a class, buyers are at least as negligent as owners, since they often buy under suspicious circumstances and neglect to investigate.<sup>168</sup> Letting owners recover is consistent with the law's deeply rooted protection of property rights and its refusal to treat a theft as a legal transfer of title.<sup>169</sup> Buyers will often be able to recoup their losses from the merchant who sold them the artwork.<sup>170</sup> Merchants of stolen art are both blameworthy (since they are in the best position to investigate title) and capable of bearing and spreading losses via insurance. Merchants may in turn be able to pass their losses up the chain of title until the loss eventually rests on the one who bought directly from the thief<sup>171</sup> and so is most culpable. Finally, international comity also favors protection of victims.<sup>172</sup>

Clear rules are less important when they cannot generate *ex ante* incentives, though they still serve to reduce litigation costs. Thus, the law could temper this pro-owner rule with a somewhat clearer version of laches.<sup>173</sup> To reduce litigation costs, courts should eschew *Guggenheim's* vague balancing and should announce what steps by an owner automatically defeat a laches defense.<sup>174</sup> If an owner took no significant steps to report a

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166. One year is an arbitrary period. Any short time period would suffice, provided it gave victims enough notice yet was not so long as to leave future buyers needlessly uninformed.

167. As argued, bad faith holders should never win. *See supra* text accompanying note 163.

168. *See supra* notes 92-97 and accompanying text.

169. *See Eisen, supra* note 7, at 1098-99; Hayworth, *supra* note 7, at 375-76.

170. *See supra* text accompanying note 105 (discussing merchant's liability for breach of warranty of title).

171. In theory, this person could recover from the thief, but in practice the thief is nowhere to be found.

172. *See supra* note 115.

173. *See supra* Part I.D (describing current doctrine of laches).

174. *See Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (declining to

theft (such as notifying the police or a *catalogue raisonné*) and this silence prejudiced the buyer, laches should bar recovery. Where a buyer has taken pains to investigate and found nothing because of an owner's laziness, the owner should pay for her sloth.

#### CONCLUSION: OTHER TYPES OF CHATELS

Does the foregoing reasoning apply to other types of chattels? It would be a mistake to lump all chattels together without further thought, just as it was a mistake to lump real and personal property together for purposes of adverse possession doctrine. Nevertheless, many of the arguments set out above apply with great force to goods besides art.

Chattels for which there are already title registries, such as motor vehicles and thoroughbred and pedigreed animals, are most similar to art. Dealers could check title just as galleries and auction houses would check for art buyers. Because of the existence of registries, buyers of these goods are the least cost avoiders.

The argument against protecting buyers is somewhat weaker for other valuable, unique goods, such as expensive jewelry, antiques, and electronic items bearing serial numbers. It is quite possible that abolishing buyer protection for these goods would encourage the creation of a theft registry. Furthermore, there is already a theft registry of sorts in the interstate computer networks of law enforcement agencies such as the FBI. By reporting a theft to the authorities, an owner could effectively put buyers on notice, especially if the computer networks communicated with vendors.

Tough cases include fungible and inexpensive goods, for which a registry would be more hassle than it is worth. The reasoning advanced in this Note hinges on the availability, or at least feasibility, of registries, which enable buyers to protect themselves. Where there are no registries and investigating title would be costly or impossible, this Note's reasoning is largely inapplicable. But the question may be moot. The law may not matter much for fungible and inexpensive goods, because an owner will face insurmountable problems in identifying and recovering such goods. Search costs may be higher than the good's value, deterring an owner from looking for it. Even if she does search, the owner will be unlikely to sue to recover inexpensive goods after several years. Therefore, even if there is no de jure limitation period, there will be de facto adverse possession.

The answers to the foregoing questions are less important than asking the questions in the first place. Commentators have repeatedly stressed buyer protection while ignoring the importance of incentives to investigate and report thefts. Perhaps the foregoing case study of art will spark debate about who is

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set forth clear due diligence reporting requirement for art theft victims).



best placed to prevent the sale of stolen goods and who is most blameworthy. Only by focusing on these questions can we dry up the market for stolen goods and so reduce the incentives to steal.

