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In Search of John Constable's *The White Horse*: A Case Study in Tortured Provenance and Proposal for a Torrens-Like System of Title Registration for Artwork

Bruce W. Burton

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IN SEARCH OF JOHN CONSTABLE'S *THE WHITE HORSE*: A
CASE STUDY IN TORTURED PROVENANCE AND PROPOSAL
FOR A TORRENS-LIKE SYSTEM OF TITLE REGISTRATION
FOR ARTWORK*

*Bruce W. Burton***

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* The Frick Collection's version of *The White Horse* is reprinted on page 598.

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I. INTRODUCTION

At least forty percent of valuable artwork circulating in the marketplace is either forged or misattributed.¹ Apart from this significant problem of art authenticity, the chains of title showing current ownership of many genuine and properly attributed objects are defective. These defects are due to incompleteness of the historical records, innocent error, lapse of time, fraudulent manipulation, or theft.² This Article explores the dual complexities of properly establishing a valuable art object's correct provenance—that is to say, determining both the authenticity as well as the chain of legal ownership of the work. This Article also examines the six principal legal doctrines that human society has designed to resolve competing ownership claims and the significant moral shortcomings of each doctrine. Most significantly, this Article presents a proposal for a much-needed reform in the law of art provenance.

The proposed reform is modeled on the Torrens land-title registration system in effect in Australia, parts of the United Kingdom, and a handful

1. THOMAS HOVING, *FALSE IMPRESSIONS: THE HUNT FOR BIG TIME ART FAKES* 17 (1996) [hereinafter HOVING, *FALSE IMPRESSIONS*]. Thomas Hoving was the longtime Director of New York's Metropolitan Museum of Art and an active art fraud exposé. *Id.* The marketplace in art is rife with scams, frauds, forgeries, false documentation, and other schemes. *See id.* at 17-18. Hoving's books, as well as those of the late Eric Hebborn, Peter Watson, and Christopher Mason, are filled with case studies in artwork chicanery. *See generally* ERIC HEBBORN, *THE ART FORGER'S HANDBOOK*, at xiii-xvii (1997); HOVING, *FALSE IMPRESSIONS*, *supra* (disclosing details of major art forgeries and the con artists who dupe art institutions, art experts, and collectors); THOMAS HOVING, *KING OF THE CONFESSORS* (1981) (recounting an intriguing story about the Metropolitan Museum of Art's acquisition of a twelfth-century ivory cross); THOMAS HOVING, *MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART* (1993) (providing a behind-the-scenes look at the intrigues and battles of the Metropolitan Museum of Art in New York City); CHRISTOPHER MASON, *THE ART OF THE STEAL: INSIDE THE SOTHEBY'S-CHRISTIE'S AUCTION HOUSE SCANDAL* (2004) (telling the story of the price-fixing scandal involving Sotheby's and Christie's); PETER WATSON, *SOTHEBY'S: THE INSIDE STORY* (1997) (revealing Sotheby's shadier business dealings, including failing to examine titles of ownership and colluding in smuggling). For one entertaining account of an IRS dodge involving donor write-ups of items of low-cost kitsch by as much as tenfold and making tax-deductible gifts of the art at its kited value to California's Getty Museum (a scam totaling millions in inflated tax deductions), see HOVING, *FALSE IMPRESSIONS*, *supra*, at 285-89. "The world wide traffic in stolen art is estimated to amount to over \$5 billion of losses each year." Paul Winick, *Certificates of Authenticity: Dealer Liability*, *ART WORLD NEWS* Sept. 1998, at 52.

2. *See* HOVING, *FALSE IMPRESSIONS*, *supra* note 1, at 76, 271-73; NANCY H. YEIDE ET AL., *THE AAM GUIDE TO PROVENANCE RESEARCH* 5, 9-10 (2001). For a lengthy list of those artists whose work has been confused with that of John Constable, see IAN FLEMING-WILLIAMS & LESLIE PARRIS, *THE DISCOVERY OF CONSTABLE* 145-46 (1984). For a classic example of the error and incompleteness of the historical record innocently caused by Clifford Constable, grandson of the artist, which led to a nearly century-long misattribution of Boston's Museum of Fine Arts's version of the famed Constable landscape, *The White Horse*, see *infra* notes 86-87 and accompanying text.

of states in the United States.³ The reform would offer the following: (1) a legal system for conclusively registering both the ownership and authenticity of any valuable piece of artwork; (2) fundamental fairness to all parties claiming an interest in the artwork; (3) assured financial compensation to any innocent party whose claim to the artwork has been injured or lost by operation of the Torrens-like system; (4) permanent and visible public records of art ownership; and (5) enhanced market stability because of the certitude and transparency afforded to art consumers by such a title registration system.⁴

First, Part II of this Article will outline the overall scope of the problem, contrasting the present regime dealing with art provenance to that of modern land titles. Then, using a case study of the various known versions of English landscape painter John Constable's priceless work *The White Horse*, Part III of this Article will explore the range of provenance problems which typically arise in establishing both the authenticity of a particular historic work and its correct ownership chain. Next, Part IV will briefly examine the tragic compounding of current provenance problems which our time has inherited from the looting, extortion, and systematic art forgery rampant during the Nazi era. Then, Part V of this Article will examine the current, morally unsatisfactory mix of legal doctrines addressing the classic dilemma of competing and plausible ownership claims to the same artwork and will pinpoint the moral failures inherent in each doctrine.

Finally, Part VI of this Article will propose a new and more just system of artwork titles parallel to the modern system of Torrens registration of land titles. This proposal is intended to accomplish two reforms: (1) assure a more lasting marketplace stability for valuable artwork regarding the twin provenance issues of authenticity *and* title; and (2) resolve, with maximum justice for each interested party, the classic moral dilemma which arises when rightful ownership claims collide.

II. NATURE AND SCOPE OF THE PROBLEM: CONTRASTING ART PROVENANCE WITH LAND TITLE ASSURANCE

From the days of ancient Rome to the twenty-first century, the world of art has been plagued with fraud, forgery, misattribution, and lost records.⁵ Such problems can turn any attempt to establish a trustworthy

3. See *infra* Part VI.A.

4. Efficient markets are predicated on information transparency, and suppression of information is the enemy of the marketplace consumer. See MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 226 (1980); THE MIT DICTIONARY OF MODERN ECONOMICS 78 (David W. Pearce ed., 4th ed. 1992); Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U.L. REV. 761, 786 (1985).

5. It is significant that a former Director of New York's Metropolitan Museum of Art once

provenance for a particular art object into a nightmare, the sorting out of which is costly and often yields only tentative results.⁶ This stands in sharp contrast to the relative certainty of establishing a marketable chain of title for real property, notwithstanding the minutia of technical and survey rules involved.⁷ For reasons grounded in history and human nature, establishing even a modestly valued oil painting's provenance is far more complex than establishing a legally valid chain of title—a marketable title—to a privately-owned tract of land.⁸

A. *Land and Authenticity*

The core reason for the sharp contrast between realty and art objects—both items classified as property under traditional Anglo-American law—is self-evident. As every first-year law student learns in her Property course, land is said to be unique and forever fixed in a single specific location.⁹ Accordingly, land law, unlike that applied to such

put it this way: “Art forgery is as old as mankind and will last as long as humanity. Not a week goes by in the world of the fine arts without a news story of some spectacular forgery being unmasked. Or someone getting rooked by acquiring a fake.” HOVING, FALSE IMPRESSIONS, *supra* note 1, at 15. For a discussion of myriad forgeries, lost records, and misattributions respecting the landscapes of John Constable, see FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 145-46.

6. When used in this Article, the term “trustworthy provenance” has two equally vital elements, namely establishing (1) the authenticity of a particular work of art as being the product of the specific artist to whom it is attributed and not a forgery or misattribution; and (2) a marketable chain of title from the creative artist down to the current ownership. See YEIDE ET AL., *supra* note 2, at 9-10. For detailed guidance to provenance research, see *id.* at 9-34. For a popular usage dictionary definition of the term “provenance,” see THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1411 (4th ed. 2000) (defining the term, in part, as “[p]roof of authenticity or of past ownership” when dealing with “art works and antiques”).

7. For a glimpse into some of the technical legal rules, variations, and special considerations regarding land titles, see WILLIAM B. STOEUBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 774-86, 898-905 (3d ed. 2000). For samples of some detailed jurisdiction-specific rules, see Title Standards of Minnesota, Real Property Section (MSBA 1985 as supplemented).

8. In American law, title to all land parcels is tied to the land records of a local jurisdiction—typically the county where the parcel is situated. See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 199-207 (7th ed. 2006). Under typical recording acts, all documents affecting title are recorded in the appropriate public records of that county or a few other designated public sites. See *id.* There is no need to search archives around the world to locate evidence of the land's transfers, mortgages, and leases. See *id.* The situs where I write this is a specific tract legally described as Lot 30, Mountain Plains II, Lawrence County, South Dakota, USA. Unlike tracing the title to art, land law presents no issues as to whether this land parcel is the geological original as created by Nature or Nature's God and not somehow a mere copy of the true Lot 30 or a misattributed version of the true Lot 30. A direct examination of the public records in the office of the Lawrence County Register of Deeds will reveal most of the information to formulate a legal opinion as to the current status of title.

9. See STOEUBUCK & WHITMAN, *supra* note 7, at 10-12. Not even accretions or relictions to riparian lands or turbulent geological avulsions such as sudden river and stream shifts are seen as physical increases in the amount of land on earth or the mass of the planet, nor do locations on the

artwork as oil paintings and sculpture, is not concerned with the issue of authenticity. Only one parcel, say Greenacre, is physically demarcated on the planet's surface, photographable by satellite, locatable by survey, able to be sampled by drill borings, and therefore Greenacre by definition.¹⁰ To land lawyers the matter is relatively simple: Either Greenacre is a specific and unique parcel of land that was created as part of, and is presently situated on, the surface of the Earth, or it is not.¹¹

B. *Land and Chain of Title*

Since authenticity of Greenacre is not a matter of concern, Anglo-American land law focuses on chain of title issues, not the true nature of the res. Private land titles typically begin their chain of ownership with a transfer of the fee simple, or other estate, from the sovereign to a private entity.¹² From that initial transfer, a private chain of title is established conveying Greenacre from owner to owner down to the present time.¹³

earth vanish forever from the universe—such events merely rearrange the topography of the one planet. See JESSE DUKEMINIER ET AL., PROPERTY 516 n.8 (6th ed. 2006); STOEBUCK & WHITMAN, *supra* note 7, at 825-27.

10. The fee simple doctrine incorporates not just surface ownership but the notions of *ad coelum* (“to the sky”) and *ad infernos* (“to the depths”). See DUKEMINIER ET AL., *supra* note 9, at 126. Most American states recognize three severable estates in land: the surface estate, the sub-surface mineral estate, and the so-called “support estate.” See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 478 (1987). Same legal doctrine provides that the support estate is not severable from the surface estate. See *id.* at 500-02. Pennsylvania law, however, is an anomaly because it “regard[s] the support estate as a separate interest in land that can be [separately] conveyed.” *Id.* at 500; see also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412, 416 (1922).

11. Land scholars unremarkably designate a land parcel’s legal description as a two-dimensional figure fixed on the earth’s global surface and also rank a “natural monument”—a surface feature such as a body of water or other relatively permanent landmark—as the highest priority of reference used in land descriptions. See STOEBUCK & WHITMAN, *supra* note 7, at 819-20, 827. Unlike land, art proveance is a multidimensional world where various, nearly-identical versions of the same work may be discovered. See *infra* Part II.C. The law of land titles leaves questions about Greenacre’s origin, whether duplicate Greenacres might exist, and similar exotica to the realms of cosmology, quantum physics, and Einsteinian speculation. Our legal system regards such questions as entirely irrelevant to land titles, and such questions are never permitted to cloud the issue of the legal ownership of Greenacre.

12. See generally *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (suggesting that most landowners in the United States trace the chain of title for their land back to patents and grants conveyed from sovereign entities such as the royal crown in England or an original American Colony). “[O]ur whole country [has] been granted by the crown These grants purport to convey the soil” *Id.* at 579. “The power now possessed by the government of the United States to grant lands has never been questioned” *Id.* at 587-88. For a general discussion of sources of title in the United States, including governmental grants, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 561 n.2 (5th ed. 2002).

13. DUKEMINIER ET AL., *supra* note 9, at 10 n.2, 560-62; see also STOEBUCK & WHITMAN, *supra* note 7, at 894-97.

This conveyancing chain lies at the core of determining a marketable land title.¹⁴

By means of America's public recording systems, such historic chains of title are permanently preserved in each jurisdiction.¹⁵ In addition, those counties which have selected Torrens registration systems maintain public records of title certificates which operate to collapse the entire complex history of a chain of title into a one-page reference showing current ownership, easements, liens, and other encumbrances.¹⁶ Moreover, the private title-insurance industry and its servicing companies maintain extensive independent title plants containing records of land ownership separate from the public recording systems.¹⁷

C. *Artwork and Authenticity*

Establishing trustworthy art provenance is far more complex than establishing a marketable chain of title for land. The following presents a quick illustration: an oil on canvas titled *Greenacre* raises immediate issues about who painted it. Who, if anyone, assisted? When? Where? Using what materials? Is the painting being examined an authentic 1668 work by the mysterious Jan Vermeer?¹⁸ Or Vermeer's later copy of one of his own, perhaps extinct, landscapes? Or Vermeer's earlier attempt at *Greenacre* later perfected, or a more polished exhibition version? Or a copy of *Greenacre* by some Vermeer acolyte or team of acolytes supervised by the great one?¹⁹ Or by some recent, or even long-dead,

14. See STOEBUCK & WHITMAN, *supra* note 7, at 898. "Marketable title" means a title acceptable in the marketplace, not perfect nor free from all doubts. See *Conklin v. Davi*, 388 A.2d 598, 601 (N.J. 1978).

15. For a general discussion of the U.S. recording system, see STOEBUCK & WHITMAN, *supra* note 7, at 869-74.

16. See NELSON & WHITMAN, *supra* note 8, at 233-35. This system is akin to automobile ownership registration certificates used in many states. See *id.* at 199. However, these registration certificates do not include some of the complex chain of transactions included in land titles. See *id.* For a proposed application of Torrens registration principles to art work, see *infra* Part VI.

17. See STOEBUCK & WHITMAN, *supra* note 7, at 918-19. For information about efficient and cost-effective electronic land title information available in the private sector, see First American-Title & Settlement, <http://www.firstam.com/list.cfm?id=54§ionid=01> (last visited May 14, 2007).

18. Also known as Jan van der Meer, the young Dutch painter of the seventeenth century was known mostly for his interior studies. See THOMAS HOVING, *MASTER PIECES: THE CURATOR'S GAME* 133 (2006). However, the hypothetical landscape of *Greenacre* is a useful illustration, and Vermeer was chosen because his works appear among those in the litany of forged paintings during the Nazi era. See YEIDE ET AL., *supra* note 2, at 44.

19. An illustrative example is the Boston Museum of Fine Arts's century-long experience with a version of *The White Horse* with a handwritten inscription on the back by a grandson of John Constable stating that it was an original by his grandfather and kept in the house of his aunt Isabel Constable. Email from Sabrina Abron, Curatorial Research Associate, Art of Europe, Museum of

skilled forger?²⁰ Or perhaps the version of *Greenacre* being examined was a product of Nazi art forgery, which cranked out products to gratify the Hitler era's immense marketplace demand for Vermeers?²¹

Hence, examining the provenance of a seventeenth-century painting known as *Greenacre* can be a maddening Rubik's Cube of known and suspected facts. There will be open questions, fragmentary information, and inferences drawn from known facts and informed by expert opinions, which might ultimately prove conflicting or changeable.²² The numerous interdisciplinary tools used for art authenticity analysis are as diverse and scholarly as the tools of expert historians and biographers, as scientific as X-radiography and laboratory analysis of the artist's materials by organic chemists, and as aesthetically based as a study by an expert connoisseur of the artist's brushwork and use of light.²³

Fine Arts, Boston, to Bruce W. Burton, Professor of Law (Nov. 29, 2006) (on file with author). But this version was later determined by expert examination to have been a sensitive copy painted by John Constable's talented young assistant, Johnny Dunthorne, probably supervised by and with help from Constable. See Charles S. Rhyne, *Deaccessioning John Constable: The Complexity of Authenticity*, *Authenticity in Art History*, Feb. 17, 1994, <http://people.reed.edu/~crhyne/papers/deaccessioning.html>.

20. The history of Western art, from ancient to modern times, is also the history of grand scale forgery. See HOVING, FALSE IMPRESSIONS, *supra* note 1, at 24-36. Art forgery in ancient Babylon and Greece is documented as early as the sixth-century B.C. See *id.* at 25, 28. Art fakery and forgery were also rampant in ancient Phoenicia, Rhodes, and Rome. See *id.* at 24-25, 29-30, 34. To feed the rampant demand for Egyptomania in Europe and America during the nineteenth and twentieth centuries, forgers spewed out junk, including some that even fooled the Metropolitan Museum of Art in New York. See *id.* at 26. Most recently, a dispute has arisen respecting the authenticity of the portraits of William Shakespeare, raising the question of whether there even exists any genuine painted likeness of the Bard of Avon. Doug Stewart, *To Be or Not to Be Shakespeare*, SMITHSONIAN, Sept. 2006, at 62, available at <http://smithsonianmag.com/issues/2006/september/shakespeare.php>.

21. The Nazi forgery efforts, as well as confiscations and extortions, were rampant from 1935 to 1945. See YEIDE ET AL., *supra* note 2, at 41-44. The post-Nazi boom in the Slovak region of Eastern Europe contributed to art fakery in the thousands. See HOVING, FALSE IMPRESSIONS, *supra* note 1, at 160-61. Because Vermeer's work sat atop the Nazis' official list of approved non-decadent artists, the market demand for new Vermeers was insatiable. See YEIDE ET AL., *supra* note 2, at 44.

22. See HEBBORN, *supra* note 1, at 155-56; HOVING, FALSE IMPRESSIONS, *supra* note 1, at 17. As Harold Bayley put it: "What authority maintains today it generally contradicts tomorrow." Harold Bayley, *Introductory Quotation* to HEBBORN, *supra* note 1, at 155.

23. Scientific investigation of provenance can involve detailed chemical analysis of the entire range of materials, including paints and surfaces, associated with any given artist. For example, a chemical analysis of John Constable's oil paint bladders used by the artist from 1802 to 1837 revealed the use of "[u]ntreated and heat-bodied poppy oil . . . as his primary grinding mediums," as well as "heat-bodied linseed oil, egg yolk, beeswax and pine resin" to modify his paint and "[p]oppy and linseed oils containing zinc and lead 'driers'" in his later works. Sarah Cove, *Mixing and Mingling: John Constable's Oil Paint Mediums c. 1802-37, Including the Analysis of the 'Manton' Paint Box*, in PAINTING TECHNIQUES: HISTORY, MATERIALS AND STUDIO PRACTICE: CONTRIBUTIONS TO THE DUBLIN CONFERENCE (Ashok Roy & Perry Smith eds., 1998) [hereinafter

The scientific search also inquires into the age and chemical composition of the paints, canvas, frame wood, nails, pegs or other fasteners, and similar matters.²⁴ In addition, there exist newly emerging interdisciplinary sciences with powerful potential for art authentication, including the fractal geometry “fingerprints” left by an artist and discernable under intense magnification.²⁵ Or, on the most recent cutting edge, the use of quantum field theory has been applied to artwork identification.²⁶

D. Artwork and Chain of Title

Assuming that the authenticity of authorship of the oil painting *Greenacre* can be expertly established as truly the work of Jan Vermeer, then what about its chain of ownership?²⁷ When and how did *Greenacre* leave the hands of the artist in, say, 1668? Over the centuries, what intervening transfers of ownership of the artwork occurred? Were there any indefinite or long-expired loans of the work to a museum?²⁸ To answer

Cove, *Mixing and Mingling*], abstract available at <http://www.iiconservation.org/conferences/dublin/abstracts98.php>. For a discussion of the canvas, framing woods, and nails, see Sarah Cove, *The Painting Techniques of Constable's Six-Footers*, in CONSTABLE: THE GREAT LANDSCAPES 50, 54 (Anne Lyles ed., 2006) [hereinafter Cove, *The Painting Techniques*].

24. See Cove, *The Painting Techniques*, *supra* note 23, at 52-60.

25. A newly evolving science of applying fractal analysis to art masterpieces has arisen recently as a method for mathematically identifying the painter and other information. See Jackson Pollock *Fractals*, Interview by Ira Flatow, Anchor, Talk of the Nation: Science Friday, with Dr. Richard P. Taylor, Professor of Physics, Univ. of Canterbury, N.Z. (National Public Radio broadcast Dec. 15, 2006) [hereinafter *Jackson Pollock Fractals*], available at <http://www.npr.org/templates/story/story.php?storyId=6631149>. Dr. Richard Taylor has described his own fractal geometry examinations of Jackson Pollock using advanced mathematics, as well as similar work by Richard Voss in studying by fractal method the evolution of the artist's creative brush strokes among Chinese painters. See *id.* Such analysis of the artist's fingerprints can require different magnifications and computerized analysis, which may even lead to knowledge of the particular artist's bodily configuration as one key to the resulting geometric patterns in the artwork. See *id.* For more information on applying fractal analysis to artwork, see Cove, *The Painting Techniques*, *supra* note 23, at 52-60; Caroline M. Hagerhall et al., *Fractal Dimension of Landscape Silhouette Outlines as a Predictor of Landscape Preference*, 24 J. OF ENVTL. PSYCHOL. 247 (2004); Richard Taylor, *Fractals: Hairy, with Warts All over Them*, PHYSICS WORLD, Dec. 2004, at 6; Richard Taylor, *From Science to Art and Back Again!*, SCIENCECAREERS.ORG, Apr. 27, 2001, http://sciencecareers.sciencemag.org/career_development/previous_issues/articles/0980/from_science_to_art_and_back_again/.

26. See *Jackson Pollock Fractals*, *supra* note 25.

27. Vermeer presents an extremely difficult provenance since modern art historians report that very little is known of him because he never titled his work and only roughly thirty authentic Vermeer oil paintings have survived since 1670. See HOVING, *supra* note 18, at 133.

28. For an example of difficulties in tracing the ownership of even a nineteenth-century oil on canvas masterpiece without accounting for sizeable gaps in the chain of title, see *infra* note 67 and accompanying text. For discussions of indefinite or expired loans of artwork to museums (“old

such questions, one must ascertain if there exists accessible evidence showing a complete chain of conveyances establishing a sequence of owners from Jan Vermeer on down to the present time. And if no such evidence exists, what gaps occur, and how can they be accounted for?

Unlike the land parcel Greenacre, which was the subject of *Greenacre* the painting, one would certainly not find a publicly recorded string of transfers of the artwork from the seventeenth century to the present in an unbroken chain of title. Nor would one find an unbroken chain of unrecorded, yet indisputable, sources.²⁹ As is often the case with older masterpieces, the chain of ownership would necessarily rely upon exploring a wide variety of letters, journals, auction catalogs with their marginal entries, press accounts, diaries, private memoirs, or such probate records as might still exist.³⁰ Such evidence must be uncovered, its own genuineness established, and assessed in the light of other tested information.³¹ In short, a squad of experts including formal and informal archivists, art historians, museum curators, expert connoisseurs, and biographers must be brought into play before a conclusive decision can be formed.³²

III. *THE WHITE HORSE*: A CASE STUDY IN PROVENANCE COMPLEXITIES

An example of the complexity that can be faced in determining the provenance of an art masterpiece is exemplified in the case of John Constable's famed six-foot oil on canvas *The White Horse*.³³ In a culture

loans") where contact or location of the owner has been lost over time, see Agnes Tabah, *The Practicalities of Resolving "Old" Loans: Guidelines for Museums*, C723 A.L.I.-A.B.A. 315, 317-25 (1992); Linden Havenmeyer Wise, *Old Loans: A Collections Management Problem*, C479 A.L.I.-A.B.A. 41, 43-44 (1990).

29. For land title chains and the relative ease of examining registered Torrens land titles, see STOEUBUCK & WHITMAN, *supra* note 7, at 869-97, 923-30.

30. See YEIDE ET AL., *supra* note 2, at 26-30.

31. For a strong example of the erroneous provenance written on the back of the Boston Museum of Fine Arts' version of *The White Horse* by John Constable's grandson, Clifford Constable, which was exposed as an error only after nearly a century of misleading curators and others, see *infra* note 86 and accompanying text.

32. See YEIDE ET AL., *supra* note 2, at 21-30. There are a considerable number of John Constable biographers, academic and marketplace experts, curators, and archivists throughout England and America. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at vii-x; Charles S. Rhyne, *The Remarkable Story of the "Six-Foot Sketches,"* in CONSTABLE: THE GREAT LANDSCAPES, *supra* note 23, at 42-49. In addition, Constable's lineal descendant Richard Constable, though not an official archivist, possesses John Constable's enormous thirty-drawer custom-built wooden dresser-cum-hutch cabinet containing dozens of ancient items, plus a large miscellany of letters, catalogues, and other documents that are consulted or copied by art historians from time to time in the pursuit of provenance or other information respecting John Constable's artwork.

33. Professor John Gage, a noted John Constable expert from Cambridge University, was

where a massive proportion of all valued masterpieces are forgeries, frauds, or misattributions,³⁴ from about the 1840s onward, John Constable has become known as “the most forged painter in history.”³⁵ Respected art historians have used the term “multitudes” in describing the numbers of forged or misattributed Constables.³⁶

The sum of genuine Constables runs this way: about one hundred of Constable's original works (excluding commissioned portraits) were sold or given away by him during his own lifetime, many by means of undocumented transactions.³⁷ These transfers left at least 1,800 large and small oil paintings, watercolors, sketches, and other items unsold and

recently quoted in an Australian newspaper as stating that Constable may be the most forged and imitated painter in art history. Elizabeth Fortescue, *Call a Constable: The Hunt for Lost Artworks*, DAILY TELEGRAPH (Sydney, Austl.), Mar. 2, 2006, at 21; see also email from Dr. John Gage, Professor of Art History, Cambridge University, to Bruce W. Burton, Professor of Law (Nov. 10, 2006) (on file with author). In the United States alone, there are three large oil versions of *The White Horse* in the holdings of major museums, all with varying complications in their chains of title and historical disputes over their authenticity. See *infra* Parts III.A-C. A legendary fourth version may exist in the United Kingdom. See *infra* Part III.D.

34. See HOVING, FALSE IMPRESSIONS, *supra* note 1, at 17.

35. See email from Dr. John Gage, *supra* note 33; see also FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 145-46, 241-45.

36. Dealers and connoisseurs constantly presented spurious Constables to famed Constable biographer C.R. Leslie before and after the first edition of his biography of Constable in 1843. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 39. Then, in Leslie's 1845 edition of his Constable biography, he went from claiming that only four forgeries were known to having seen “multitudes” of them. *Id.*; see also *id.* at ix, 39, 241-45, 145-46. An added complexity in sorting out what was done by innocent imitators of Constable is the historic veracity of some of their statements. For example, in 1850, R.R. Reinagle boasted that, at Constable's request, Reinagle had once used a palette knife imitating Constable's manner to put a group of steamy-breathed cattle into a Constable painting that was being displayed at The Royal Academy in London. Duane R. Chartier & Fred G. Notehelfer, *Authentication: Science and Art at Odds?*, paper presented at Scientific Detection of Fakery in Art Conference, The International Society for Optical Engineering, at 74-86 (Jan. 29-30, 1998), available at <http://www.conservartassoc.com/spie.html>. Constable biographers and family did not challenge this statement in 1850, but the leading Constable scholar of the past generation, R.B. Beckett, challenged Reinagle's veracity, asserting that Constable had broken off with Reinagle before using a palette knife on his works. *Id.* Such nuanced disputes illustrate the sort of difficulties in authenticating art works from the distance of decades or centuries.

37. FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 5; see also BARRY VENNING, *CONSTABLE: THE MASTERWORKS* 41-42 (1990) (pointing out that Constable's *oeuvre* has been surrounded by doubtful works ever since his death). Some known producers of Constable forgeries, not merely innocent misattributions, include: James Webb; one of the Willcocks; Joseph Paul; a shopkeeper named Warren; an Italian artist who went by Chianini (or Quenini); anonymous painters known by cryptic handles such as “Master of the Red Signature”; and countless other unknown painters whose Constable imitations survive. FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 241, 243. For a discussion of some of Constable's significant portrait work, see JOHN CONSTABLE'S CORRESPONDENCE: THE FAMILY AT EAST BERGHOLT 1807-1837, at 20-21, 31, 83, 87, 105-06 (R.B. Beckett ed., 1962).

retained in the Constable estate following his sudden death in 1837.³⁸ Even today, putative “Constables” are discovered and sought to be marketed, often at very high prices.³⁹

During the fall of 2006, at the National Gallery of Art stop on the first touring exhibit of all known Constable six-footers (London-Washington-California), a respected Washington, D.C., economist explained why there are so many Constable forgeries in the marketplace.⁴⁰ She stated the equation in terms of supply and demand.⁴¹ With the supply of genuine Constables frozen with his death in 1837 and an increasing market demand, only two things could happen: (1) prices increase, and (2) producers seek an “innovative way” to increase supply.⁴² Additionally, with Constable’s death, there was one less person around to dispute the authenticity of the forgeries.⁴³

Quite apart from fraudulent Constables, there is the added problem of erroneous attribution of paintings to Constable, often by other artists who were actually painting after the style of, or in the school of, John Constable.⁴⁴ The ranks of these innocent misattributions include dozens of worthy artists, most notably Constable’s two artist sons Lionel (Toby) Bicknell Constable and Charles Golding Constable, plus J.T. Smith, Sir George Beaumont, Thomas Gainsborough, R.R. Reinagle, George Frost, John Dunthorne senior and junior, John and Mary Fischer, F.W. Watts, W.G. Jennings, George Constable (an unrelated namesake), Thomas Churchyard, Thomas Stothard, Peter DeWint, Dr. William Crotch, Perry Nursey, W.J. Müller, John Jackson, William Purton, G.H. Harrison, John Chase, T. Clark, Ann and Robert Leslie, and David and George Lucas.⁴⁵

Thus, the first marketplace dilemma faced in establishing a full provenance of any work by a deceased artist lies in establishing that a

38. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at viii, 7-8.

39. See *id.* at 38-39. John Constable’s great-great grandson Richard Constable, an artist in his own right and Constable expert, recently recounted to the author the telling story of a European Count, doggedly seeking an expert to authenticate a putative John Constable for purposes of sale. The Count summoned Richard Constable and another expert to his London hotel room to view the work. When Richard immediately saw it was a fraud and said so (as did the other expert who’d simultaneously been invited to review the work), the Count became agitated. He repeatedly entreated Richard to reverse his view, becoming more desperate with each refusal. The motive for the Count’s urgency was obvious—a certified Constable enjoys enormous market value, and by comparison an imitation has almost zero.

40. See email from Dr. Gina Livermore, Assistant Dir., Cornell Univ. Inst. for Policy Research, to Bruce W. Burton, Professor of Law (Jan. 8, 2007) (on file with author).

41. *Id.*

42. See *id.*

43. *Id.*

44. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 145.

45. *Id.* at 145-46. For a discussion of the complexity involved in sorting out what was done by innocent imitators of Constable’s work, see *supra* note 36.

particular painting is authentic. That is to say: First, whose hand actually created the work in question? And second, what is the chain of ownership from the artist whose skill created the work decades ago to the present holder? Constable's 1819 popular masterpiece known generally as *The White Horse* provides an informative case in point for these central issues. The following will briefly examine the various versions of *The White Horse*, looking at both the authenticity and the chain of title issues involved in each.

A. *The Frick Version*

The first six-foot canvas Constable painted for exhibition was completed in 1819 when the artist was forty-three years old.⁴⁶ Although the popular name *The White Horse* was given by the artist's friend Archdeacon John Fischer, Constable himself referred to it more prosaically as *A Scene on the River Stour*.⁴⁷ Widely accepted sources make clear that during his lifetime, Constable sold this particular version to his friend Fischer for one hundred pounds, and then repurchased it when Fischer fell into financial difficulty.⁴⁸ Constable then held it in his personal estate until the time of his death.⁴⁹ The known transfers are as follows:

- 1819: Completed for exhibition by Constable; sold to Fischer.
- 1830: Repurchased from Fischer by Constable.
- 1837: Became part of Constable's estate at his death.
- 1838: Sold to Lancelot Archer-Burton, Constable's cousin and guardian of Constable's seven minor children, at Constable's estate sale.
- 1852: Death of Lancelot, inherited by his barrister son Burton Archer-Burton.
- 1855: Sold by Burton via Christie's via Hodgson to Richard Hemming.
- 1894: Sold by Hemming via Agnew to American millionaire J. P. Morgan.
- 1913: J.P. Morgan's death.
- 1943: Transferred by Morgan family via Knoedler & Company to the Frick Collection.⁵⁰

46. See GRAHAM REYNOLDS, *CONSTABLE'S ENGLAND* 179, 181 (1983).

47. JOHN HAYES, *BRITISH PAINTINGS OF THE SIXTEENTH THROUGH NINETEENTH CENTURIES* 33 (1992); see also C.R. LESLIE, R.A., *MEMOIRS OF THE LIFE OF JOHN CONSTABLE COMPOSED CHIEFLY OF HIS LETTERS* 73 (Jonathan Mayne ed., Phaidon Press 1951) (1843).

48. 1 *THE FRICK COLLECTION: AN ILLUSTRATED CATALOGUE* 30, 32 (1968).

49. See *id.* at 32.

50. See *id.* at 29-34; see also FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 20.

This version, where the horse on the barge sports a red collar and the noon sky is placid and only partly cloudy, hangs in the Frick's New York gallery, with a published chain of ownership that begins with the Burton-Hemming sale in 1855, eighteen years after the artist died in 1837.⁵¹

Sources indicate that from the time of the 1838 estate sale of the deceased John Constable until 1852, *The White Horse* was owned by his cousin Lancelot Archer-Burton.⁵² Lancelot purchased it at the estate sale for slightly more than 157 pounds, the highest sum fetched at the sale,⁵³ and he is reputed to have later refused an offer of either 600 guineas or 620 quid,⁵⁴ which were nearly identical at the time.⁵⁵

In 1852, when Lancelot Archer-Burton died, ownership of the work passed to his oldest son, Burton Archer-Burton,⁵⁶ who rather promptly sold it in 1855 at Christie's, fetching 630 pounds, a Constable sales record of that time.⁵⁷ Family sources indicate that at the time of this sale, Burton was

51. See THE FRICK COLLECTION, *supra* note 48, at 29-34. The gap is filled with biographical and family data. See *supra* text accompanying note 50. In his own copy of the Fleming-Williams and Parris book, *The Discovery of Constable*, the late James Archer-Burton handwrote a marginal notation on page thirty-nine corroborating this sequence of transfers from the Archer-Burton family into the chain of ownership relied upon by the Frick. See James Archer-Burton, *Marginal Note*, in FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 39 (on file with author). This notation also suggests the underlying source of Burton's financial need to make the 1855 sale. *Id.*

52. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 20, 39.

53. See *id.* Fleming-Williams and Parris report that the amount paid at the estate sale was either 157 pounds, 10 shillings or, alternatively, 150 guineas. *Id.* These sums were nearly identical, since quids, pounds, and guineas have recently been defined as modern synonyms for the same monetary value. JEREMY SMITH, BUM BAGS AND FANNY PACKS: A BRITISH-AMERICAN, AMERICAN-BRITISH DICTIONARY 46, 67, 70 (2006). For a published explanation of UK currency terms, see *id.* at 16-17, 67, 70, 101 (describing such terms as crown, shilling, pence, sovereign, guinea, pound, quid, and buck). In explaining quid, longtime Surrey resident Robert Archer-Burton told the author that traditionally a quid was equal to 1.05 pounds sterling. A guinea's traditional equivalent is not known. For tables giving a historical perspective on British monetary nomenclature and values, see Bignell's 19th Century UK Currency, http://www.bignell.uk.com/19th_century.htm (last visited Mar. 12, 2007).

54. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 39, 45.

55. See *supra* note 53 for a discussion of British currency values.

56. See James Archer-Burton, *supra* note 51.

57. FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 45. Burton Archer-Burton probably sold the painting for a record sum rather quickly because Burton, though a barrister, carried the financial burden of providing for his ten children, six of whom were girls, and it was expected must be dowered and married, and four of whom were boys, the three oldest having been shipped off to private school in Germany and then to America as remitter men to establish their own fortunes. This financial information is loosely corroborated by James Archer-Burton's marginal note on page thirty-nine of his copy of *The Discovery of Constable*. See James Archer-Burton, *supra* note 51. Very insightful in this connection is the revision in the estimation of his Archer-Burton cousins by Abram Constable, youngest of Constable's siblings and stolid manager of the family businesses. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at xxii-xxiii, 55. Shortly after Constable's oldest son, John Charles, reached adulthood while still studying at Cambridge, Abram wrote to him

in a financial squeeze.⁵⁸ Eventually, this version of *The White Horse* was sold to J. P. Morgan,⁵⁹ and finally to the Frick in 1943 according to the Frick's published provenance.⁶⁰

B. *The NGA Version*

This full-size version of *The White Horse* hanging in the National Gallery of Art (NGA) in Washington, D.C., was never mentioned in John Constable's correspondence or journals.⁶¹ The surmised chain of ownership is as follows:

- 1818-1819: Constable painted and kept a full-sized oil sketch from nature.
- 1837: Death of Constable.
- 1837-1872: Ownership gap.
- 1872 (or earlier?): Purchased by Sir John Pender.
- 1882 (or earlier?): Purchased by E. Fox White Gallery, London, who sold it to Wallis & Son, London.
- 1893: Purchased by P.A.B. Widener of Elkins Park, Pennsylvania.
- 1942: Widener estate gift to the NGA via testamentary power of appointment.⁶²

As suggested above, this version has a highly questionable authenticity and ownership chain. In 1857, one Constable connoisseur thought this painting was the finished painting that Constable had once sold to

singing the praises of cousin Lancelot Archer-Burton: "[H]e being so able & so willing (thank God) to give you advice & assistance without running too often to a [l]awyer who must (& will) be paid for all he does." JOHN CONSTABLE'S CORRESPONDENCE, *supra* note 37, at 305. After the death of Lancelot and the succession of Burton Archer-Burton, elderly Abram Constable changed his tune: "Do you hear anything of the Archer Burtons? [D]o the Miss Burtons live now at or near Windsor? [A]nd does Burton Burton live near them? How little they made of their great wealth, and how little any of us benefitted by it." *Id.* at 313-14.

58. See James Archer-Burton, *supra* note 51.

59. See THE FRICK COLLECTION, *supra* note 48, at 32-34. Because the price increases in Constable's works outstripped the financial capacity of the British market, by the beginning of the twentieth century, many important works tended to go to wealthy American collectors such as J. Pierpont Morgan and P.A.B. Widener. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 92-93, 114. For the impact on Henry Clay Frick of viewing the late J. Pierpont Morgan's collection, which included *The White Horse*, at the time of Morgan's death, see COLIN B. BAILEY, BUILDING THE FRICK COLLECTION: AN INTRODUCTION TO THE HOUSE AND ITS COLLECTIONS 59-61 (2006).

60. See THE FRICK COLLECTION, *supra* note 48, at 32-34.

61. See Rhyne, *supra* note 32, at 42; Charles S. Rhyne, *Constable's First Two Six-Foot Landscapes*, in 24 STUDIES IN THE HISTORY OF ART 109, 116-17 (Jane Sweeney ed., 1990).

62. HAYES, *supra* note 47, at 33.

Archdeacon Fisher and then repurchased for himself (now the Frick version).⁶³ Over many years, this six-footer was believed to be the Frick version; not a genuine Constable; or a later copy of *The White Horse* painted by Constable, his pupils, or both sometime after 1819.⁶⁴

Modern scientific and artistic analysis has led to a consensus that this NGA version is a full-size oil sketch, sometimes referred to as a “sketch from nature,” made by John Constable preliminary to his completing the Frick version for exhibition.⁶⁵ To some observers, in accord with many twentieth-century critics, the energy-filled sky and coarser finish of the NGA version is preferable to the tranquil noon sky and more refined and polished character of the Frick’s version.⁶⁶

The details of the NGA’s published chain of ownership for this version begin with Sir John Pender who had acquired it from unstated parties by 1872 when he loaned it for an exhibit; Pender then sold it via the E. Fox White Gallery to Wallis & Son, London, by 1882.⁶⁷ In 1893, Peter Arnell Brown Widener of Pennsylvania acquired it from Wallis & Son and brought the work to America.⁶⁸ After Widener’s death, it was transferred to the NGA in 1942 via a testamentary power of appointment in Widener’s estate from the holder of the power of appointment, Joseph E. Widener.⁶⁹ This means that there is a thirty-five-year gap between the death of Constable in 1837 and the apparent ownership of Sir John Pender in 1872, which is the published root of the NGA’s chain of title.⁷⁰

63. John Gage, *Constable: The Big Picture*, in *CONSTABLE: THE GREAT LANDSCAPES*, *supra* note 23, at 25-26. To some minds, this author included, the oil sketches—for instance, the version of *The White Horse* at the NGA—are more enjoyable than the finished oil exhibition paintings—for instance, the version at the Frick. During the twentieth century, there was “a burst of critical enthusiasm” for the full-sized oil sketches as preferred to the finished paintings. Rhyne, *supra* note 32, at 44.

64. See HAYES, *supra* note 47, at 33, 39. One critic, James Smethem, believed the NGA version to be the finished painting which he had seen displayed at the Royal Academy in London. *Id.* at 39 n.6. Another critic, Robert Hoozee, dismissed the NGA version as most likely an imitation. *Id.* at 39 n.7. Richard Constable recently wrote of the NGA version: “The White Horse sketch until a few years ago was thought to be a later copy but it has now been proved to be the original sketch.” Email from Richard Constable to Marlyse Burton (July 26, 2006) (on file with author). The confusion about the NGA version was possibly the result of the handwritten provenance written by Constable’s grandson Clifford on the backside of the MFA version of *The White Horse*. See *infra* note 86 and accompanying text.

65. See HAYES, *supra* note 47, at 33, 39; see also Rhyne, *supra* note 32, at 42-44; email from Sabrina Abron, *supra* note 19 (quoting Clifford Constable’s handwritten provenance).

66. John Constable has been referred to as a modernist and “Prophet of Impressionism.” FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 123-24. For varied critical preferences of Constable’s works, see *id.* at 88-89, 122; Rhyne, *supra* note 32, at 42-44.

67. See HAYES, *supra* note 47, at 33.

68. See *id.*

69. See *id.*

70. See *id.*

One explanation for this gap might be traced to the handwritten annotation by one of Constable's grandsons, Clifford Constable, found on the back of yet another rather large version of *The White Horse*, neither the NGA's nor the Frick's:

This picture of "The White Horse" was the finished study from nature for the larger work painted by my grandfather John Constable R.A.—for Archdeacon Fisher—The picture was never out of the possession of my grandfather's family until the division of my Aunt Isabel Constable's property, June 11, 1895.⁷¹

Modern experts have argued that the grandson's handwritten notation was in error; presumably, the correct reference should have been to the "study from nature," which is the NGA's version of *The White Horse*.⁷² The grandson's dates do not mesh with any known version because Constable's daughter Isabel was only sixteen years old at the time of her father's 1838 estate sale.⁷³ Of course, the work might have been acquired for Isabel or other Constable orphans by Isabel's uncle, Golding Constable, before his 1838 death and during the brief time that Golding served as co-executor of his brother's estate.⁷⁴

Alternatively, it is plausible that Lancelot Archer-Burton, guardian of the seven orphaned John Constable children, including teenaged Isabel, and co-executor with Golding of the John Constable estate, may have purchased the work in 1838 on behalf of Isabel or other minor children at the same time he purchased the version now in the Frick Collection.⁷⁵ This might be because Golding Constable himself died shortly before the two-day John Constable estate sale of 1838, and there had been an agreement between the co-executor Lancelot Archer-Burton and John Constable's friend C.R. Leslie to purchase for the family items that were bid below the reserve price if one was set, or "a worthwhile price" if no reserve price was set.⁷⁶

It is even possible that Golding Constable had personally acquired the NGA version before John Constable's 1837 death, and at some point,

71. Email from Sabrina Abron, *supra* note 19. Clifford Constable's handwritten note was removed during a cleaning in 1916. *Id.*

72. *See supra* note 65 and accompanying text.

73. *See* FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 4. Isabel, who was John Constable's last surviving child, died in 1888. *See* JOHN CONSTABLE'S CORRESPONDENCE, *supra* note 37, at 318.

74. *See* FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 4; JOHN CONSTABLE'S CORRESPONDENCE, *supra* note 37, at 305.

75. *See* FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 4.

76. *See id.* at 20-21.

Golding or his heirs might have transferred it to Isabel. Any of these possibilities could explain Clifford Constable's handwritten note on the back of a similar painting, asserting that it was the piece he had seen hanging in his Aunt Isabel's home for many years.⁷⁷ What does not square with Clifford Constable's handwritten note is any possibility that the NGA version actually remained in Isabel's or some other family member's possession until June 11, 1895, because NGA's provenance traces ownership to Sir John Pender by 1872.⁷⁸

In any case, presumably there was a marketplace sale, the documents now lost, possibly by Isabel to Sir John Pender before 1872, and this sale was followed by the mesne conveyances described in the NGA provenance, eventually leading to the NGA via the P.A.B. Widener estate.⁷⁹ The bottom line is that there is insufficient documentation to be certain of the links in ownership between the Constable estate sale in 1838 and the ownership by Pender in 1872, and this gap is not accounted for in the NGA's published provenance.⁸⁰

The above illustrates the fragmentary nature of the chain of ownership in artwork. Gaps are often caused by incomplete transfer records, innocent misidentification by relatives of the artist or other supposedly informed persons, and the impact of later scientific and expert analysis. In this instance, such analysis came more than a century after all the people immediately involved were deceased.⁸¹ Because there is no permanent official record archive, an art object's provenance is frequently plagued by gaps because many crucial events are not memorialized in the surviving writings and the events themselves have faded from all living memory. This gap-plagued chain underscores the vital necessity for having an expert archivist or art historian as part of any proposed reform seeking a more permanent solution. Moreover, unlike land, there is no permanent, public, and systematic archive of records showing the chain of title to artwork. Thus, any viable reform must address this deficiency as well.⁸²

77. See email from Sabrina Abron, *supra* note 19.

78. For documentation of the timing gap, see HAYES, *supra* note 47, at 33. For corroboration of Sir John Pender's possession by 1872, see LESLIE, *supra* note 47, at 410.

79. See HAYES, *supra* note 47, at 33.

80. See *id.* at 33.

81. See *supra* notes 23-26 and accompanying text.

82. Expert analysis, due process, an opportunity to be heard based on the expert's research, and the backstop of an Assurance Fund are all critical elements for any reform. For an introduction to the Torrens-style title reform proposed in this Article, see *infra* Part VI.A.

C. *The MFA Version*

The chain of title of this fine version of the painting is a fog-shrouded history. This particular large painting is four and one-half feet wide, a bit narrower than the Frick's and the NGA's six-foot versions.⁸³ The twisting tale of the full provenance of the Boston Museum of Fine Art's (MFA) version is pockmarked with questions:

- 1819–1832: Painted by Dunthorne under Constable's supervision?⁸⁴
- 1832–1895: Gap? Sir Humphrey Ward? Exact dates?⁸⁵
- 1895: MFA purchased this version with baffling handwritten notation by Clifford Constable on the backside stating that the work was held by Constable's daughter Isabel and other Constable family members until 1895.⁸⁶

Clifford Constable's statement, the most confounding aspect of this version, was first challenged in 1905 when art expert William Rankin said of the MFA's *The White Horse* that it "did not seem to him to have anything to do with Constable but to be cleverly imitative."⁸⁷

Rankin's assessment was seconded a quarter-century later, in 1929, by expert Sir Charles Holmes.⁸⁸ Holmes admitted that he had first hoped to find that the MFA painting was an earlier nature version of Constable's finished studio version, which, in 1929, was still held in the J. P. Morgan collection.⁸⁹ But after direct examination, Holmes ascribed the MFA's painting to the work of some highly skilled professional artist, "not any of

83. Rhyne, *supra* note 19.

84. *Id.*; see also email from Sabrina Abron, *supra* note 19.

85. See Rhyne, *supra* note 19.

86. See *id.* For the exact phrasing of Clifford Constable's handwritten notation, see *supra* text accompanying note 71. Some experts were likely misled for several years by this elusive handwritten notation, the aesthetic quality of the painting, and the fact that Clifford's aunt, Isabel Constable, held a collection of hundreds of original Constables. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 85-87. To extend Socrates' famed syllogism: All mortals are flawed; all art experts are mortal; therefore, all art experts are flawed. While it is true that art experts can be as misled as the rest of us, society must sort out the truth over time as was done in the MFA case. Let us not adopt a categorical "To Hell with the Critics" stance as did Thomas Hoving, the former Director of the Metropolitan Museum of Art, in one of the chapters in his lively book, *Making the Mummies Dance: Inside the Metropolitan Museum of Art*. See HOVING, *MAKING THE MUMMIES DANCE*, *supra* note 1, at 124. After all, Hoving himself is an art critic.

87. Email from Sabrina Abron, *supra* note 19.

88. See *id.*

89. See *id.*

the common forgers and imitators, and in the course of thirty years or more I have seen nothing else of the same kind.”⁹⁰

We must assume that Clifford Constable wrote his description by innocent error, confusing the full-sized oil sketch (the NGA version), which was held by his Aunt Isabel Constable for a time, with the MFA version.⁹¹ The MFA’s files indicate that the “painting was once in the possession of Humphrey Ward. . . . Later, in December 1895, it was purchased by the [MFA].”⁹²

As if the MFA version were cursed, during a 1916 cleaning and restoration process, technicians removed Clifford Constable’s handwritten note from the back of the MFA painting.⁹³ This removal of vital evidence illustrates another provenance hazard: the destruction of relevant information that can happen during the course of caring for a piece of artwork over the centuries.

This version of *The White Horse* was extracted from the basement of the MFA in 1980 by noted Constable authority Professor Charles Rhyne of Reed College.⁹⁴ Apparently there had been a growing realization at the MFA, likely starting with the Holmes and Rankin critiques, that the painting might not be an authentic Constable.⁹⁵

Professor Rhyne undertook a detailed, stroke-by-stroke aesthetic examination, which led to his expert opinion that it was a copy of Constable’s masterpiece produced primarily by Johnny Dunthorne, the budding artist, sometime studio assistant, and youthful son of Constable’s longtime friend John Dunthorne.⁹⁶ Presumably, the copy was produced between the completion for exhibit of the Frick version of *The White Horse* in 1819 and young Dunthorne’s early death in 1832.⁹⁷ In Professor Rhyne’s opinion, Dunthorne had been closely supervised by Constable, which explains why the MFA painting is a sensitive copy that captures the

90. *Id.*

91. Clifford’s confusion is understandable when one considers that even after the 1838 estate sale, the John Constable children still held over 1,800 original works, including 750 oil paintings and sketches, as well as over 1,100 watercolors and drawings. See FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 7-8. Isabel, the longest living of the seven Constable children, was holder of a massive art collection, and at her death in 1888, she bequeathed 400 paintings and drawings to the Victoria and Albert Museum in London. See GRAHAM REYNOLDS, *CONSTABLE: THE NATURAL PAINTER* 134 (1965). That same year, Isabel bequeathed *The White Horse* to the NGA. *Id.* at 60.

92. Email from Sabrina Abron, *supra* note 19.

93. *See id.*

94. Rhyne, *supra* note 19.

95. *See supra* notes 87-90 and accompanying text.

96. Rhyne, *supra* note 19.

97. Johnny Dunthorne died at the end of October 1832, his malady not clearly determined, and Constable had the “melancholy task” of helping his old friend, the elder Dunthorne, wind up Johnny’s estate. JOHN CONSTABLE’S CORRESPONDENCE, *supra* note 37, at 270.

Constable touch.⁹⁸ This position was officially adopted by the MFA in 1987 in its revised provenance when, after a nearly century-long attribution to John Constable, the MFA changed its official attribution to “John Dunthorne, Jr., copy after John Constable.”⁹⁹

Any reform system for artwork title must be designed to deal with the authenticity problems arising from misattributions. Accordingly, a reform system must have the ability to take and weigh facts of every nature, including evidence of destructions or alterations, and to deal with circumstances where, as in the case of *The White Horse*, more than one version is found to exist.¹⁰⁰

D. *The Legendary Archer-Burton Family Version*

As noted above, the Frick's version of *The White Horse* traces its ownership to the eldest male offspring of John Constable's cousin, Lancelot Archer-Burton, who had served as co-executor of Constable's estate and guardian of the seven minor Constable children.¹⁰¹ As confirmed by family sources, Lancelot's eldest son, a barrister named Burton Archer-Burton,¹⁰² inherited the work upon his father's death in 1852.¹⁰³ He then quickly sold it in 1855 for 630 pounds, the largest sum paid for any Constable at the time.¹⁰⁴ This 1855 sale eventually led to J. P. Morgan's, and ultimately the Frick's, ownership.¹⁰⁵

Intriguingly, some years before his death in 2003, James Archer-Burton, O.B.E.,¹⁰⁶ mentioned to the author his belief that a version of *The*

98. Rhyne, *supra* note 19.

99. Email from Sabrina Abron, *supra* note 19.

100. Still other versions and studies of *The White Horse* were reported to exist during the 1800s. See LESLIE, *supra* note 47, at 410.

101. See *supra* note 50 and accompanying text. For Abram Constable's radically differing views of Lancelot Archer-Burton (positive) in contrast to his oldest son Burton Archer-Burton's (negative), see JOHN CONSTABLE'S CORRESPONDENCE, *supra* note 37, at 305, 314.

102. See JOHN CONSTABLE'S CORRESPONDENCE, *supra* note 37, at 321.

103. Burton Archer-Burton's grandson, James Archer-Burton, stated:

The White Horse remained in the family until 31st March 1855. Left by Lancelot to his eldest son Burton, my grandfather, who probably sold *The White Horse* to raise money for the education of his five daughters, the four sons, James, my father, Graeme, Leonard and Vivian were virtually 'transported.'

James Archer-Burton, *supra* note 51. This reference to “transported” sons refers to Burton dispatching the three oldest boys (Vivian was a baby), with some cash settlements, to make their way in Minnesota during the 1870's, a practice sometimes referred to as making them “remitter men.”

104. FLEMING-WILLIAMS & PARRIS, *supra* note 2, at 7 n.5.

105. See THE FRICK COLLECTION, *supra* note 48, at 32-34.

106. James Robert Archer-Burton, O.B.E., was deputy provost marshal with the rank of Lieutenant Colonel under General Montgomery in World War II; he was wounded in the battle of

White Horse was among the Constable paintings that had hung in the family townhomes at Numbers 10-11-12 Rockstone Place, Southampton, during his own childhood.¹⁰⁷ James's son, Robert Archer-Burton, also recalled to the author that he had heard this tale.¹⁰⁸ The legendary ownership chain would appear something like this:

- 1819-1837: Archer-Burton family version painted by Constable?
- 1837-1912: Located presumably at the Archer-Burton family home in Southampton?
- 1912-1940: Family version observed by young James?
- 1940: Painting lost in Blitz of Archer-Burton home in Southampton? Retrieved from the rubble? Secreted someplace before the Blitz?

El Alamein, and climaxed his career at Scotland Yard after the war by rising to Chief of Police for Hastings in 1954 and then to Chief Constable of the North Riding of Yorkshire County Constabulary in 1958 before retiring in 1965. See Terry Coyle, *Fairmont Has Place in His Heart*, SENTINEL (Fairmont, Minn.), June 10, 1988, at 1, 3; *Ex-Fairmonter Named Police Chief in West*, SENTINEL (Fairmont, Minn.), Dec. 1954; *News About "Our Boys,"* SENTINEL (Fairmont, Minn.), June 30, 1943; see also Draft Letter from James Archer-Burton to the Editor of the *The Sentinel* (Mar. 1988) (on file with author) (commenting on the June 30, 1943 article); see also *infra* note 107.

107. See Interview with James Archer-Burton, 8-9 (1989) (recording James's memories as set forth in the 1789-1989 Amicus Vitae Solatium). The author conducted the Interview in James's home in St. Leonards on Sea, U.K., over a period of several days during the first week of July, 1989. The transcript was typed and bound in Houston, TX later that summer.

Grandfather [Burton Archer-Burton] in 1852 [the same year as the death of Burton's father Lancelot Archer-Burton] purchased a lovely old row of terraced homes, 10, 11 and 12 Rockstone Place, off the Avenue, which are considered so good today that they have been classed as listed buildings . . . I remember best where Granny had all the pictures of her 23 grandchildren and all the family portraits, the piano, the floor-to-ceiling gilt mirrors and the paintings by Constable and others . . . It was sort of an Aladdin's cave . . .

Id. It's the author's recollection that James said, during these memoir conversations, he remembered seeing a painting of *The White Horse* as one of the art objects hung in the Rockstone Place compound. At Rockstone, James could not have seen the three versions held in America by the Frick, the NGA, and the MFA, collectively. This follows mathematically because James was not born until 1912, nearly sixty years after 1855 when Burton Archer-Burton sold *The White Horse* into the chain of title that sent the painting to America and eventually ended in the Frick's holding. See THE FRICK COLLECTION, *supra* note 48, at 32-34. This was also exactly thirty years after the known sale by Sir John Pender in 1882 into the chain of title resulting in the NGA ownership, see HAYES, *supra* note 47, at 33, and seventeen years after the purchase by the MFA in December 1895, see email from Sabrina Abron, *supra* note 19.

108. During the author's visit to Robert Archer-Burton's home in Farnham in November, 2006, Robert Archer-Burton recalled also having heard the story that *The White Horse* was among the artworks at Rockstone Place prior to Rockstone's destruction during the Nazi blitz of 1940.

If the tale is correct, then certain authenticity and title issues arise as to what version hung at Rockstone Place, the family's three adjacent town homes in Southampton from 1855 until the Nazi Blitz of 1940. How and when was it first acquired? What became of it before and during the Blitz? Where is it now?¹⁰⁹

During the decades that passed from 1855 to 1940, it ultimately came about that the only permanent family occupant of the Archer-Burton compound at Rockstone Place was Burton Archer-Burton's youngest son, Major Vivian Ellis Archer-Burton. By 1940, Vivian was the only family member occupying Number 12 Rockstone Place, since the other two units had been leased to third parties.

Vivian, age 72, was killed as a result of injuries suffered in a 1940 German bombing of Southampton that struck Rockstone Place.¹¹⁰ Following this event, family solicitors wrote to James Archer-Burton, then a twenty-eight-year old Captain in the British Eighth Army, having left Scotland Yard to volunteer.¹¹¹ The solicitors reported to James that Vivian's residence, Unit 12, Rockstone Place, had been totally destroyed but that Unit 11 remained only slightly damaged.¹¹² This raises an intriguing question: What happened before or during the Blitz to the artwork and antiques that filled the residence that was referred to by family members as "Granny's Aladdin's Cave"?¹¹³

"[H]ide them in cellars or in caves, but not one picture shall leave this island."¹¹⁴ So went Prime Minister Winston Churchill's urgent order

109. The post-World War II private market for art is enormous. "[A]rt theft is so pervasive today that chances are that any client who owns an object of art may be holding stolen property." Bryan Hanley, *Law Enforcement Issues in Art Theft*, paper presented at Art Crime Conference, Australian Inst. of Criminology, at 4 (Dec. 2-3, 1999), available at <http://www.aic.gov.au/conferences/artcrime/hanley.pdf> (quoting Peter Spero, U.S. Attorney). Wealthy private collectors are a mainstay in the art marketplace. MASON, *supra* note 1, at 36-38. Many works hang in private collections around the globe due to the Cold War's flourishing black market. See LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 364 (1994).

110. See Interview with James Archer-Burton, *supra* note 107, at 8-9; see also Funeral of Mr. V.E. Archer-Burton: Last Tributes to So'ton Sportsman (undated clipping of Blitz victim Vivian Archer-Burton's funeral report from a Southampton newspaper) [hereinafter Funeral Report] (on file with author).

111. See letter from Mr. Payne, Solicitor, Pearce, Harfied & Emanuel to James Archer-Burton (Dec. 10, 1941) (on file with author).

112. See *id.* The solicitor's letter reads in part: "With regard to No. 12 Rockstone Place this property has been completely destroyed by enemy action . . ." *Id.*

113. This refers to the art treasures situated at Rockstone Place, presumably including the legendary version of *The White Horse*. See Interview with James Archer-Burton, *supra* note 107, at 8-9.

114. National Gallery of Art, London, The Gallery During the Second World War, <http://www.nationalgallery.org.uk/about/history/war/evacuation.htm> (last visited May 14, 2007) (quoting Prime Minister Winston Churchill on the idea of transporting World War II paintings to

respecting Britain's art treasures issued in the months leading up to the devastation of Rockstone Place.¹¹⁵ In this connection, commencing in 1939, trainloads of artwork from England's foremost museums rolled northward to protection in the deep salt mines of North Wales.¹¹⁶ Other private and public artwork was being secreted in country homes, caves, and elsewhere throughout Britain.¹¹⁷

During World War I, Vivian Archer-Burton fought as a Major in the Hampshire Regiment¹¹⁸ and remained active in Southampton community affairs.¹¹⁹ Prior to his fatal injuries amid the rubble of Rockstone Place as a result of the Blitz, Vivian, though seventy-two-years old, would have been in a position to heed Churchill's order. If, in 1940, a version of *The White Horse* was in fact still located in "Granny's Aladdin's Cave" at No. 12 Rockstone Place, the issue arises of its chain of ownership being diverted by war or other calamity. If such a version existed, would it have been moved by retired Major Vivian Archer-Burton, along with other art treasures from "Granny's Aladdin's Cave," to someplace safe from both the bombings and the expected Nazi cross-channel invasion, which had prompted Churchill's order to hide the nation's artwork? Of necessity, such a move would have taken place prior to the Blitz that fatally injured Vivian and destroyed his townhome.¹²⁰

Or, if not removed for secretion elsewhere, would such a version of *The White Horse* and other artwork simply have been destroyed as a result of the bombings and scooped away with the rubble, as might be inferred from the family solicitor's assets-accounting letter?¹²¹ Or would scavengers,

Canada). See generally N.J. MCCAMLEY, SAVING BRITAIN'S ART TREASURES (2003) (discussing accounts of pre-war planning, secretion of public and private art treasures in country houses, the rolling fleets of art trains headed to the deep salt mines of Wales, and the scramble to hide private artwork). For more information on hiding art objects during World War II, see email from Christopher Marsden, Senior Archivist, Word and Image Department, Victoria and Albert Museum Archives, to Bruce W. Burton, Professor of Law (Aug. 25, 2006) (on file with author); email from Katrina Royall, Course Administrator, Victoria and Albert Museum, Royal College of Art, to Bruce W. Burton, Professor of Law (July 26, 2006) (on file with author) (discussing how a German invasion force would certainly have found art works "hidden" in country estates and eventually those secreted in caves in the Welsh mountains). For a general discussion of the impact of the Second World War on the Victoria and Albert Museum, see Katrina Royall, V & A at War 1939-45, http://www.vam.ac.uk/collections/periods_styles/history/war/index.html (last visited May 14, 2007).

115. National Gallery of Art, London, *supra* note 114.

116. See generally MCCAMLEY, *supra* note 114 (discussing transportation of artwork during the second World War); email from Katrina Royall, *supra* note 114.

117. See email from Katrina Royall, *supra* note 114.

118. See interview with James Archer-Burton, *supra* note 107, at 8.

119. See Funeral Report, *supra* note 110.

120. See interview with James Archer-Burton, *supra* note 107, at 8-9.

121. See letter from Mr. Payne, *supra* note 111.

sifting among the rubble after the Blitz, have found and removed it as a sort of World War II version of the grave robbing of Ancient Egypt's antiquities?¹²²

This set of circumstances makes clear that any reform system to assure marketable art title must account for the impact of wars or other calamities which can disrupt the chain of ownership, cause artwork to become displaced and lost or stolen, or cause damage to, or total destruction of, art works caught up in the turmoil. Accordingly, any system of reform must have the capacity to take and weigh evidence not only of authenticity, but also of disruptions in the chain of ownership resulting from history's calamities.¹²³

The next Part of this Article briefly examines the twentieth century's largest calamity in disrupting the provenance of world artwork.

IV. THE DARKEST PROVENANCE: NAZI LOOTING FROM 1933-1945

Any proposals for reform must deal with more than just garden-variety thefts, forgeries, mistaken attributions, frauds, and swindled transfers. In addition, proposals should deal with the provenance issues plaguing Europe and America in the wake of Nazi Germany, which carry monumentally tragic complications for the international art world as to both authenticity and proper chain of ownership. And Nazi art looting places an even more intense magnification on the serious moral pitfalls of the prevailing legal doctrines that attempt to deal with the conflicting rights of innocent claimants.¹²⁴ Any viable reform must provide a mechanism to sort out the massive ownership snarls arising out of World War II. Additionally, an element of any serious proposal must include a

122. For various descriptions of ancient and modern tomb looters (*tombaroli*) and the illegal transfer of antiquities to Europe and America, see HOVING, MAKING THE MUMMIES DANCE, *supra* note 1, at 401-28 (discussing the immense amount of money involved in arranging even legitimate antiquities loans to the West).

123. See *infra* Part V.C. One core Torrens-like procedure is the use of a court-appointed expert in art provenance to investigate all of the American and European agencies and clearing houses, which are repositories for Holocaust and other war-related artworks information. See YEIDE ET AL., *supra* note 2, at 39-40.

124. See *infra* Part V.C. Briefly stated, when an innocent bona fide purchaser's claims clash with those of a True Owner who was a Holocaust or other Nazi victim (or whose ancestor-True Owner was herself a victim of the Nazis), such a classic conflict has at its core the tragedy of right versus right. See *infra* note 150. The litigation spawned by our heritage of Nazism, which includes persecution, murders, looting of art objects, and illicit banking practices, is ongoing. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 680-81 (2004); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141-42 (E.D.N.Y. 2000); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 167-68 (S.D.N.Y. 2000); Burger-Fischer v. DeGussa, 65 F. Supp. 2d 248, 250 (D.N.J. 1999); *Museum Wins Dispute Over Art Allegedly Stolen by Nazis*, CNN.com, Sept. 21, 1999, <http://www.cnn.com/US/9909/21/looted.art/> [hereinafter *Museum Wins Dispute*].

mechanism to establish a lasting provenance for art objects, and in doing so, offer maximum justice for all innocent parties.¹²⁵

The Nazi-borne complications stem in part from the vast quantities of art looted or extorted from private Jewish owners, from non-German non-Jewish owners, and the expropriated galleries of conquered nations and politically disfavored groups. There is also the headache of systemized art forgery by the Third Reich.¹²⁶ Though similar to the classic civil conflicts between True Owners and Bona Fide Purchasers (BFPs),¹²⁷ the World War II issues add the chilling dimension of systematic, state-sponsored criminality on a vast scale.¹²⁸

Specifically, today's provenance turmoil traces its roots to the following: (1) Nazi extortion and looting of works from museums, art dealers, and private collections in Germany itself and the conquered nations;¹²⁹ (2) grandiose competition among Third Reich leaders—including Hitler, Goering, Von Ribbentrop, and Goebbels—to outdo one another in creating public museums and private collections for

125. For a discussion of the lack of fairness and morality of prevailing legal doctrines, see *infra* note 185 and accompanying text.

126. See YEIDE ET AL., *supra* note 2, at 39-44 (detailing the entire range of Nazi atrocities to Jewish and non-Jewish owners of art and also laying out the resource tools currently available in Europe and America for tracing ownership of artwork whose legitimate chain of title may have been broken or distorted by Nazi wrongdoing or Third Reich forgeries of both documents and the art objects themselves); see also ASS'N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933-1945) (1998), <http://aamd.org/papers/guideln.php> (providing an online resource for tracing Nazi confiscations that have not been restored); NAT'L ARCHIVES & RECORDS ADMIN., HOLOCAUST-ERA ASSETS: A FINDING AID TO RECORDS AT THE NATIONAL ARCHIVES AT COLLEGE PARK, MARYLAND (1999), available at <http://www.archives.gov/research/holocaust/finding-aid/index.html> (same). For the scope of the illicit Nazi art activities from 1933 to 1945, see generally NICHOLAS, *supra* note 109. See also KENNETH D. ALFORD, NAZI PLUNDER (2000); JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY (2000).

127. Throughout this Article, the term "True Owner" is used in the relative sense, referring to one holding a claim of title that is paramount to that of a current possessor or purchaser. "BFP" refers to an innocent purchaser for value without notice of the claims of a rival claimant such as the True Owner. STOEBUCK & WHITMAN, *supra* note 7, at 879. The concept of the BFP arises in the Uniform Commercial Code (U.C.C.) sense, the recording act sense, and in the conflicts itemized in discussion of the Discovery Rule and the Demand Rule. See *infra* Part V.C.

128. See NICHOLAS, *supra* note 109, at 444 ("It has been sixty years since the Nazi whirlwind took hold, sweeping the lives of millions before it. Never had works of art been so important to a political movement and never had they been moved about on such a vast scale, pawns in the cynical and desperate games of ideology, greed, and survival. Many were lost and many are still in hiding.").

129. See YEIDE ET AL., *supra* note 2, at 41-44; Siobhan Morrissey, *Train of Heartbreak*, A.B.A. J., Mar. 2004, at 18; The Art Institute of Chicago, Provenance Research Project, <http://www.artic.edu/aic/provenance/index.html> (last visited May 14, 2007).

state-approved artwork appropriated from across Europe;¹³⁰ (3) underpriced “sales” and “donations” of art masterpieces made under duress by private owners and dealers;¹³¹ (4) the nightmarish provenance issues arising from the systematic falsification of title documents and other records by Nazis and their collaborators;¹³² (5) market demand for forgeries, especially Vermeers, created by Nazi policies that bred incentives to illicit operators;¹³³ (6) looting and blackmarket purchases of art by American and other allied soldiers during the liberation, many pieces being smuggled to the United States in returning GI’s rucksacks;¹³⁴ (7) the reluctance of some museums, national governments, and businesses holding Holocaust art to make restitution of plundered works to the true owners or their heirs;¹³⁵ (8) rejection of what the Nazis labeled “degenerate art” and the Nazi promotion of “nationally correct” artwork with resulting

130. See NICHOLAS, *supra* note 109, at 44-49; YEIDE ET AL., *supra* note 2, at 41-46. For instance, Reichsmarschall Goering considered himself a connoisseur of art and sought to establish one of the world’s great private collections at his country estate and open his own museum after World War II. See YEIDE ET AL., *supra* note 2, at 43. To this end, Goering confiscated “ownerless” Jewish property, selected objects for his own collection or to barter for art that he wished to acquire from occupied France’s *Jeu de Paume*, the Nazi clearinghouse for looted art, or via the infamous ERR (i.e., the *Einsatzstab Reichsleiter Rosenberg*), the organization devoted to confiscating European Jewish art, and acquired art at discounted prices or without any payment apart from the elaborate false paper trail Goering used to make coercive or confiscatory acquisitions appear as legal purchases. See *id.* at 42-46, 62-63, 70-71. Hitler, himself a failed artist, planned to build the world’s greatest art museum in his hometown of Linz, Austria, which would house the greatest art treasures of Europe, also using the ERR and the services of Dr. Hans Posse, Director of the Dresden Museum, as his personal specialist. See NICHOLAS, *supra* note 109, at 44-46; YEIDE ET AL., *supra* note 2, at 43, 60. Goering’s art dealers often competed with Posse for acquiring masterpieces, particularly in Nazi-occupied Holland. NICHOLAS, *supra* note 109, at 47-48; YEIDE ET AL., *supra* note 2, at 45.

131. See, e.g., NICHOLAS, *supra* note 109, at 109; YEIDE ET AL., *supra* note 2, at 45; *Museum Wins Dispute*, *supra* note 124 (discussing the Nazi-era extortion gimmick in relation to the Museum of Modern Art’s court victory in 1999 that gave it permission to ship reputedly Nazi-extorted artwork back to Austria’s cultural ministry because of a 1968 New York statutory law exempting such artwork from seizure when within New York).

132. See YEIDE ET AL., *supra* note 2, at 42-44.

133. See NICHOLAS, *supra* note 109, at 345, 427; YEIDE, ET AL., *supra* note 2, at 44.

134. See NICHOLAS, *supra* note 109, at 354-57; YEIDE ET AL., *supra* note 2, at 46 (discussing American GI’s so-called “rucksack” looting of artwork as “souvenirs” to take home with them). For information about Nazi looting on a larger institutional scale, see NICHOLAS, *supra* note 109, at 385-87.

135. See YEIDE ET AL., *supra* note 2, at 46. The turmoils still persist as shown by continuing disputes. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 680-81 (2004); *DeWeerth v. Baldinger*, 836 F.2d 103, 104-06 (2d Cir. 1987); Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZOL. REV. 657, 659-64 (1998); Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 96-98 (1999); *Museum Wins Dispute*, *supra* note 124.

seizure, destruction, or surreptitious export;¹³⁶ (9) U.S. “vesting” laws enacted and enforced against property in the possession of foreign nationals immediately following Pearl Harbor, frequently done without regard to third-party rights, including innocent parties involved in bailments or pledges;¹³⁷ and (10) the growth of thriving postwar networks, sometimes involving the most reputable art institutions, for smuggling and illegal trafficking in artwork and antiquities.¹³⁸

The international dimension of this complexity has given birth to a number of treaties, a myriad of cross-boundary associations, and enforcement agencies that seek, with mixed success, to restore looted objects to their rightful owners or their heirs and successors.¹³⁹ It is not the purpose of this Article to investigate this area in depth. Rather, this Article points out the complications for correct ownership research and the added risk of questionable authenticity of any item of art work which had contact with Nazi activities of the World War II era.¹⁴⁰ The special scope of Holocaust art must be dealt with by any viable reform.

Following a brief account of the normal incidents in an object’s chain of title and today’s morally-deficient legal doctrines which seek to deal with conflicting claims, a proposal for a legal reform modeled on the Australian-UK-US system of Torrens registration for land titles will be presented.

V. PREVAILING LEGAL DOCTRINES AND MORAL DILEMMAS

Quite apart from the authenticity issue of forgeries being palmed off as originals, errors, gaps in the record, innocent mistaken attributions,¹⁴¹ and art theft are all matters of vital concern. In a perfect world, the documented chain of a lawfully sufficient title would involve documentary proof of the following types of transfers.

136. See YEIDE ET AL., *supra* note 2, at 44.

137. See *id.* at 46-47.

138. See *id.* at 45-47. For examples of smuggling and art laundering scams, see sources cited *supra* note 1.

139. See, e.g., YEIDE ET AL., *supra* note 2, at 55-107, 214-42 (describing the myriad of resources and references for researching Holocaust-era art provenance); NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 126.

140. See ASS’N OF ART MUSEUM DIRS., ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 1-4 (2001), available at http://www.aamd.org/papers/documents/NaziLootedArt_000.pdf.

141. Recall the MFA’s version of *The White Horse* and the confusion caused by an erroneous provenance inscribed on the back of the painting by Constable’s grandson. See *supra* text accompanying note 71.

A. *Lawfully Transferred Artwork*

Evidence showing gifts, bills of sale, grants, pledges, or leases is the customary mode of establishing voluntary *inter vivos* transfers of personalty, including artwork.¹⁴² The results of chattel foreclosures, court decrees arising in a variety of situations, finders of lost goods, bankruptcy proceedings, and governmental takings are the principal involuntary methods of *inter vivos* transfers of ownership.¹⁴³ Lawful testamentary transfers are evidenced by wills and trusts, executory powers of appointment, joint-ownership survivorship rights, and intestacy.¹⁴⁴ That quasi-testamentary anomaly, gifts made in contemplation of death, is another mode of estate-planning transfer.¹⁴⁵ Involuntary transfers include estate sales for payment of taxes, expenses, or to divide the proceeds among creditors and other claimants and that ancient sovereign-oriented chestnut of escheat to the government.¹⁴⁶

B. *Wrongfully Obtained Artwork*

The nub reality here is that a very large number of transactions do not involve the open and voluntary or involuntary transfers designated above. In reality, there is the serious problem of stolen or otherwise wrongfully obtained artwork transferred on the black market.¹⁴⁷ Also, there are the commercial principles of entrusting artwork to a dealer and the various theft-discovery rules explored in the famous Georgia O'Keeffe case *O'Keeffe v. Snyder*.¹⁴⁸ These principles might cause wrongfully obtained

142. See generally BARLOW BURKE, *PERSONAL PROPERTY IN A NUTSHELL* 236-312 (3d ed. 2003).

143. For fast reference to the main principles of personal property and its transfer, see BURKE, *supra* note 142. For an excellent fast treatment of U.C.C. provisions dealing with personalty, see JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (5th ed. 2000). For the most current debtor-creditor refresher, see generally DAVID G. EPSTEIN & STEVE H. NICKLES, *PRINCIPLES OF BANKRUPTCY LAW* (2007).

144. See DUKEMINIER ET AL., *supra* note 9, at 183-85, 233-39, 276-79, 540-41.

145. See *id.* at 159-66.

146. See generally *id.* at 95-172, 451. Escheat is an outgrowth of feudal law whereby a person's property would return to the lord from whom it was held if that person died intestate without any heirs. See *id.* at 179, 185. A similar concept to escheat is where the estate of a deceased artist obtains court-approved abandonment of purportedly "worthless" artwork, which later becomes valuable and is acquired by public or private galleries, at which time heirs of the deceased artist seek replevin of the abandoned artwork. See *Johnson v. Smithsonian Inst.*, 189 F.3d 180, 182-85 (2d Cir. 1999).

147. The black market in stolen art creates a knotty legal problem for potential buyers of expensive or rare works. See Peter J. Caruso II, Esq., *To Buy or Not to Buy: Protecting Yourself From Stolen Art*, ARTSEditor, Aug. 2000, http://www.artseditor.com/html/august00/aug00_law.shtml.

148. 416 A.2d 862 (N.J. 1980).

artwork to pass into the stream of legitimate commerce without any contact with the black market.¹⁴⁹

C. Operative Legal Rules

To address issues of wrongfully obtained artwork, the law provides six main legal rules that are effective in various American states and foreign nations. These doctrines control the rival claims to title as between an innocent artist (or other True Owner) and an innocent bona fide purchaser for value without notice (BFP) of wrongfully obtained artwork. Note that even where the applicable legal rule favors the BFP over the True Owner, the wrongdoer himself is not automatically insulated from the True Owner's civil claims, or possible criminal sanctions, under any of these rules.

The conflict between the thief and the True Owner represents the prosaic right versus wrong, the stuff of mere melodrama. The conflict between an innocent artist (or other True Owner) and an innocent BFP is right versus right, the stuff of true tragedy.¹⁵⁰

The six prevailing legal rules revolve around a core question: Is it best for society to adopt controlling legal policies favoring the artist or some

149. In *O'Keeffe*, the ownership of several early works by the famed artist, Georgia O'Keeffe, were at issue. *Id.* at 864-65. O'Keeffe's husband, Alfred Stieglitz, operated a New York City art gallery for display and sale of art in the ordinary course of business. *Id.* O'Keeffe, then an artist of little note or value, had left the disputed works of art with Stieglitz in 1946. *See id.* at 865. Apparently, within weeks, the paintings were missing, perhaps by way of theft. *Id.* It was not until 1972 when O'Keeffe, now a renowned and important artist, finally reported the pieces missing. *Id.* at 866. In 1975 and 1976, the pieces were in the marketplace and in the process of being traded to putative BFPs. *Id.* The court emphasized the following principles: (A) a thief acquires voidable (no) legal title; (B) the True Owner's entrusting possession of goods with a dealer who deals in like items in the ordinary course of business can result in a transfer of good title from the dealer to a BFP; and (C) the U.C.C. and certain common-law principles allow one with a voidable title to transfer good title to a BFP under certain conditions where facts indicate that the True Owner unreasonably delayed in following due diligence to discover and report the loss, take reasonable steps to locate the missing art object, or both. *See id.* at 867, 872-73. "Unreasonable delay" could mean a delay beyond the time permitted by either the preferred, so-called "Discovery Rule," which is an equitable analysis of the True Owner's diligence in reporting, investigating, and recovering the lost goods or an applicable statute of limitations to replevy or otherwise recover after the date of the loss or some other event. *See id.* at 868-69. The parties ultimately settled before a retrial after the New Jersey appellate decision. *DUKEMINIER ET AL.*, *supra* note 9, at 154. For accord on the "Discovery Rule," see *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288-89 (7th Cir. 1990). For guidance on the legal issues faced by museums in connection with collection objects, see 2 RALPH E. LERNER & JUDITH BRESLER, *ART LAW* 1425-82 (2d ed. 1998).

150. For nearly forty years, I have cited the former Dean of the Yale Drama School on this point: right versus wrong is melodrama; right versus right is tragedy. Now, however, I can no longer locate the cite for that proposition. Further proof, I suppose, that intellectual entropy plagues the human species.

other True Owner? Or, by contrast, should our policies favor the BFP who innocently acts within the marketplace? More broadly stated, is stability of the marketplace to be preferred over vindication of the True Owner's claims? Thus, the prevailing legal rules confront the thorny policy question of how the rights of these two rival innocent claimants are to be properly addressed. It is a thesis of this Article that each of the six prevailing rules fails a key moral test.

1. The "Market Overt" Rule

This principle functions in some European and other nations.¹⁵¹ It is pro-BFP-on-steroids. As the name "Market Overt" suggests, an innocent purchaser for value may acquire good title from a thief or other wrongdoer provided, however, that the sale takes place in an open market for art.¹⁵² Obviously, this rule strongly favors the rights of the BFP at the expense of the artist (or other True Owner) of the stolen work—this during an era when art theft is probably second only to drug smuggling among international crimes.¹⁵³ Equally clear, it raises serious concerns in the art world, and within the United States and other nations not following the law of "Market Overt," that the rule provides an invitation for laundering stolen art.¹⁵⁴ Quite apart from the possibility of laundering wrongfully obtained artwork, the "Market Overt" rule shares the inherent moral shortcoming of all the other rules: the entire loss is visited upon an innocent party, perhaps the very party whose labor and talent created the valued object in the first place. Traditional Lockean notions of labor theory that underlie so much of Anglo-American property law rest squarely on the principle that expending one's labor and talent is the moral source of one's property rights.¹⁵⁵

151. DUKEMINIER ET AL., *supra* note 9, at 155; *see also* Karen Theresa Burke, Comment, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 430 (1990) (critiquing the rule favoring the BFP over the artist and other True Owners); Caruso, *supra* note 147.

152. DUKEMINIER ET AL., *supra* note 9, at 155; *see also* Burke, *supra* note 151, at 430.

153. Burke, *supra* note 151, at 427, 430. It has been claimed that "'art theft has in recent years become the second most serious international crime form after drug smuggling.'" *Id.* at 427 (quoting Melvin E. DeGraw, *Art Theft in Perspective*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1, 3 (1987)).

154. DUKEMINIER ET AL., *supra* note 9, at 155.

155. *See* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 286-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). "[A] man's person and labor were his alone, and his property was whatever he produced by dint of his personal labor." Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 474 (1976). The sources of Locke's labor theory of property giving "greater moral weight" is further explained in DUKEMINIER ET AL., *supra* note 9, at 14.

2. Theft and America's U.C.C.

Art theft is a timeless fact of the world, so legal rules are essential.¹⁵⁶ Section 2-403 of the Uniform Commercial Code (U.C.C.) provides that the thief of an object acquires no title—often designated as “void title”—and hence can transfer no title to the stolen object.¹⁵⁷ Subject to prevailing statute of limitations law, a purchaser for value from the thief will not be protected against claims of the True Owner even if the purchaser were an innocent BFP.¹⁵⁸ The U.C.C.’s theft rule is superficially simple until one considers that not all theft is direct, and not all resulting sales are transparently illicit.

3. Entrusting, Fraud, or Error and the U.C.C.

Notwithstanding the void title of a thief, § 2-403 further provides that if the True Owner entrusts the object to one who is a dealer in such goods, this grants the dealer a “voidable title” as contrasted to the void title held by a thief.¹⁵⁹ Voidable title means that an innocent BFP purchasing from the dealer can acquire good title as against the True Owner and others.¹⁶⁰ A purchaser is a BFP if, at the time of acquiring the property, the purchaser paid value and was without notice or knowledge of the rights of the True Owner or other claimant of paramount title.¹⁶¹ One who purchases with notice that the property was stolen or belonged to another is not a BFP.

156. “Art theft has probably been with us for almost as long as there has been art, which is to say, virtually forever.” Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 49 (1995).

157. See U.C.C. § 2-403 (2003); *DUKEMINIER ET AL.*, *supra* note 9, at 155.

158. U.C.C. § 2-403 provides that a BFP acquires all the title his transferor had legal power to transfer. See U.C.C. § 2-403(1). Hence, the thief’s title is void. This should be contrasted to the purchaser from a seller with voidable title (i.e., one who deals in goods of that kind and was entrusted with the goods by the owner, or procured them through fraud or deception, by use of a dishonored check, etc., holds a voidable title and has the legal power to transfer a good title to a BFP). See *id.*; *O’Keeffe v. Snyder*, 416 A.2d 862, 867 (N.J. 1980) (examining the role of the art dealer as an entrusted party who had power to sell and transfer good title to a BFP).

159. See U.C.C. § 2-403(2).

160. See *id.* § 2-403(1).

161. See *STOEBUCK & WHITMAN*, *supra* note 7, at 879. The U.C.C. § 2-403 concept is substantially the same as that used under most land title recording acts wherein an innocent purchaser for value without notice can be protected under most recording acts. See *id.* at 879-91. It is also substantially the same concept in modern regulatory takings law where the “reasonable investment-backed expectations” (R.I.B.E.) of the purchaser of land provides a baseline for measuring whether any post-purchase regulatory changes were reasonably anticipated by the purchaser at the time of the land acquisition. See Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 *OR. L. REV.* 603, 656-59 (1993).

The U.C.C.'s approach is a middle ground between the absolute protection of a True Owner under the void title rule involving theft and the "Market Overt" rule's nearly absolute protection of the BFP discussed above. Accordingly, where the True Owner has voluntarily entrusted the art object to a wrongdoer because of the wrongdoer's fraud, such as a con artist's misrepresentations, negligent conduct by a dealer-bailee, a bounced check, or through some innocent error, the principles of so-called voidable title apply.¹⁶² Hence, an innocent BFP from such a dealer could obtain good legal title as against the True Owner's claims.¹⁶³

4. Statutes of Limitations and Laches

What if a stolen work of art, taken by a thief who holds a void title, comes into the hands of an innocent BFP and any applicable time limitation on a claim for replevin or conversion by the True Owner has lapsed?¹⁶⁴ If a jurisdiction chooses to follow its local statute of limitations (or an equity court's sensibility that the True Owner's laches caused some injustice or prejudice to the BFP), then the True Owner would be barred from gaining replevin of the art object from the BFP.¹⁶⁵ Consequently, the BFP and the marketplace are protected from unsettling claims for replevin by the True Owner.¹⁶⁶ Such limitation-driven outcomes are grounded in traditional reasons of policy.¹⁶⁷

However, the key element in statutes of limitations is to determine from what moment in time the statutes begin to run. Two major American rules designed to answer this question are the Discovery Rule (e.g., New Jersey) and the Demand Rule (e.g., New York).

162. See U.C.C. § 2-403.

163. See *id.*

164. See *O'Keeffe v. Snyder*, 416 A.2d 862, 868-69 (N.J. 1980); Hawkins et al., *supra* note 156, at 59-69.

165. See *O'Keeffe*, 416 A.2d at 868-69. For a definition of "laches," see BLACK'S LAW DICTIONARY 891 (4th ed. 2004).

166. See *O'Keeffe*, 416 A.2d at 868-69. By quieting claims in a BFP, the law encourages confidence in the marketplace, sometimes at the expense of the True Owner.

167. This rests on longstanding social policy found in both equitable principles and statutes dealing with the quieting of stale claims. This policy represents a variety of underlying social needs, which include the following: promoting judicial efficiency; quieting civil conflict; appreciating the evidentiary problems of old claims reposing on facts to which human recollection runneth not to the contrary; understanding human instincts, which include psychic needs such as the hunger for stasis and stability; and recognizing that possession breeds incentives and power in the present property holders to thwart the belated seeker of replevin. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897).

5. Discovery Rule

The Discovery Rule modifies the U.C.C.'s theft rule. Many jurisdictions prefer not to allow the harshness visited upon the True Owner when a statute of limitations could rapidly bar the True Owner's right of replevin.¹⁶⁸ Such jurisdictions have adopted equity's Discovery Rule.¹⁶⁹ This means that a statutory period of limitation which might operate to bar a True Owner from recovering the artwork from a BFP will not begin to run until after the True Owner has discovered, or should have discovered, the loss of the art object and pursued it.¹⁷⁰

However, for a True Owner to report the loss and pursue the object is sometimes a difficult task in the art world.¹⁷¹ By contrast to the direct application of a statute of limitations (New Jersey enacted a six-year statute in the *O'Keeffe* case¹⁷²), the Discovery Rule tilts moderately toward the True Owner. Under the Discovery Rule, the True Owner's claims are protected against the triggering of the statute of limitations until the loss has been discovered or should reasonably have been discovered.¹⁷³ Such issues are fact-sensitive and depend upon varying circumstances of the case.¹⁷⁴

6. Demand Rule

The Demand Rule is the pro-True-Owner-on-steroids version of the Discovery Rule. New York, the current site of a vast amount of American and international art trade,¹⁷⁵ has rejected the Discovery Rule and the

168. See, e.g., *O'Keeffe*, 416 A.2d at 869-70.

169. See, e.g., *id.* The court in *O'Keeffe* applied the Discovery Rule in an action for replevin to determine when the statute of limitations began to run. *Id.* It determined that *O'Keeffe's* cause of action accrued when she either knew or reasonably should have known by performing due diligence the identity of the person in possession of the painting. *Id.* at 870. For a good discussion of the artist-art merchant relationship in New York, see 75A N.Y. JUR. 2D *Literary and Artistic Property* § 35 (2006); Winick, *supra* note 1, at 52.

170. For the interplay between a statute of limitations, laches, and the doctrine of the Demand Rule, see *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430-31 (N.Y. 1991). See generally *supra* note 149.

171. Some of the steps that a True Owner ought to reasonably take are spelled out in *O'Keeffe*. See *O'Keeffe*, 416 A.2d at 869-70. However, even though the court remanded on the issues of *O'Keeffe's* steps toward recovery, *id.* at 870, the parties ultimately settled before a retrial, *DUKEMINIER ET AL.*, *supra* note 9, at 154.

172. *O'Keeffe*, 416 A.2d at 868.

173. *Id.* at 870.

174. Thus, it's not surprising that the parties in *O'Keeffe* elected to compromise the issue before retrial. In their settlement, they split the three disputed paintings in the expected three ways: one of the three to the BFP defendant; another to Georgia *O'Keeffe*, the plaintiff; and a third painting was sold at auction to pay the parties' legal fees. *DUKEMINIER ET AL.*, *supra* note 9, at 154.

175. See *Guggenheim*, 569 N.E.2d at 427.

others listed above.¹⁷⁶ Instead, New York has adopted the Demand Rule—a legal principle that the artist or other True Owner should be protected by reason that the local statute of limitations in replevin, which was three years in New York at the time of the famed *Guggenheim* case, should not begin to run to protect a BFP's title until after the True Owner demands return of the goods and the BFP refuses the demand.¹⁷⁷

Additionally, as an evidentiary corollary to the Demand Rule also favorable to the True Owner, the burden of proof that the artwork was not stolen is placed upon the BFP.¹⁷⁸ However, even if a theft did occur, laches may be pled and proved by the BFP as an equitable defense. Thus, if laches by the True Owner is found, the BFP might prevail notwithstanding the Demand Rule, thereby ameliorating a bit of the Rule's harshness.¹⁷⁹

However, the legally proper conduct by the True Owner following the theft is to be resolved on a case-by-case basis and with due regard to the True Owner's institutional or other nature. There are a number of variables, for example: Does the system of undated notations on accession cards in the files of a major museum impede determining whether or not there has been a theft and when it occurred?¹⁸⁰ What was the value of the property stolen?¹⁸¹ What was the manner of the theft?¹⁸² Are there serious risks in publicizing the loss and thereby exposing gaps in museum security?¹⁸³ Such issues provide ample room for a True Owner to

176. See *id.* at 430.

177. See *id.* Over twenty years had expired after the True Owner's loss and the 1986 demand-and-refusal exchange between the True Owner and the BFP. *Id.* at 427. This demand-and-refusal triggered the applicable statute of limitations for replevin, which was three years at the time of the case. *Id.* at 428. Hence, under the Demand Rule, the True Owner enjoyed a total of twenty-three years from the time of the theft before loss of title to a BFP, including the period of sixteen years from the time that the *Guggenheim's* board had deemed recovery of the missing work futile and had "deaccessioned" the piece, an action proving a critical step in triggering the Discovery Rule had New York followed New Jersey's Discovery Rule as articulated in *O'Keeffe*. *Id.* As noted in the case, however, the *Guggenheim* court did allow the BFP the opportunity to raise the True Owner's laches in failing to exercise reasonable diligence in locating the painting during the period prior to 1986. *Id.* at 431.

178. See *id.* at 431.

179. "The . . . decision of the New York Court of Appeals—the highest court in the art market capital of the world—in *Solomon R. Guggenheim Foundation v. Lubell* exemplifies this judicial failure to balance the rights of the two innocents." Hawkins et al., *supra* note 156, at 51 (footnote omitted); see also *Guggenheim*, 569 N.E.2d at 427, 431. For a general discussion of laches (in dicta), see *Republic of Turkey v. Metro. Museum of Art*, 762 F. Supp. 44, 46-47 (S.D.N.Y. 1990).

180. See *Guggenheim*, 569 N.E.2d at 428.

181. *Id.*

182. *Id.*

183. *Id.* at 431. Pursuant to New York's Demand Rule as articulated in *Guggenheim*, innocent BFP's who purchase without knowledge of an art theft, are at a serious disadvantage. So long as New York adheres to its construction of the Demand Rule, the BFP's risk will not be lessened by any mere indexing reform, such as an international computerized theft reporting system providing

rationalize its lengthy delays. As a legal sop to the innocent BFP, retaining possession of the stolen art object is not deemed wrongful until after the True Owner has made demand and the BFP has refused to return the art object.¹⁸⁴

All six of the above rules include the same moral shortcoming. Each places the entire burden of loss on the shoulders of one of two innocent parties. By some rules, the loss can be wholly visited upon the innocent BFP who paid value for the artwork in good faith without any notice of the True Owner's paramount claim. Under others, the loss can be wholly placed upon the innocent True Owner, thwarting her moral claims, even those of the same creative artist whose talent and labor brought the artwork into existence and thereby established a powerful moral claim of property ownership under the Lockean labor theory so deeply rooted in American law.¹⁸⁵

The proposal set forth in the following section seeks to achieve a more just balance between the claims of the innocent artist (or other True Owner) and the innocent purchaser for value. This proposal also seeks to promote the legitimate public interest in public access to permanent title records for an art masterpiece. Ultimately, the proposal places the title to unique and valued artwork on the same level as that other unique form of property in Anglo-American law, the land parcel.

VI. PROPOSAL: A TORRENS-LIKE TITLE REGISTRATION AND ASSURANCE SYSTEM FOR ART OBJECTS

A. Background

Sir Robert Torrens of Australia devised the system of registered land ownership conclusively evidenced by a Certificate of Title.¹⁸⁶ The system

access to information about art theft. See Hawkins et al., *supra* note 156, at 54, 87-90.

184. *Guggenheim*, 569 N.E.2d at 429.

185. See *supra* note 126 and accompanying text.

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever . . . he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property* [T]his *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to

LOCKE, *supra* note 155, at 287-88.

186. DUKEMINIER ET AL., *supra* note 9, at 617.

has been imported to several American jurisdictions since 1895.¹⁸⁷ The fundamental Torrens concept is that a conclusive, governmentally guaranteed certificate of title will be issued pursuant to a court order after full due process (notice and hearing).¹⁸⁸ Following any applicable appeal period, the certificate of title represents legal finality in the determination of ownership and other interests in the registered parcel of land, all of which are memorialized on the title certificate.¹⁸⁹ Any person wrongly deprived of an interest in the land by reason of a Torrens system error will have recourse to an Assurance Fund to recover money damages equal to the interest lost.¹⁹⁰ Such an Assurance Fund was originally amassed from fees collected from users of the Torrens system as registration and filing fees.¹⁹¹ However, in one American jurisdiction with more than a century of successful Torrens land-title experience, the fund has been replaced by the statutory obligation of state government.¹⁹²

187. STOEBUCK & WHITMAN, *supra* note 7, at 923 n.2, 924 (listing all the states that have implemented the Torrens system of land title registration). For a very experienced registered land title jurisdiction, one should consult the Torrens system instituted in Minnesota (as operated by the “Torrens Department” in Hennepin County, Minnesota). See Hennepin County, <http://www.co.hennepin.mn.us/portal/site/HCIInternet/> (search “Torrens”; follow “Torrens Frequently Asked Questions” hyperlink) (last visited May 14, 2007) [hereinafter Hennepin County Torrens]. For a general discussion of the Torrens system, see DUKEMINIER ET AL., *supra* note 9, at 617-23; NELSON & WHITMAN, *supra* note 8, at 233-35; C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 64 (1988).

188. See STOEBUCK & WHITMAN, *supra* note 7, at 923-30.

189. *Id.* at 924-25; see also MINN. STAT. ANN. §§ 508, 508(A) (West 2006). Hereinafter, in discussing relevant land title Torrens elements, reference will be to the following: (1) the sample application to register land title under the Torrens system drawn from the Application for Registration in Hennepin County, Minnesota; and (2) the sample final decree of land title registration drawn from Order and Decree of Registration in Hennepin County, Minnesota. For the Torrens Application, see Hennepin County, Individual Application, *available at* <http://www.co.hennepin.mn.us/portal/site/HCIInternet/> (search individual application, follow “individual application” hyperlink) (last visited May 14, 2007) [hereinafter Torrens Application]. For the Torrens Decree, see Hennepin County, Order and Decree of Registration, <http://www.co.hennepin.mn.us/portal/site/HCIInternet/> (search “order and decree of registration”; follow “order and decree of registration” hyperlink) (last visited May 14, 2007) [hereinafter Torrens Decree].

190. See STOEBUCK & WHITMAN, *supra* note 7, at 929.

191. See history of §§ 508, 508A MINN. STAT. ANN. for the operation of the Torrens Assurance Fund prior to the 1989 adoption of § 508.77, providing for the monies to be paid into the general funds of the Minnesota State Treasurer and claims to become an obligation of the State.

192. See MINN. STAT. ANN. §§ 508.77-508.84; email from Edward Bock, Hennepin County Examiner of Titles, to Bruce W. Burton, Professor of Law (Nov. 20, 2006) (on file with author) [hereinafter Bock email (Nov. 20, 2006)]; email from Edward Bock, Hennepin County Examiner of Titles, to Bruce W. Burton, Professor of Law (Jan. 18, 2007) (on file with author) [hereinafter Bock email (Jan. 18, 2007)]. For the credibility of Hennepin County’s long experience with successful operation of its Torrens land title system, see STOEBUCK & WHITMAN, *supra* note 7, at 924, 930.

As with our current system of property titles generally and registered land titles in particular, the proposal described below envisions state-level control.¹⁹³ Each individual state would possess the power to create its own Torrens-like title system for art objects; to delegate administrative authority for the system to its counties or other political subdivisions as each state deems necessary; and to continue without altering its current rights and liabilities under prevailing inter-jurisdictional legal concepts such as choice of law, American constitutional doctrines such as division of powers, full faith and credit principles, and similar laws.

Lasting social values reside in establishing a Torrens-like registration system for valuable art. Each art work passing through a completed title registration can put to rest the provenance nightmare.¹⁹⁴ The position of the

193. For reference to individual state title registration laws, see STOEBCUK & WHITMAN, *supra* note 7, at 923 n.2, 924. It is not the intent of this proposal to suggest federal legislation creating a national title registration system for artwork. Since 1895 the tradition of Torrens registration of land titles has been implemented at the state level, usually with select counties in a state administering the system. *See id.* Similarly, it is not the intent of this proposal to change current conflict of laws doctrines, full faith and credit principles, or international recognition or enforcement of judgments rules. The rights and liabilities of registered property owners in an inter-jurisdictional context would not differ pursuant to a Torrens-like registration of artwork in, say, New Jersey, than if the property rights were vested pursuant to other New Jersey statutes and case law insofar as rival claimants from, say New York or the United Kingdom, are concerned. Under the proposal, New York, New Jersey, Massachusetts, California, and other states which enjoy active markets in artwork would not be expected to surrender their traditional local roles, nor achieve special inter-jurisdictional privileges respecting property rights. Similarly, it is beyond the scope of this Article to envision the creation of some global Torrens-type registration system established by international treaty. It is this Article's viewpoint that reform would best be built upon tested modalities, leaving to others the pursuit of a more universal utopia.

194. The registered ownership of Torrens land is only upset in extreme circumstances such as denial of due process in the initial registration. *See Konantz v. Stein*, 167 N.W.2d 1, 6 (Minn. 1969). Even title of a BFP is not protected by land Torrens registration where due process was breached by a failure to serve the owner-occupant. A reform system should protect the rights of the registered owner in the res itself only if owners' due diligence in registering the title had exhausted all reasonable archives in searching for other claimants, e.g., persons victimized by the Nazis during the Second World War, and provided all persons so identified with every reasonable notice including notices to the principal archive centers. In short, title registration of the art objects would be carried out with gimlet-eyed diligence. However, the point here is that any state could choose to craft its Torrens-like registration system for artwork to permit recovery of the object itself by the True Owner under certain facts and reduce the registered title owner to money from the Assurance Fund. It is suggested here that some legislatures may opt for that sort of procedure when a work of art has been diverted from its ownership as a result of the Nazi era, whereas other legislatures may not. A dated but revealing Minnesota Torrens case presents the classic requirements of due process in the context of title registration. *Id.* at 6. The Constitution imposes a duty to make rigorous inquiry as to all parties who might claim rights in the property, make direct personal service upon all persons who are found or reasonably might be found, and make service by publication only on persons unknown or not locatable. *See id.*; *see also State ex rel Douglas v. Westfall*, 89 N.W. 175, 177-78 (Minn. 1902). As the proposal in this Article makes clear, the rigorous inquiry as to artwork must include an expert's report showing that inquiry has been made into all of the established

holder of the recorded certificate of ownership is that of one whose property right is secured by a final court decree, thereby making the marketplace in art objects more stable and visible.

Moreover, the moral shortcomings of the present legal doctrines would be addressed by the reform proposal in several fashions. Adopting the proposal for title registration of valued artwork would avoid the all-or-nothing approach of the six prevailing doctrines.¹⁹⁵ In addition, Torrens provides the backup of an Assurance Fund to compensate any party wrongly injured in the administration of the system.¹⁹⁶ It would also prevent future moral conflicts arising between the rights of an innocent True Owner and a BFP.¹⁹⁷

B. Reform Objectives

By applying Torrens procedures to artwork and supplementing these procedures with important elements found in the private sectors of art title insurance, art authenticity protections, and ALTA land-title insurance, the proposed reform would advance a number of important goals.

1. Procedural Fairness

A Torrens-like title registration approach provides fundamental fairness to all interested parties in the sense that due process of law, including notice and an opportunity to be heard, would be observed during the initial title registration of each art object.¹⁹⁸ In registering land titles, this principle has had classic development in the Torrens system since 1902.¹⁹⁹ Offering procedural due process in the initial title registration offers fairness to both the innocent BFP and innocent True Owner, furthering a moral ultimate outcome.²⁰⁰ More importantly, once title to an art object is

archives in Europe and America. See *infra* note 248 and accompanying text.

195. See *supra* Part V.C. Recall that the six prevailing legal doctrines provide a variety of rules for resolving the problem of True Owner versus BFP and each is a winner-take-all approach. One hopes that no equity court will someday be moved in an art case to resurrect the ancient Roman law principle of "equitable division" (split the ownership of the res into two equal parts). See *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *7-8 (Cal. Super. Ct. Dec. 18, 2002). This split-ownership approach would be seriously flawed. Merely awarding half of the res each to the BFP and the True Owner would ultimately result in forcing a sale of the art object in the marketplace, splitting the cash proceeds between the two innocent parties, and allowing neither to retain ownership of the res itself.

196. See MINN. STAT. ANN. §§ 508.75-508.76.

197. For a discussion of the legal impossibility of an innocent BFP arising subsequent to the registration of the artwork's title, see *infra* note 201 and accompanying text.

198. See *supra* note 194.

199. See *Douglas*, 89 N.W. at 177.

200. Offering procedural due process would not in itself require any changes in state substantive law. For instance, in a Torrens-like art title registration in New York, with notice duly

registered, there cannot thereafter arise the tragedy of a conflict between two innocent parties since no BFP can exist once the True Owner's title is a matter of visible public records.²⁰¹

2. Monetary Compensation

By instituting a Torrens-like Assurance Fund, innocent parties whose rights to an art object might somehow be injured by the object's title registration or some error in the operation of the system can be monetarily compensated for their out-of-pocket loss.²⁰² This also addresses the moral shortcomings found in the six main doctrines currently used to adjudicate the rights of an innocent BFP against those of an innocent artist or other True Owner. Naturally, a money solution will never be seen as perfect by a party who feels strongly that ownership, and only ownership, of the art object itself will satisfy her deepest psychic needs and who views money as an unsatisfactory substitute. Absolute human perfection is not possible in such cases, but the land-title Torrens system resolved this very same dilemma in the nineteenth century by establishing monetary compensation for injured persons through an Assurance Fund.²⁰³

given to all parties, the resolution of the issue between the True Owner and the BFP seeking to register its title might turn on the nuances of the Demand Rule. In New Jersey, it might turn on the nuances of the Discovery Rule. In neither state would their prevailing rule or case law gloss be upset by Torrens-like registration. However, in both states, both the BFP and True Owner could receive due process and confront each other's claims if wrongly injured by the system. Both could have access to the Assurance Fund, and all of society would enjoy a court-ordered final title resolution that would be fair and conclusive.

201. In the recording acts of most jurisdictions and under the U.C.C., a party who purchases the property with actual or constructive notice of the interest of a paramount titleholder is not an innocent purchaser and cannot acquire the property free of the paramount holder's interest. *See* U.C.C. § 2-403 (2003); STOEBCUK & WHITMAN, *supra* note 7, at 879-91.

202. Out of caution against exposing the Fund to subjective arguments about the present increased value, it is recommended that the Fund should not be subject to speculative claims for appreciated fair market value. Rather, it should be capped at a recovery limited to the actual loss without an inflationary writeup.

203. This choice was made as to land from the very beginning of Sir Robert Torrens's land registration reform movement in the nineteenth century. *See* history of MINN. STAT. ANN. § 508.77 prior to adoption of state payment obligations in 1989 under § 508.77. Following age-old common law that each parcel of land is regarded as wholly unique, there is only one Greenacre on the planet. In the clash of two innocent parties with valid ownership claims, one or both injured by the operation of the Torrens system, one must settle for monetary compensation from the Torrens Assurance Fund, and the other innocent party is assured the enjoyment of full registered ownership of Greenacre. The proposal for a Torrens-like system for registered provenance of art objects applies this same moral logic to replace the all-or-nothing shortcoming found in the current doctrines with their varying tilts towards promoting either the marketplace and its population of BFPs or the True Owner.

3. Marketplace Transparency and Stability

Grasping the analog between land-title Torrens registration and a similar system for art lies in recognizing that both seek the same culmination: court-mandated finality. Under the proposed Torrens-like registration for art, conclusive ownership of a valued piece of art can be determined with finality, and a court-sanctioned certificate of ownership can be issued and filed in the public records.²⁰⁴ In addition to ownership of title to the res, a court determination of the authenticity of the artwork—at the registering owner's election—can also be permanently memorialized on the certificate of title and provide the desired marketplace stability and transparency.²⁰⁵

Details of how such a system could be organized to achieve these goals constitutes the balance of this Article.

C. Necessary Components

To be effective, the reform proposed by this Article should borrow several tested elements from well-functioning land-title Torrens systems and private sector insurance programs.

1. Examiner of Provenance

In many respects, the crucial cog in the land-title Torrens system is the staffing and maintenance of the office of Examiner of Titles led by an experienced and able attorney.²⁰⁶ In the reform proposal, an effective lawyer serving as Examiner of Provenance is necessary for the same reasons. Having an experienced attorney who has developed expertise in such matters is vital to the following: (1) effectively supervising the administration of due process and all other statutory procedures involved in initial and subsequent registration hearings, whether default or contested;²⁰⁷ (2) acting as the trial court's expert hearing officer for all

204. See MINN. STAT. ANN. § 508.35 (West 2006).

205. Neither an opaque marketplace nor burdensome information access are efficient or fair to the consumer. See FRIEDMAN & FRIEDMAN, *supra* note 4, at 226; Gordon & Kornhauser, *supra* note 4, at 786. Accordingly, the transparency of lasting public records—which would show the conclusively determined ownership, plus chattel liens and lesser interests in the artwork—provides an extremely healthy medicine for the art marketplace. And visible public records are backed up by a Torrens-like Assurance Fund for compensation to innocent injured parties, which should help provide greater stability in the artwork marketplace.

206. See, e.g., MINN. STAT. ANN. § 508.12; Hennepin County, <http://www.co.hennepin.mn.us/portal/site/HCIInternet> (follow “Environment, Property, & Transportation” hyperlink; then follow “Examiner of Titles” hyperlink) (last visited May 14, 2007) [hereinafter Hennepin County Examiner].

207. See, e.g., MINN. STAT. ANN. § 508.13; Hennepin County Examiner, *supra* note 206.

uncontested proceedings;²⁰⁸ (3) preparing all initial reports, proposed orders, and like materials for the court;²⁰⁹ (4) acting as a resource for all parties and their attorneys in advising them about the system, its procedures, and other pertinent information;²¹⁰ and (5) taking all of the necessary legal steps in the event of a claim against the Assurance Fund.²¹¹ The Examiner of Provenance should be assisted by court-appointed experts in art provenance whenever necessary or requested.

2. Application Procedures

Applications for policies of title insurance for artwork are currently available from certain insurers in the international art marketplace.²¹² Torrens registration also makes use of an extensive and carefully crafted application process.²¹³ Thus, a workable system of art title registration should borrow from private art title insurance and land-title Torrens application procedures.

There are five necessary elements: (1) full and complete written disclosure of all matters affecting title and authenticity in the

208. See, e.g., MINN. STAT. ANN. § 508.13; Hennepin County Examiner, *supra* note 206.

209. See, e.g., MINN. STAT. ANN. § 508.13; Hennepin County Examiner, *supra* note 206. The chief source will be, in the case of land titles, all public records and recorded documents pertaining to land title which can be viewed and copied in the public offices, including “liens, encumbrances, notices, and other interests that apply to any particular parcel.” See Michael Cunniff, County Recorder and Registrar of Titles, <http://www.co.hennepin.mn.us/portal/site/HCInternet> (search Michael Cunniff) (last visited May 14, 2007). Contrast this relatively open and easy system of configuring the chain of documents in a land title (abstracting the public record, if you will) to the complexity of artwork title chains. See *supra* Part III.

210. See, e.g., Hennepin County Examiner, *supra* note 206.

211. See, e.g., *id.*

212. There are three existing systems from which elements of this proposal are drawn. In private sector land title insurance, the elements of a standard policy of landowner’s insurance are drawn from the ALTA Standard Owner’s Policy of Title Insurance. NELSON & WHITMAN, *supra* note 8, at 237-42; AM. LAND TITLE ASS’N, OWNER’S POLICY 1-12 (2006), available at <http://www.alta.org/forms/download.cfm?formID=155&type=pdf> [hereinafter ALTA POLICY]. Private sector art title insurance elements come from Hiscox’s document entitled *Defective Title Insurance for Works of Art*. HISCOX SYNDICATES LTD., DEFECTIVE TITLE INSURANCE FOR WORKS OF ART (1998), available at <http://www.hiscox.com/Downloads/38fa5d51-79eb-459e-b77a-0a14b25de7a6.pdf> [hereinafter HISCOX POLICY]. The requirements for applying for such a policy are drawn from Hiscox’s document entitled Proposal [for] Defective Title [Insurance]. HISCOX SYNDICATES LTD., PROPOSAL: DEFECTIVE TITLE (1998) (on file with author) [hereinafter HISCOX APPLICATION]. The public sector elements of an application to register land title under the Torrens system are drawn from the Application for Registration in Hennepin County, Minnesota. Torrens Application, *supra* note 189; see also MINN. STAT. ANN. §§ 508.03-508.06. The elements of a final decree of land title registration are drawn from the Order and Decree of Registration in Hennepin County, Minnesota. Torrens Decree, *supra* note 189; see also MINN. STAT. ANN. §§ 508.22-508.23.

213. See *supra* note 189.

application;²¹⁴ (2) a continuing duty of disclosure from the initial application through to the court's final issuance of a certificate of registered ownership;²¹⁵ (3) use of sworn statements under oath as to all disclosures and representations;²¹⁶ (4) the threat of prohibiting recovery from the Assurance Fund and other sanctions to anyone who violates the first three elements;²¹⁷ and (5) the ongoing right of subrogation by the Examiner on behalf of the Assurance Fund if wrongful conduct—whether by the initial applicant, any expert or other witness, or following initial registration by some registered owner—was the cause of any loss to the Assurance Fund.²¹⁸

3. Chain of Ownership

Many difficulties are inherent in discovering whether the chain of ownership of an art object can be sufficiently established to make the title marketable.²¹⁹ It is difficult to determine marketability's financing

214. See HISCOX APPLICATION, *supra* note 212; Torrens Application, *supra* note 189.

215. All of the registering party's assertions made in the Torrens Application are under oath, all of which will be testified to under oath at the final hearing before issuance of the Torrens Decree. See MINN. STAT. ANN. §§ 508.03-508.06, 508.80. Thus, from start to finish, the Torrens applicant is under a sworn duty to state under oath all nine of the material factors respecting title to the land. See Torrens Application, *supra* note 189. As for similar requirements in the private land title sector, before any act or payment by an ALTA policy pursuant to "Proof of Loss or Damage," the ALTA title insurer has the right to examine the insured under oath and require the production by the insured of all relevant documents and records respecting all facts pertaining to the loss or damage caused by the alleged title defects. See ALTA POLICY, *supra* note 212, at 7-8. Finally, as to private sector art object insurance, though not under oath, the material declarations of the proposal for insurance are stated to be truthful and ongoing. HISCOX APPLICATION, *supra* note 212, at § 10(1)-(2).

216. See Torrens Application, *supra* note 189 (laying out sworn requests of the applicant in the initial unnumbered paragraph and also in the unnumbered paragraph following item I). Though the final Torrens Decree is an Order signed by the court, "the evidence adduced by the applicant(s)" is taken under oath at the hearing. Torrens Decree, *supra* note 189; see also MINN. STAT. ANN. § 508.80 (describing the consequences of fraud in procuring a Certificate of Title).

217. See MINN. STAT. ANN. § 508.80; HISCOX APPLICATION, *supra* note 212, at § 10(1)-(2); HISCOX POLICY, *supra* note 212, at Exclusions para. A & B; ALTA POLICY, *supra* note 212, at 3.

218. See NELSON & WHITMAN, *supra* note 8, at 242 n.1; ALTA POLICY, *supra* note 212, at 10; HISCOX POLICY, *supra* note 212, at Conditions para. 6 & 7. Actually, a subrogation clause is not needed since the insurer's rights of subrogation exist anyway under common-law principles of insurance law. See STOEBUCK & WHITMAN, *supra* note 7, at 922 n.27 (citing *Paramount Props. Co. v. Transamerica Title Ins. Co.*, 463 P.2d 746 (Cal. 1970)).

219. Marketable title is not a perfect title; rather it rests on "the reasonable reaction of the marketplace," meaning whether an informed and reasonably prudent buyer (more accurately, the attorney for the buyer) would decide in the marketplace to spend significant money to purchase it. See STOEBUCK & WHITMAN, *supra* note 7, at 775. Marketable title is not identical to insurable title, i.e., title an ALTA insurer would take the risk to insure for a stated amount. See *Conklin v. Davi*, 388 A.2d 598, 601-02 (N.J. 1978) (finding that the condition of insurable title was satisfied where a title insurance company vice president testified at trial that even though the seller's title was

corollary: would a prudent lender in the marketplace advance funds using the artwork as collateral?²²⁰ Tracing the potential ownership chains of the four versions of Constable's *The White Horse* discussed earlier²²¹ illustrates several difficulties. First is the need to use adequate resources—scientific and historic—from which to form expert judgments about the art object in point.²²² The tools of historians, archivists, biographers, curators, and scientists are called into play.²²³

As illustrated by the Frick version of *The White Horse*, even with the most solidly accepted research, inferences from known historic facts sometimes need to be drawn.²²⁴ The factual data about this piece depends in part upon estate records, journals, letters, and informed inferences.²²⁵ Even more dramatically, the NGA version of *The White Horse* contains a gap of nearly four decades, requiring specialized expertise to account for it.²²⁶ Whether spotty or solid, all relevant evidence of the chain of

imperfect “of record,” the company was willing “to insure the purchasers’ possession against claims of third persons”).

220. This question points to the legal intersection where the chain of ownership of an art object meets the chain of title to a parcel of land. The legal issue in each case becomes whether the ownership is sufficiently established to satisfy reasonably prudent purchasers in the marketplace, including lenders looking to the art or the land for collateral because the lender may someday become the owner of the artwork through chattel foreclosure and needs title stability when seeking to sell it in the marketplace. *See* *Trimboli v. Kinkel*, 123 N.E. 205, 206 (N.Y. 1919) (indicating that marketable title may be resold freely). Therefore, every lender wishes to obtain marketable title to the collateral, regardless of whether the res is land, artwork, or otherwise, in the interests of selling the same to recover its losses on any foreclosed loan; this desire by the lender explains why ALTA lenders’ title insurance policies are nearly universal in land loans. *See* NELSON & WHITMAN, *supra* note 8, at 236-37. For the details of some specific lender title concerns, see GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 580-81, 639-41 (4th ed. 2001); STOEUBUCK & WHITMAN, *supra* note 7, at 922 n.27.

221. *See supra* Part III.A-D.

222. *See supra* notes 22-26 and accompanying text.

223. *See supra* note 32 and accompanying text.

224. *See* Hector Feliciano et al., *Nazi-Stolen Art*, 20 WHITTIER L. REV. 67, 74 (1998) (discussing how claimants must rely on various sources, such as records, testimonies, and works of art history, to establish ownership).

225. An abstract of the chain of ownership of, for example, the Frick’s version of *The White Horse* would list facts drawn from a variety of sources and read something like this: The work was first sold by Constable to his friend John Fisher (who named it *The White Horse*); later repurchased by the artist; later in 1837, the work became part of Constable’s estate at the time of his death; then in 1838, purchased from the estate by executor Lancelot Archer-Burton; then inherited in 1852 by Lancelot’s eldest son Burton; then sold by Burton in 1855 for 630 pounds; and so on into the J. Pierpont Morgan ownership and thence to the Frick. *See supra* notes 47-51 and accompanying text.

226. For the title gap from Constable’s death in 1837 to his daughter Isabel’s transfer to Sir John Pender at some unknown time circa 1872, and the confusion caused by the handwritten note of Constable’s grandson Clifford Constable on the backside of the MFA version, see *supra* notes 67-80 and accompanying text. In any registration hearing, expert evidence necessarily must be taken on such matters, in the form of live testimony or sworn expert depositions, and a conclusive

ownership from the creative artist down to the time of the party registering its ownership must be taken and examined in the context of a judicial hearing. This is akin to the hearings in a land-title Torrens registration.²²⁷ The difference with art is that there is no abstract of title based on public land records.²²⁸ There is only the evidence derived from the multitude of interdisciplinary sources currently used, and those which science and history might develop in the future.²²⁹

4. Authenticity

In the business of providing private title insurance for artwork, the insurer customarily does not protect against loss due to the artwork being forged, misattributed, or otherwise not being an original work by the artist who was thought to be its creator at the time of the policy.²³⁰ In other words, if a BFP acquires a Constable landscape for \$2,000,000 and obtains a title insurance policy in that amount but the landscape is later revealed by expert examination to be the work of young Johnny Dunthorne (as in the MFA case²³¹), the insurer is not liable because it insured only the title to the physical object, not its authorship.²³²

decision reached. See John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 83-84 (1992).

227. See DUKEMINIER ET AL., *supra* note 9, at 619; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 588 n.68 (1988).

228. See Feliciano et al., *supra* note 224, at 74.

229. For scientific examination to determine authenticity, see *supra* notes 25-26 and accompanying text.

230. See email from Robert Read, Fine Art Underwriter, Hiscox Ltd., to Bruce W. Burton, Professor of Law (Nov. 24, 2006) (on file with author) [hereinafter Robert Read email (Nov. 24, 2006)]. Art title insurer Hiscox Ltd. (affiliated with Lloyd's) says that most persons acquiring valuable artwork will get a substantial expert's opinion and appraisal as to authenticity from the firm or expert as part of setting the valuation for acquisition. See *id.* Only the title will be insured by Hiscox. See *id.* Thus, if the work later turns out not to be authentic, the owner who relied on the appraisal will likely bring an action directly against the expert, not Hiscox. *Id.* If Hiscox were asked to provide authenticity insurance, it would use the same expert authentication process. *Id.* ("[Hiscox] wouldn't insure the authenticity of the work. We would be able to consider that separately but it is rarely bought as underwriters would insist on a valuation by a third party such as Sotheby's or Christies [sic] and most people are happy to go on that and seek recourse from them if the valuation is incorrect."); see also HISCOX APPLICATION, *supra* note 212, at para. 6 (stating that the insured party must disclose full details of the provenance process used to check the artwork prior to receiving it).

231. See *supra* notes 97-98 and accompanying text.

232. See Robert Read email (Nov. 24, 2006), *supra* note 230.

We have a stand alone defective title policy that can protect collectors and museums against the costs incurred defending a claim, as well as the financial loss up to the agreed value of the work if they find out they no longer have good title, and have to return the work to the rightful owners.

However, it is customary in the high-end art world for the purchaser to obtain an expert opinion or certification from an established house such as Sotheby's or Christie's.²³³ Thus, if it later turns out that the work was actually by young Johnny Dunthorne, not John Constable, the BFP's recourse would be a claim against Sotheby's or Christie's, whose experts had appraised it before purchase as a \$2,000,000 John Constable original, not a claim against the title insurance company.²³⁴ Only if the title was successfully challenged—say an insured BFP loses ownership of the piece itself to the True Owner under New York's Demand Rule²³⁵—would the liability of the title insurer come into play.²³⁶

If a special rider insuring the authenticity of the artwork is sold by the insurer, there are several risk management strategies of note. First, prior to issuing such a rider, the insurer would require expert certification of authenticity from an established private firm such as Sotheby's or Christie's,²³⁷ no doubt using the same network of experts the firm would have chosen in certifying authenticity directly to a private BFP prior to her acquisition of the piece. Accordingly, if authenticity is later successfully challenged, the insurer would recoup its losses by a claim—either by direct claim or subrogation—against the erroneously certifying expert, exactly as the BFP would have done in the normal course of things had the

Email from Robert Read, Fine Art Underwriter, Hiscox Ltd., to Bruce W. Burton, Professor of Law (Nov. 13, 2006) (on file with author) [hereinafter Robert Read email (Nov. 13, 2006)].

233. See email from Robert Read (Nov. 24, 2006), *supra* note 230 (discussing purchasers of valuable art obtaining expert authentication from Sotheby's or Christie's and the resulting liability of such companies if error later arises). Like all human institutions and experts, problems and even scandals can arise, see *supra* note 1, which is not to say society's functioning does not continue to require experts and institutions.

234. See Robert Read email (Nov. 24, 2006), *supra* note 230.

235. See *supra* note 177 and accompanying text (discussing the "Demand Rule" of the *Guggenheim* case).

236. See Robert Read email (Nov. 13, 2006), *supra* note 232. This is very much akin to the legal consequences under an ALTA Policy of land title insurance that, absent the purchase of special riders to the contrary, the title policy does not insure any feature of the land in question except its title. See ALTA POLICY, *supra* note 212, at 1. Thus, questions about its compaction quality, environmental suitability, encroachments by adjacent property owners, and parties in possession are excepted from coverage. See *id.* at 2; see also Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. COMP. & INT'L L. 7, 65 (2002). Specific exceptions from coverage can also be listed in Schedule B of the ALTA Policy if any particulars are itemized. ALTA POLICY, *supra* note 212, at 5. For a list of riders to an ALTA Policy which can be specially purchased available on the Internet, see ALTA Policy Forms Online, <http://www.alta.org/forms/> (last visited May 14, 2007). Similarly, a typical title policy respecting an art object does not insure the quality of the painting or its true authorship, and those valuation questions are left to the authenticity expert engaged by the purchaser. See email from Robert Read (Nov. 24, 2006), *supra* note 230.

237. See Robert Read email (Nov. 24, 2006), *supra* note 230.

certification run directly to the BFP.²³⁸

This Article proposes that, at the election of the person registering the title, authenticity as well as title should be covered by a Torrens-like registration system.²³⁹ The normal processes by which authenticity is established would be required as in the private insurance process—reliable expert certifications of authenticity based on established practices: expert aesthetic examination, x-radiographs, and chemical analysis,²⁴⁰ including such new scientific methodologies as may emerge in the future and become accepted practices in the art world.²⁴¹ Of course, all costs would

238. See *id.*; Robert Read email (Nov. 13, 2006), *supra* note 232. The title company's claim would be made directly or by way of subrogation. For a discussion of art and land title insurers and subrogation clauses and principles, see *infra* notes 307-09 and accompanying text.

239. Most owners of valuable art who determine to use a Torrens-like system of art registration would proceed to register both title and authenticity as this would enhance marketability in the art world and help to permanently fix the authenticity foundation which, along with the physical condition of the artwork, determines value. See *supra* notes 204-05 and accompanying text. An original Constable landscape in good condition may be worth millions but a Johnny Dunthorne imitation may be worth only a fraction of that amount. Recall that Professor Rhyne, in order to examine the Dunthorne copy, had to physically locate and remove the MFA's version of *The White Horse* from the museum's basement storage area—a fate unimaginable for a work which had been conclusively established in court as a genuine Constable. See Rhyne, *supra* note 19; email from Sabrina Abron, *supra* note 19. For a discussion of the MFA's authenticity issues, see *supra* notes 86-92 and accompanying text.

240. Scientific tools to determine authenticity include x-radiography and the processes of chemical analysis to ascertain and date what materials were used. Leonard D. Duboff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 987-97 (1976) (discussing scientific methods of authentication). To determine authenticity, the following general questions should be examined using scientific analysis: What was the composition of the canvas and other raw materials? Are there any tracings of underpaintings, sketches, or some re-use of an earlier canvas? What are the paint pigments and the additives used, and do they match the known uses of that historic period? Similarly, were the glues, nails, or other fastening materials correct for the historical time period of the work of art? Constable experts also must discern whether the art piece in point is genuinely by the artist himself, the artist plus assistants, later followers of the artist, or by persons working “in the school of” or “in the manner of” the artist whose works may be mistaken for works by Constable. Then, there is also the problem of forgeries and fraudulent imitations. Ultimate authenticity of the piece is a determination that requires a lifetime of expertise in the nuances of the particular artist, his history, his associates, and their nuances. For the need of expertly-nuanced aesthetic examination, see Cove, *The Painting Techniques*, *supra* note 23, at 52-60. The MFA's 3.5-foot version of *The White Horse* and the expert analysis by Professor Charles Rhyne provides another excellent example. See Rhyne, *supra* note 19. All such evidence of authenticity of the art object as a product of the alleged artist would be weighed in the context of a judicial hearing with notice to all interested parties. See *supra* notes 226-28 and accompanying text. There is no counterpart to authenticity of the res in a land title Torrens registration proceeding. See *supra* notes 9-10 and accompanying text. In a Torrens-like art title registration, all such evidence would come from the expert scientific, aesthetic, and other interdisciplinary sources currently in use at the time of the hearing. For a fuller discussion of scientific tools in examination of artwork, see *supra* notes 23-26 and accompanying text.

241. See *Jackson Pollock Fractals*, *supra* note 25 (exploring the use of fractal geometry in

be borne by the party who is registering the artwork.²⁴²

In the event of a loss caused by an erroneous certification of authenticity, this Article proposes that the Examiner be authorized to proceed against the firm certifying authenticity on behalf of the Assurance Fund to recover the Fund's losses, exactly as in cases involving a private title policy with an authenticity rider.²⁴³

The benefits of including not only title but also, at the owner's election, authenticity in the proposed registration system would be four-fold: (1) to promote the social interest in finality by establishing in court with a high degree of expertise the true authorship of the particular work of art; (2) to eliminate the registered owner's risk of non-recovery because of a future insolvency or dissolution of Sothby's, Christie's, or another expert, rendering worthless its private certification of authenticity; (3) to eliminate the risk that some future statute of limitations or other legal theory may void the protection of a private firm's certification of authenticity; and (4) to eliminate the risk over time of eventual loss or destruction of the owner's private documentation and necessary records, as a Torrens-like title assurance system can provide a permanent, official, public, and governmentally protected record, not only of the ownership of title, but also of the authenticity of the registered artwork.²⁴⁴

identifying the "fingerprints" of Jackson Pollock, similar scientific work in Europe on Monet's paintings, related advanced work with Chinese art, and the emerging "fertile area" of quantum field philosophy in analyzing artwork). Dr. Richard Taylor, of the University of Oregon's Physics Department, has pioneered the interdisciplinary approach of applying fractal research and chaos theory in determining the "fingerprints" revealed in art, particularly those of Jackson Pollock. *Id.* For an introduction to Dr. Taylor's fractal analysis applied to artwork and other aesthetic matters, see Richard Taylor, <http://materialsscience.uoregon.edu/taylor/taylor.html> (last visited May 14, 2007). For a recent exploration of visual landscape aesthetics measured by fractal characteristics, see Hagerhall et al., *supra* note 25, at 247-55.

242. By analogy, in land title Torrens registration proceedings, the burden of providing abstracts, surveys, and other title evidence is upon the party seeking to register the title. See STOEBUCK & WHITMAN, *supra* note 7, at 925-26. For a guide to Torrens proceedings, including the costs to register in Hennepin County, Minnesota, see HENNEPIN COUNTY, INSTRUCTIONS FOR CONDUCTING LAND REGISTRATION (TORRENS) PROCEEDINGS 1-16 (2005) [hereinafter LAND REGISTRATION INSTRUCTIONS], available at <http://www.co.hennepin.mn.us/files/HCInternet/Static%20Files/100686147Land%20RegistrationInstructions2005.pdf>. For ongoing charges once title has been registered, see MINN. STAT. ANN. § 508.82 (West 2006).

243. For a discussion of seeking direct recovery or subrogation under the ALTA Policy or Hiscox Policy, see *infra* notes 307-09 and accompanying text.

244. For information about the public records and the custody, indexing, and storage of Certificates of Title and other materials under the Minnesota Torrens system, see MINN. STAT. ANN. §§ 508.34-508.381.

5. Court Procedures

Normal rules of civil procedure would apply with the addition of those special statutory-based powers of referral granted by the court to the Examiner of Provenance as the initial court-appointed hearing officer. In land title registration, the major due process hazards are failures to give notice to either the parties actually in possession of the land or to the parties overlooked by the Examiner's review of the public land records.²⁴⁵ The owner seeking to register the art object must show actual possession as part of the hearing, so the possession issue is removed, leaving the public records matter.

There are no public title records for artwork as there are for land, but there are repositories of needed information. Thus, the Examiner should name a well-credentialed expert (or experts) in art history and provenance research respecting the specific artist involved. The expert would then have the duty to assist the court and file a written report of the results of her expert search of all appropriate registries and other provenance sources. The expert's report should identify all persons, classes, or entities with any relationship to the work of art. These reports would provide the baseline for the necessary service of process requirements.²⁴⁶

a. Service of Process Generally

Service must be made on all persons noted in the Application for Registration, the expert's report to the Examiner of Provenance, and matters revealed by both the court-appointed expert and a consultation with archives.²⁴⁷ Also, all persons who might have an interest in the art object as noted in the various art registries and archives should be served. The expert should ascertain the identities of all interested persons by using the highest art provenance standards of due diligence, including consultation with the large registries and archives in America and Europe that contain vital information about artwork.²⁴⁸ Any sources which are not explored in the expert's report but that the Examiner feels might provide

245. See, e.g., MINN. STAT. ANN. §§ 508.12-508.13. For a discussion of procedural fairness in the land title registration process, see *supra* notes 198-201 and accompanying text. Also, for a detailed look at the role of the Examiner of Titles, see *supra* text accompanying notes 206-11.

246. Some general highlights of what might be expected from court-appointed expert provenance investigations are set forth in the attached Appendix.

247. In land title Torrens registration, the Examiner has access to all the public records and can compile a list of all parties to be served from these and other resources such as the Application or county surveyor reports. See LAND REGISTRATION INSTRUCTIONS, *supra* note 242, 4-10 (describing service of process requirements and sources thereof). For expertise in archival research, see *supra* notes 123-26. For a guide to provenance research, see YEIDE ET AL., *supra* note 2.

248. The entire due diligence in searching title of art objects is essential. Some interested parties use commercial title searching firms. See YEIDE ET AL., *supra* note 2, at 5; *supra* note 126.

important information should also be consulted, with evidence also provided directly from the registry administrators as well as from court-appointed experts.²⁴⁹ When a party cannot be located, or as to parties not identifiable by name for personal service or service by mail, service of process by publication will be deemed to satisfy the demands of due process, as in other civil matters.²⁵⁰

b. Nazi-Impacted Artwork and Service of Process

Because of the uniqueness and scope of the Nazi looting and extortion problem,²⁵¹ it is recommended that service of process, including a photograph of the art object being registered, always be served upon those parties and archival resources that are devoted to sorting out ownerships ensnared by acts of Nazi criminality.

In the interest of fairness, the Torrens-like art registration system must establish several vital procedures, including use of a court-appointed expert in art provenance to investigate all of the American and European agencies and clearing houses which are repositories for Holocaust and other war-related artwork information.²⁵² The expert's report must be directed at identifying "red flag" names and events, and at compiling reliable lists of the names and known addresses, if any, of persons, families, institutions, and others related to the art object in point.²⁵³ The report must also include reference to all archival sources that are listed by the American Association of Museums, the Art Libraries Society of North America, the Society of American Archivists, and others as being engaged

249. In land title Torrens registration, the Examiner of Titles issues an Examiner's Report noting all those to whom notice of the registration hearing must be given. See LAND REGISTRATION INSTRUCTIONS, *supra* note 242, at 5, § 4. This Article proposes that the same would be true in a Torrens-like title registration for an art object. For an example of the content in an Examiner's Report, see *id.*

250. See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); see generally Dustin G. Hall, Comment, *What to Do When a State Fails to Take Notice That Its Notice Has Failed?*, 59 FLA. L. REV. 453 (2007) (discussing due process notice requirements in light of the Supreme Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006)). For service of process issues in a Torrens registration setting, see *Konantz v. Stein*, 167 N.W.2d 1, 7 (Minn. 1969); Note, *Due Process Notice Required for Real Estate Tax Sales*, 49 MO. L. REV. 385 (1984) (discussing due process requirements in a property tax foreclosure proceeding). If a party's identity and address are known, then notice by publication will not provide sufficient due process. See, e.g., *Mullane*, 339 U.S. at 318. These principles should be followed in art title registrations in order to provide due process of law and assure that maximum procedural fairness will be done to the persons holding paramount ownership claims to the registering BFP or other party.

251. For a discussion of Nazi art expropriation and forged provenance records, see *supra* notes 124-28 and accompanying text.

252. See *supra* note 123.

253. See YEIDE ET AL., *supra* note 2, at 50-54.

in post-war restitution efforts.²⁵⁴

To all such persons and entities, due process notice must be given, providing an opportunity to be heard at the art title registration hearing. In this way, an art object that is claimed by the heirs of a Holocaust victim or someone whose art was looted or extorted by officers or operatives of the Third Reich would have the maximum chance of receiving notice and an opportunity to be heard during the registration process.

Finally, there is the delicate issue of best providing fine-tuned justice for art-owning families victimized by the Holocaust era. When the rights of a modern innocent BFP of an art work collide with an innocent True Owner whose title claim dates back to an ancestor exploited during the Nazi era, the law is faced with a heightened tragedy of choices. Special statutes of limitations may be designed in jurisdictions which are especially sensitive to this problem.²⁵⁵ Also, by installing a Torrens-like title system for artwork, society will have gone about as far as humanly possible to avert tragedy by providing the fullest due process possible in the title registration process. And in the rare case of a registration-caused injury, the Assurance Fund will provide monetary relief to the loser in the battle of right versus right.²⁵⁶

254. See *supra* note 126.

255. There is established legislative precedent for diverse time periods within the Torrens land title registration system. See MINN. STAT. ANN. §§ 508A.01-508A.85 (West 2006) (marrying title registration with the statutes of limitation, which, in turn, ripen adverse possession). In possessory title registrations under § 508.01, the final Order and Decree of Registration signed by the court becomes final after expiration of five years as to all parties served with notice of possessory title registration. *Id.* § 508A.01. Under the possessory title registration process, the system does not require a full Torrens hearing immediately, which would result in a final Order and Decree of Registration. See *id.* Instead, service of process is made on all parties and a temporary certificate of title is issued to the applicant who remains in possession of the land. See *id.* This limited certificate of title, ripening over time, becomes a fully effective title certificate on a “day forward” basis—that is to say after the expiration of a certain period of years. Some of the varying expirations are as follows: fifteen years in an older version, § 508A.01 (amended 1996), five years in the current version, § 508A.01 (2006), and twenty years as suggested by one source, NELSON & WHITMAN, *supra* note 8, at 235 n.79. For a more detailed discussion of possessory title registration under the Torrens system, see Note, *Possessory Title Registration: An Improvement of the Torrens System*, 11 WM. MITCH. L. REV. 825 (1985). Because of the possessory nature of the Section 508A registration, the problems of constitutional due process that arose under *Konantz* do not exist. See *Konantz*, 167 N.W.2d at 6.

256. The Torrens system has determined that the holder of a registered certificate of title has conclusive evidence of title. See *supra* notes 189-90 and accompanying text. Any paramount claimant (apart from some claimant whose constitutionally protected property rights have been ignored because of failure to provide due process of law) injured by the system has recourse to money recovery from the Assurance Fund. See *supra* notes 198-202 and accompanying text.

6. Antiquities Excluded

For a variety of valid reasons, this proposal is not intended to cover valuable antiquities retrieved from ancient tombs, temples, archeological digs, and early dumpsites. Rather, this proposal intends to cover only art objects—mainly European and American. It seems prudent not to ensnarl a system of registered art provenance with cultural antiquities due to the scandalous international situation respecting smuggled objects; the flagrant violation of numerous laws prohibiting removal of national antiquities and other cultural treasures from Egypt, Greece, Turkey, and other countries; the laundering of smuggled items by illegal sales networks with the complicity of some of the world's most prestigious art houses; and violation of treaties and other international prohibitions against such commerce.²⁵⁷ Moreover, determining what parties to serve when dealing with a piece of unattributed antiquity, cunningly smuggled out of its nation of origin in violation of national law and treaties, would be a near impossibility as well as an international jurisdictional nightmare.²⁵⁸

7. Final Certificate of Ownership

Just as the processes involved in the land-title Torrens system results in a Certificate of Title to the land,²⁵⁹ any effective Torrens-type system registering title to valued artwork would result in a Certificate of Ownership, with one crucial difference. Apart from the determination of title to the art object, this Article proposes that the Certificate of Ownership would also indicate the court's determination of authenticity

257. See generally Daniel W. Eck et al., *International Cultural Property*, 36 INT'L LAW 607 (2002) (discussing the international problem of the illicit market of artworks, antiquities, and other cultural property, as well as recent developments in the field of cultural property). The international snarl of smuggled antiquities is well-documented. See generally MASON, *supra* note 1 (discussing the Sotheby's-Christie's price-fixing scandal that involved auctioning off antiquities); WATSON, *supra* note 1 (discussing how Sotheby's often failed to examine titles of ownership, which lead to the illegal auctioning of antiquities). For a sample of the complexity of international trade in cultural property, see for example, *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 279-81 (7th Cir. 1990); *Republic of Turk. v. Metro. Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990); LERNER & BRESLER, *supra* note 149, at 545-77; Claudia Fox, Note, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y. 225, 225 (1993); General Conference of UNESCO, Nov. 14, 1970, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, available at <http://www.interpol.int/public/workofart/convention/wounesco.asp>.

258. For an overview of the legal snarls pertaining to international antiquities as cultural property, see, for example, 22 U.S.C. § 2459 (2000); Ashton Hawkins et al., *Who Is Entitled to Own the Past?*, 19 CARDOZO ARTS & ENT. L.J. 243, 243-44 (2001); John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831-33 (1986).

259. See MINN. STAT. ANN. § 508.35.

of the work at the application of the title-registering owner.²⁶⁰ As a matter of economic efficiency and fairness, the visibility and permanency of these Certificates of Ownership would provide significant benefits to the marketplace.²⁶¹

The final Torrens-like Certificate of Ownership of an art object will include key elements drawn from private artwork title insurance policies, private ALTA land title insurance policies, and existing Torrens practices for registered land. The following matters should be memorialized on the initial Certificate of Ownership's face, or incorporated therein by reference with the referenced materials permanently retained in the court file:

1) Title of the art object has been registered pursuant to the provisions and operations of the statute creating the Torrens-like registration system.²⁶²

2) Current ownership of the art object, together with any current liens, pledges, or other encumbrances determined in the court registration hearing with changes as filed of record from time to time memorialized on any then-current Certificate of Ownership.²⁶³

3) Court's finding of authenticity—if registration of authenticity was applied for by the registering party—backed up in the court's registration file by expert reports, and other evidence of authenticity presented in the hearing.²⁶⁴

4) Detailed description of the art object accompanied by digital photos from the court's title registration file where appropriate, plus x-rays, chemical analyses, and other scientific and aesthetic reports.²⁶⁵

5) Special identifying information, including all unique fingerprints, scientific or aesthetic, which assist in the identification of the particular piece.²⁶⁶

6) Actual possession, including an explicit finding by the court that the owner registering the art object held actual possession at the time of

260. For current authenticity practices in the art title insurance area, see *supra* notes 230-38 and accompanying text.

261. Marketplace transparency is essential to efficiency. See FRIEDMAN & FRIEDMAN, *supra* note 4, at 226; THE MIT DICTIONARY OF MODERN ECONOMICS, *supra* note 4, at 78; Gordon & Kornhauser, *supra* note 4, at 786.

262. See, e.g., MINN. STAT. ANN. § 508.35; TORRENS DECREE, *supra* note 189.

263. See MINN. STAT. ANN. § 508.35.

264. Whether Sotheby's, Christie's, or other authenticating experts are used, the expert certification would be as valuable to the Torrens department in authenticating art objects and for purposes of recovery in the event of erroneous authentication as in the private sector. For authenticating experts in the art title insurance area, see *supra* notes 230-38 and accompanying text.

265. See HISCOX APPLICATION, *supra* note 212; HISCOX POLICY, *supra* note 212.

266. For a discussion of scientifically-determined artistic fingerprints, see *supra* note 25 and accompanying text.

registration.²⁶⁷

7) Certificate of the appraised value by court-approved expert appraisers, if authenticity certifications exist by the same firm or experts.²⁶⁸

8) The report of the expert(s) appointed by the Examiner to assist the court in providing the identity of appropriate persons, classes of persons, or entities who were to be served on the issue of ownership (and authenticity if that was registered).²⁶⁹

9) The court's finding that all necessary searches of art archives were completed, all necessary or proper parties were served, other jurisdictions embracing artwork title registration systems were formally contacted, and the case was uncontested, or if contested, that all issues were determined.²⁷⁰

10) The rights of the Examiner of Provenance to defend title—and authenticity, if registered—of the art object on behalf of the registered owner and the Assurance Fund.²⁷¹

11) Major alterations, including any damage, change, repair, restoration, or substitution—e.g., the MFA's removal of the Clifford Constable handwritten history from the back of its version of *The White Horse*.²⁷²

12) Subrogation rights, accruing at the time of initial registration or in the future, of all claims which have arisen or may thereafter arise in favor of the current or any past registered owner so that the Examiner of Provenance may seek recovery for any payments made or costs expended on behalf of the Assurance Fund arising from any actionable error or misrepresentation, from any third parties (including claims against any current or past registered owner, and any insurer thereof, whose breach or failure of disclosure was a cause of loss). All recoveries made should be retained by the Assurance Fund.²⁷³

267. See MINN. STAT. ANN. § 508.06; TORRENS APPLICATION, *supra* note 189, at para. E.

268. See MINN. STAT. ANN. § 508.06; HISCOX APPLICATION, *supra* note 212, at para. 4.

269. For a discussion of court-appointed provenance experts that determine title evidence and persons to be served, see *supra* notes 245-50. For a discussion of experts in certification of authenticity, see *supra* notes 230-38 and accompanying text.

270. See TORRENS DECREE, *supra* note 189, at para. 2. For a discussion of the due process notice issues as between differing Torrens-type art title registration systems, see *supra* note 250 and accompanying text.

271. See ALTA POLICY, *supra* note 212, at para. 4; HISCOX POLICY, *supra* note 212, at para. 3.

272. For a discussion of the MFA restorers' removal of the handwritten memorial written on the rear of its version of *The White Horse*, see *supra* notes 86-93 and accompanying text. For a discussion of various accrued blemishes, aging scars, and unfortunate human interventions on the John Constable six-footers, see Cove, *The Painting Techniques*, *supra* note 23, at 66-67.

273. For a discussion of subrogation principles, see *infra* notes 308-10 and accompanying text.

13) Conclusive agreement by all registered owners, and all others holding an interest in the art object, on the choice of law.²⁷⁴

14) Specific Exclusions, including the requirement that no claims shall be made against the Assurance Fund for any of the following: (1) undisclosed matters known to a registered owner either before acquiring the art object or before the issuance of the initial Certificate of Ownership;²⁷⁵ (2) physical loss or damage to the work of art;²⁷⁶ (3) claims made against the registered owner by any creditor, spouse, related person, or entity with an interest in the registered owner's assets, business, or operations.²⁷⁷

Following the initial ownership registration, there will be an inevitable need for future memorials or other revisions of the initial Certificate of Ownership. As time passes, ownership changes, new encumbrances, and other revisions to a Certificate of Ownership will arise. Just as the so-called "proceedings subsequent practices" under a Torrens land title system are used to address future events,²⁷⁸ a Certificate of Ownership for artwork must be also be adaptable to the future. Such future elements would include the following:

1) From time to time, as new scientific methods such as high-magnification fractal identification and quantum analysis are added to the accepted quiver of tools for scientific analysis of artwork, such methods should be undertaken at the expense of the registered owner, and the relevant results should be permanently memorialized on the Certificate's face, or incorporated therein by reference with the materials permanently retained in the court file.²⁷⁹

2) Future encumbrances, including any liens, pledges, charges, or other encumbrances arising after the initial registration, should be registered and memorialized (at the registered owner's expense) on the Certificate's face, or incorporated therein by reference with the referenced materials

274. Choice of law would presumably always be that of the state enacting a Torrens-like registration process for artwork and issuing the Certificate of Ownership. For a comparable choice of law clause in the private art insurance arena, see *HISCOX POLICY*, *supra* note 212, at Conditions para. 10.

275. For similar policy exclusions, see *ALTA POLICY*, *supra* note 212, at Exclusions from Coverage para.3; *HISCOX POLICY*, *supra* note 212, at Exclusions para. A, B.

276. For similar policy exclusions, see *HISCOX POLICY*, *supra* note 212, at Exclusions para. H, I.

277. *See id.* at Exclusions para. C-E.

278. For proceeding subsequent practices in Hennepin County, Minnesota's land title Torrens system, see *HENNEPIN COUNTY, INSTRUCTIONS FOR CONDUCTING PROCEEDINGS SUBSEQUENT TO INITIAL REGISTRATION IN HENNEPIN COUNTY, MINNESOTA (2005)*, available at [http://www.co.hennepin.mn.us/portal/site/HCIInternet/\(search "Proceedings Subsequent"; follow "Proceedings Subsequent to Initial Registration" hyperlink\)](http://www.co.hennepin.mn.us/portal/site/HCIInternet/(search%20%22Proceedings%20Subsequent%22);follow%20%22Proceedings%20Subsequent%20to%20Initial%20Registration%22%20hyperlink).

279. *See supra* notes 25-26 and accompanying text.

permanently retained in the court file.²⁸⁰

8. Fee System

In land-title Torrens, substantially all costs are carried by user fees in the form of court costs and attorney's fees.²⁸¹ The original Torrens Assurance Fund was also a function of special user fees.²⁸² By analogy, the costs of a Torrens-style system for registration of title to art objects, including court costs and all expert report fees, should be borne by its users. If a state so chose, it would be possible to cut some initial registration court costs by adopting a "possessory artwork" approach to title registration similar to the possessory title registration system.²⁸³

In the event that subsequent matters become necessary after the initial registration (such as the "Future Fingerprints" or "Major Alterations" noted above), such costs should also be borne by the registered owner.²⁸⁴

280. For examples of ongoing memorialization of future recording of liens and other encumbrances and issuance of new Certificates as to land title Torrens Certificate of Title, see MINN. STAT. ANN. §§ 508.47, 508.52-508.60, 508.67 (West 2006).

281. See *STOEBUCK & WHITMAN*, *supra* note 7, at 926 n.9. For an example of current registration costs and filing fees in a land title Torrens jurisdiction, see MINN. STAT. ANN. § 508.82. For information about the fee/cost materials for the Torrens Department in Hennepin County, Minnesota, see HENNEPIN COUNTY, DETAILED TORRENS FEE SCHEDULE (2006) [hereinafter *TORRENS FEE SCHEDULE*], available at <http://www.co.hennepin.mn.us/portal/site/HCInternet/> (search "Document Recording Detail"; follow "Document Recording Detail-Registrar of Titles" hyperlink).

282. See Edward Bock email (Nov. 20, 2006), *supra* note 192.

283. Apart from initial court costs (and any subsequent filing fees for transactions from time to time), there would be no added costs over what guarantees of both authenticity and art title insurance would cost in the private sector for each transaction. For both elements—separate title insurance and authenticity certificate—of the owner's usual undertakings, see Robert Read email (Nov. 13, 2006), *supra* note 232; Robert Read email (Nov. 24, 2006), *supra* note 230. Initial court costs in bringing a valuable art object into the registration system would have the lasting benefits to the owner and the marketplace. See *supra* note 205 and accompanying text. If any jurisdiction so chose, its art title registration could save most court-hearing costs except in contested cases. This could be achieved by using the possessory title registration approach. See MINN. STAT. ANN. §§ 508A.01-508A.85. In a 508A-type process, the registration applicant who is holding possession of the art object can apply for registration. See § 508A.01. This triggers the normal procedures. But after an Examiner of Provenance report is issued and service of process is made on all persons holding any potential interest, a temporary Certificate of Ownership would be issued. See § 508A.13. This temporary Certificate would ripen into a full and final Certificate after expiration of a Statute of Limitations unless a party given notice contacted the Examiner of Provenance. See § 508A.85. In which case, the matter would be scheduled for full hearings as a contested case. At its core, this approach marries an adverse possession approach with its statute of limitations to a title registration process.

284. This is the analog to filing fees and costs of subsequent proceedings to memorialize various future changes on Torrens land title Certificates of Title. See MINN. STAT. ANN. § 508.82; *TORRENS FEE SCHEDULE*, *supra* note 281.

9. Assurance Fund

Historically, the land-title Torrens registration system was funded to pay claims against the system by means of an Assurance Fund.²⁸⁵ The 106-year Minnesota experience with land-title Torrens has shown very few claims against the Assurance Fund.²⁸⁶ This is no doubt a tribute to the diligence with which the various County Examiner of Titles offices have proceeded in seeking proper identification and service of process on all parties having an interest in the claim and affording them an opportunity to be heard.²⁸⁷

As an additional financial precaution, any jurisdiction so inclined could require coinsurance, set an added period of time following completion of the initial registration and expiration of relevant civil appeals periods before the fund was placed at risk,²⁸⁸ or do both. This would provide parties who feel that their rights were overlooked or abused in the initial registration an additional period to assert their claim. In the main, however, claims would likely arise only in the event of negligence in the administration of the system—e.g., failure to post some transfer or lien in the recording office.²⁸⁹ It is doubtful many claims would arise by a True

285. See MINN. STAT. ANN. § 508.75. Hennepin County was chosen as the model because it is the flagship of the country's "best-functioning Torrens system." See STOEBUCK & WHITMAN, *supra* note 7, at 926 n.9. For citations to various statutory provisions of the former Assurance Fund from 1901 to 1989, before the State took over the monies paid in by Torrens users and the obligation for direct payment to injured parties under § 508.77, see the reviser's statutory history published in the annotations of MINN. STAT. ANN. § 508.01. In 1989, after positive experiences since 1901, Minnesota decided to assume the Assurance Fund and its stream of fee revenue directly into its general fund. See *id.* § 508.75. It also decided to take direct responsibility if any claims were asserted. See *id.* § 508.77.

286. See Bock email (Jan. 18, 2007), *supra* note 192.

287. If a party is properly served and fails to appear, or fails to prevail in a contested matter, and the appeals period has lapsed, such result becomes *res judicata* as to that party's claims in the matter. See *Konantz v. Stein*, 167 N.W.2d 1, 4-5 (Minn. 1969). For contested cases in Hennepin County, Minnesota, see HENNEPIN COUNTY, CONTESTED TORRENS CASES (2004), available at <http://www.co.hennepin.mn.us.portal/site/HCIInternet/> (search "Contested Torrens Cases"; follow "Contested Torrens Cases" hyperlink).

288. See, e.g., MINN. STAT. ANN. § 508A.01 (dictating five year waiting period following completion of the initial registration and expiration of relevant appeals before the fund is placed at risk).

289. See Edward Bock email (Jan. 18, 2007), *supra* note 192. Before the State of Minnesota Treasurer took over payment of claims, there was one paid from the Assurance Fund in the late 1970s for a misfiled mortgage. *Id.* That would have nothing to do with the system's due process in its registration process but merely negligence by a Hennepin County filing clerk. After the State took over liability for funding land title Torrens claims, a similar claim for a negligent county error was also paid in the 1980s by the Minnesota State Treasurer. See *id.* Hennepin County's historic experience (from 1901 to 2007) shows that a properly administered Torrens registration system need not place the public fisc at any great risk. Such claims under an art title registration system

Owner against a registered owner after a properly completed registration.²⁹⁰

From 1901 to 2007, almost no claims were made against the Hennepin County, Minnesota Fund—a testament to the care with which the system was designed and maintained.²⁹¹ Although the Fund initially accrued money in the event of a claim by means of fees charged for each transaction within the county Torrens system, after the State took over funding claims, the monies collected were sent to the State Treasurer.²⁹²

As an underwriting matter, it is proposed that the fees charged for registering and transferring valuable artwork be sufficient to create an Assurance Fund reserve to pay any claims, exactly as a private insurer must in order to build its reserve against a possible future claim. The Fund could also be used to purchase co-insurance.²⁹³ It is also proposed that a Torrens-like system of title registration for art should eventually be constructed with the full faith and credit of government, backing any loss occasioned by some bizarre lapse in the system which injures someone

would be the equivalent of the registered owner of the artwork using it as security for a loan and the lender being injured by a clerical failure to file the lender's chattel lien properly against the registered title. Even apart from Torrens registration, in most states, a clerical misfiling of a material document is already an actionable tort by the injured party against the clerical employee or the government; what the Torrens system does is make the remedy statutorily explicit and secure. *See* STOEBUCK & WHITMAN, *supra* note 7, at 870 n.5. Unlike Minnesota's positive track record with its effectively managed system, California's experience with its land title Torrens system prior to 1937 consisted of registering 10,000 titles in four counties. *Id.* at 924 n.4. But in that year, a single claim of \$48,000 wiped out the state's Assurance Fund, and California promptly repealed its system. *Id.*

290. *See* STOEBUCK & WHITMAN, *supra* note 7, at 924-25. With proper notice as required by due process, the main rule is the conclusive settlement of the registered title. *See Konantz*, 167 N.W.2d at 4-7.

291. *See supra* note 289.

292. *See* MINN. STAT. ANN. § 508.75.

293. Additionally, some portion of the Assurance Fund fees could eventually be used to purchase policies of co-insurance from Lloyd's of London or other large scale re-insurers in the marketplace. These natural steps occurred in the evolution of the land title Torrens Assurance Fund. In the 1980s, perhaps with fears that land price inflation could spawn a massive land title claim in Minnesota, the then Examiner of Titles for Hennepin County's Torrens system (the late Dick Edblom, who is related this to the author), toyed with an interesting idea. The notion dealt with increasing the amount of the Fund by getting legislative authorization to re-insure with Lloyd's of London, or another significant re-insurer, to cover the remote event of a catastrophic title mistake made by the Torrens Department. However, the Minnesota legislature eventually determined to back any claims against the Torrens system with the state government's full faith and credit, thus obviating the need for private co-insurance in case of a catastrophic title mistake in an era of inflationary land prices. Inflation in the price of artwork may be seen as analogous to America's recent experience of inflation in real estate prices. Something of the same concern can be expected to evolve respecting objects of art. All things considered, it seems more direct to cut to the core of the matter and have the system pledge the full faith and credit of government from the start. For the effects of Minnesota's 1989 statutory change, see MINN. STAT. ANN. § 508.77.

lawfully relying on the system. This proposal does not indicate any reluctance to also impose a system of fees for those using the system which can pour into an Assurance Fund, as was done historically in land Torrens.²⁹⁴

The structure of an art registration Assurance Fund must include several key principles for success: (1) Parties with claims against the Fund must be “innocent” and that term should be defined in the statute to mean the claimant, or her ancestor, acquired her interest in the artwork without notice of conflicting claims and with reasonable investment-backed expectations (R.I.B.E.);²⁹⁵ (2) The registered owner or other “innocent” party injured by the operation of the fund following initial registration shall be made whole by recovery of the title to the res itself or money damages equal to the actual out-of-pocket loss incurred; (3) If a paramount claimant (True Owner) appears during the initial registration proceeding, the res ownership rights of both parties must be respected and sorted out in accord with the prevailing jurisdictional laws; and (4) If one or both of the “innocent” claimants holds under a chain of ownership containing potential claims against third parties concerning the artwork’s title or authenticity, any compensation paid by the Assurance Fund to a claimant shall be reimbursed pursuant to the Fund’s special subrogation rights described below.

10. Maintenance of Torrens-Like Title Registries for Artwork

An added benefit of the reform system would be an artwork index system servicing the Torrens office in each jurisdiction adopting it.²⁹⁶ Akin

294. *See id.* § 508.82.

295. Borrowing the concept of R.I.B.E. from Takings Clause law plus a few elements of the law of recording acts, the concept of “innocent” claimant means the following: at the time of acquisition of an interest in the art object, the claimant against the Assurance Fund must have had no notice of the rights of the other party as the notice concept is defined by local law; the claimant’s investment-backed expenditure must qualify as valid consideration under local law; and the claimant’s expectations of owning the art object must have been reasonable at the time of such expenditure under local law. Carrying the burden of proof of a valid R.I.B.E. should rest upon the claimant against the Assurance Fund. If the claimant is an heir of an earlier owner, showing the R.I.B.E. of the ancestor will satisfy the claimant’s burden. This requirement for the showing of a R.I.B.E. is to protect the Assurance Fund from claims by parties whose interest in the artwork was purchased at a time when notice of the rival claimant’s rights were known to a party. Lack of a R.I.B.E. would not disqualify any party from claiming a paramount ownership interest to a rival claimant, only to seeking redress from the Assurance Fund. For the Takings Clause concept of R.I.B.E., see Burton, *supra* note 161, at 622-23, 629-60. For recording act principles of the innocent purchaser for value without notice, see *DUKEMINIER ET AL.*, *supra* note 9, at 560; *NELSON & WHITMAN*, *supra* note 7, at 202-07; *STOEBUCK & WHITMAN*, *supra* note 7, at 879-91.

296. For a glimpse into Minnesota’s indexing system, see *MINN. STAT. ANN.* §§ 508.34-508.38. And for Minnesota’s official information storage provision, see § 508.381. Would adoption of a Torrens-like art title registration system in other prominent states, say New Jersey or

to the land-title Torrens system, the indices could be of several cross-indexed sorts: One indexed under the names of registered owners; one under the names of the art objects; one under the names of the artists; and one solely for numbers assigned to current Certificates of Ownership. All of these indexes would be computerized and, one hopes, placed on a digitally accessible site for internet access by other agencies, national or international, concerned with art title.²⁹⁷

In this respect, there are presently proposals to create effective art indexes for North America and Europe.²⁹⁸ Such proposals are in response to the felt need among experts for creating information archives relating to individual artists to ascertain visual and physical characteristics of their art.²⁹⁹ Torrens-like art title registration indexes should be made publicly accessible via a state or county's online resources. Any local Examiner of Provenance failing to demand searches of all available indexes as part of a registering owner's due diligence would risk both invalidation of the final Certificate of Ownership on due process grounds and claims against the local Assurance Fund for money damages by injured parties.³⁰⁰ Similarly, any Examiner of Provenance ignoring notices received of pending title registrations in other jurisdictions would risk the same twin hazards.³⁰¹

As a corollary, the due diligence required in all initial registration actions, or any subsequent proceedings, must demand that a thorough check be made of all similar Torrens-like title indexes in states that have instituted a system of artwork registration for purposes of identifying persons for service of process.³⁰² Moreover, to avoid simultaneous

Massachusetts, prompt New York to do the same as a matter of competition? Probably not, as the successful operation of land title Torrens in Minnesota has not caused other states to rush forward with their own Torrens systems. See STOEBUCK & WHITMAN, *supra* note 7, at 924.

297. See McCormack, *supra* note 226, at 115-28.

298. For example, Professor Rhyne has proposed a nationally available curatorial archive of the working procedures of individual artists as a public responsibility of scholars, curators, and collectors. See CHARLES S. RHYNE, A PROPOSAL FOR THE CREATION OF COMPREHENSIVE ARCHIVES OF INFORMATION ON THE WORKING PROCEDURE OF INDIVIDUAL ARTISTS AND ON THE VISUAL APPEARANCE AND PHYSICAL CHARACTER OF THEIR ART, 4-10 (1990), available at http://www.reed.edu/~crhyne/papers/jc_procedure.pdf. For a sensible article advocating an international computerized theft reporting system for stolen art in order to avoid the innocent BFP versus innocent True Owner conflicts noted herein, see Hawkins et al., *supra* note 156, at 49-55.

299. See RHYNE, *supra* note 298, at 4-10. For a discussion of using fractal geometry "fingerprints" or quantum theory for identifying works by particular artists, see *supra* notes 25-26 and accompanying text.

300. For the grounds of a due process attack on a registered title for failure to give reasonable notice, see *Konantz v. Stein*, 167 N.W.2d 1, 6 (Minn. 1969). For claims against the Assurance Fund by injured parties, see *supra* notes 285-95 and accompanying text.

301. See *supra* note 300 and accompanying text.

302. There is a constitutional need for personal or mailed service of process on all identified

registration of the same art object in multiple jurisdictions, an automatic service of process of any initial registration proceeding would wisely be made on each Examiner of Provenance office existing in any state maintaining a Torrens-like system.³⁰³ The burden of checking art indexes is tiny compared to modern information retrieval activities from repositories numbering in the thousands.³⁰⁴ The actual number of counties where valuable artwork activity would justify maintaining a Torrens-like system will likely prove to be rather small—only a handful of states have counties with Torrens land title registration systems³⁰⁵—and modern electronic data retrieval systems will also lighten the burden of adding this number to the world's existing variety of art index systems. Again, any Examiner of Provenance ignoring such notices would risk the same twin hazards of due process invalidation of the Certificate of Ownership as against the injured parties and claims for money damages against the local Assurance Fund.³⁰⁶

11. Subrogation Rights

It is typical in ALTA land title policies, art insurance policies, and other insurance situations for the insured party to expressly grant general subrogation rights to the insurer, at least up to any amounts actually paid by the insurer.³⁰⁷ The purpose, of course, is to allow the insurer to recover its losses against any third party who caused the loss.³⁰⁸ Similarly, Torrens-

persons holding a potentially vested interest in the property being registered. *See Konantz*, 167 N.W.2d at 5-6.

303. Current developments and proposals for the electronic filing of land data could be adapted to artwork and adopted. *See, e.g.*, Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 233-34 (1999). This could be a statutory mandate for service of process of the highest dignity, somewhat akin to the constitutionally mandated automatic service of process required on any party in possession of a land parcel being registered. *See Konantz*, 167 N.W.2d at 6.

304. For instance, the current land information retrieval system using federal, state, and county information repositories by a single company's domestic activities (excluding foreign information retrievals in such global centers as Europe, New Zealand, and Asia) numbers more than 4,000 sources. Some of these repositories are electronic, and some require manual information retrieval. *See* email from Bruce W. Burton, Professor of Law, to George S. Livermore, President, Property and Information Services Group, First American Corporation (Apr. 5, 2007) (on file with author) (confirming the author's telephone discussion of that date).

305. *See* STOEBUCK & WHITMAN, *supra* note 7, at 923 n.2. For modern proposals respecting electronic filing of title data, *see* Whitman, *supra* note 303, at 233-34.

306. *See supra* note 300 and accompanying text.

307. For subrogation principles required by ALTA and Hiscox, *see* ALTA POLICY, *supra* note 212, at 10, para. 13; HISCOX POLICY, *supra* note 212, at 3, paras. 6-7.

308. For the sort of subrogation rights that should be crafted to accrue to benefit the public Torrens-like art registration system, *see, for example*, *Homeowners' Loan Corp. v. Baker*, 12 N.E.2d 199, 201-02 (Mass. 1937).

like registration systems for art objects should enjoy a special statutory right of subrogation so that the Examiner of Provenance, on behalf of the Assurance Fund, may step into the shoes of the registered owner.

For instance, suppose Christie's or Sotheby's or some other experts had issued formal opinions as to authenticity of a particular painting, labelling it a genuine Constable (upon which its estimated value would hinge). In reliance on such expertise, a Certificate of Ownership backed by the Torrens-like Assurance Fund was issued covering both title and authenticity. But later, the painting turned out to be by a lesser artist, a forgery, or both, resulting in the registered owner making a successful claim against the Assurance Fund for loss of authenticity. The Assurance Fund subrogation rights should "run" with the registered art object and thereby enable direct statutory recourse against Sotheby's, Christie's, or whatever expert made the error.³⁰⁹

12. Limited Scope: Public Museums or Nonprofit Collections Only?

As indicated above, the proposal for a Torrens-like title registration system for costly art work could be extended to any art owner who would like to assure the title of the art work and perhaps its authenticity.³¹⁰ As a matter of social policy, however, one can distinguish among varying priorities for such protection by different classes of art collections, and some jurisdictions might desire to narrow the scope of coverage, limiting it to public and non-profit museums, universities, and other collections. Manifestly, this would be an unwise approach.

Even public and non-profit collections deal in the general art marketplace. A limitation could lead to the anomaly that a work—once registered by a public or non-profit entity—might be traded or sold, inevitably passing into the private market. Thus, some private collector would come to hold such registered art, its longterm value likely enhanced by the mere fact of registration. Consequently, some private benefactors

309. Such subrogation rights should be established by enactment of special statutory subrogation rights in favor of the state's Assurance Fund and should provide the following: (1) subrogation accruing to the state in the amount of any claims paid by the Assurance Fund; and (2) the state's subrogation rights should "run" with the art object (extend up the chain of title unblocked by any archaic notion of privity) and be legally effective against any party who issued a certification of title or authenticity directly to the innocent Assurance Fund claimant or to any earlier party in the claimant's chain of ownership. Conceptually, such a statutory plan would be much akin to the common-law doctrine of the running of future covenants in warranty deeds and its more recent counterpart creating the same result for present covenants by using the theory of the implied assignment of a chose in action. *See, e.g., Rockafellor v. Gray*, 191 N.W. 107, 108 (Iowa 1922). *See generally* DUKEMINIER & KRIER, *supra* note 12, at 625-26, 631.

310. For a discussion of authenticity of artwork, see *supra* notes 18-26 and accompanying text.

who make art donations for tax reasons would find the tax benefit of donating registered art larger than that of unregistered art. Diminishing the tax write off could well skew the choice of items to be donated and possibly even diminish the overall incentive to give. Such a result is not in the social interest and would conflict with the longstanding tax policy of encouraging maximum generosity.³¹¹

Undeniably, wealthy private collectors are certainly in a position to protect the title and the authenticity of costly art objects by means of hired expertise and private title insurance policies.³¹² But there are some shortfalls in this private network of protections, and many private parties would soon see art title registration as a lasting social value.³¹³ The enhanced permanence of title and authenticity determinations will likely reflect itself in greater market values for registered work, as noted above.

Alternatively, a publicly-owned collection, with its inventory of art acquired by donation, purchase, testamentary gifts, or art that is permanently on loan from private owners, might feel that a Torrens-like system of title protection is not needed. To such a public entity, whether *de facto* or *de jure*, the public fisc is viewed as its ultimate guarantor against loss, as some museums openly state.³¹⁴ Notwithstanding this

311. For example, on its website, the Frick announces to potential contributors that it is a not-for-profit entity and that donations will be treated as charitable deductions under the Internal Revenue Code. The Frick Collection & Frick Art Reference Library, <http://shopfrick.org/support/plannedgiving.htm> (last visited May 14, 2007). The Frick also supplies a contact person for the attorneys or tax advisers of potential donors to discuss any gifts. *Id.* The MFA offers an online analysis of the new tax rules signed into law in August 2006 and also links to charitable giving ratings agencies. MFA Boston: Give, <http://www.mfa.org/give/index.asp> (last visited May 14, 2007). Such facts show the practical importance attached by major collections to the tax deduction incentives offered to their donors.

312. See Robert Read email (Nov. 24, 2006), *supra* note 230 (“[Hiscox] wouldn’t insure the authenticity of the work. We would be able to consider that separately but it is rarely bought as underwriters would insist on a valuation by a third party such as Sotheby’s or Christies [sic] and most people are happy to go on that and seek recourse from them if the valuation is incorrect.”).

313. Risks of transiency—namely dissolution, bankruptcy, future scholarly disputes, or mortality—of the institutions or experts certifying authenticity are removed when the authenticity is grounded in a governmental registration system. Moreover, the permanence of public title registration of artwork generates official records and related court files, and this offers substantial protection against the loss of private documents, reliance upon human memory, the shifting trends of expertise, and similar insecurities.

314. See email from Tara Feshitan, Lawyer, Tate Britain, to Bruce W. Burton, Professor of Law (Nov. 29, 2006) (“I can informally advise you that all the art work in Tate’s national collection is secured by the Treasury (as Tate is a national museum) not by any commercial or title insurance with a provider such as Hiscox or any other.”) (on file with author); see also email from Anne Halpern, Dept. of Curatorial Records, Nat’l Gallery of Art, to Bruce W. Burton, Professor of Law (Nov. 30, 2006) (stating that the publicly-owned NGA “does not insure the provenances (or title) of any works of art in the collection”) (on file with author). Other public UK museums were reluctant to answer my inquiries. See email from Dr. Mark Evans, Senior Curator, Paintings,

narrow view, the overall stability of the marketplace provided by a system of registered title to artwork has value even to a publicly-owned institution. Those works not currently in the collection but to be acquired in the future by gift or purchase would benefit from such a system.³¹⁵ Moreover, some objects in a public or non-profit collection are used for barter, or sold outright in the long-term process of growth and change in the collection. Thus, a Torrens-like art registration system would offer the same marketplace advantages to a public museum as to any other collector.³¹⁶

Looking solely at the private, non-profit class of museums, schools, and other collections not owned by private collectors, the advent of a Torrens-like system would have both current and long term advantages. In the absence of a special grant or appropriation favoring a non-profit institution—unlike a public collection—the government fisc is not the ultimate guarantor of institutional solvency.³¹⁷ Existing on the generosity of others, a private non-profit collection would be better able to assure the value of its art endowment with registered titles and assure its benefactors, over time, of the security of its art collection. In addition, as noted above, the interactive market for barter and sale of artwork would be more secure. For such reasons, many non-profits would eventually find it useful to take advantage of a Torrens-like title registration system.

VI. CONCLUSION

We live in an era when the art world is plagued by history's gap-riddled records of art transactions, misattribution of the true authorship, the ancient heritage of art theft and similar human chicanery, the twentieth

Victoria and Albert Museum (London), to Bruce W. Burton, Professor of Law (Nov. 14, 2006) (“National museums exercise due diligence concerning the provenance of new acquisitions. It is not our practice to discuss valuations, indemnity or insurance arrangements concerning the collections of the V&A.”) (on file with author). Further pursuit of the question with the UK’s National Archives yielded a similar response. *See* email from Nigel Taylor, Remote Enquiries Duty Officer, UK Nat’l Archives, to Bruce W. Burton, Professor of Law (Nov. 15, 2006) (“The National Archives of the United Kingdom does not hold records which would help you with your enquiry.”) (on file with author). Inquiries made of several American museums went without response altogether: American Association of Museum Directors; Cincinnati Art Museum; The Getty; The Walker (Minneapolis, Minnesota); and the Chicago Museum of Art.

315. For a discussion of the benefits of title registration to public and non-profit collections, see *supra* note 311 and accompanying text.

316. *See supra* note 311 and accompanying text.

317. *See* email from Tara Feshitan, *supra* note 314. This is not an assurance enjoyed in the private sector, and non-public galleries cannot automatically look to the public treasury for any title or authenticity losses within their collections. *See id.* Governmental grants, special legislative appropriations, NCA support, and similar ad hoc sources might be available in event of a loss to a private non-profit gallery, but this would present a specific political question.

century's tragic aftermath of Nazi art lootings and forgery on a grand scale, and a morass of legal rules to adjudicate the conflicting rights between innocent BFPs and innocent True Owners. Society needs a solution that ameliorates unjust individual hardships and builds a more secure foundation for the art marketplace. A Torrens-like system of title registration for art objects is such a solution.

APPENDIX

Brief samples of the type of sorting out of provenance information that a court-appointed art expert might undertake in drawing up a report to the court:

1. GETTY MUSEUM'S *JAMES HAY*: If the Getty were registering title to the *John Hay*, the expert would find that a gap in the ownership chain might exist from 1919 to 1967. This gap is reasonably explained by lineage and other documents, but the court-appointed expert should require service of process be made on Leith Fyvie to assure that a lawful transfer was made before 1967 to Alfred S. Karlsen, who sold it in 1971 via Christie's to Getty donors, Mr. & Mrs. Peter Moller. The respective heirs should be served if the identified owners are deceased, and service should be by publication as to persons not able to be located by due diligence. Authenticity expertise, by written certification or by testimony in court, should also be brought to bear to establish that aspect of the painting.³¹⁸

2. HANS WENDLAND: If a Vermeer had a provenance that mentioned the work passing through the hands of Hans Wendland in 1938, this would be one of the listed "Red Flag Names" with involvement in Nazi-related art looting. This would require a full investigation into the name sources of victims by contact with agencies offering guidance respecting provenance art. Similarly, with a gap between 1933 and 1938 for the painting, being one of the artists listed as particularly suspect of Nazi involvement would require such investigation. The court-appointed expert would require all identifiable persons or families, using due diligence, to be served directly if locatable and by publication if not. Finally, authenticity expertise, by written certification or by testimony in court, should also be brought to bear to establish that aspect of the painting.³¹⁹

3. AN UNKNOWN VERSION OF *THE WHITE HORSE*: The court-appointed expert would issue service of process on any persons straddling chain of title gaps between the artist and the party registering. Also, any Holocaust-era information arising from any "Red Flag Names" in the provenance would have to be investigated. In addition, all known collections owning other versions (the Frick, NGA Washington, MFA Boston) would have to be contacted. Possibly, because of the multiple connections of Lancelot Archer-Burton to Constable and to the title chains for some versions of *The White Horse*, any surviving English descendants of Lancelot Archer-Burton would be served, particularly if the expert had information about the possibility of a version being caught up in the 1940

318. See, e.g., YEIDE ET AL., *supra* note 2, at 17-18.

319. *Id.* at 49-51.

Blitz of Southampton. Finally, authenticity expertise, by written certification or by testimony in court, should also be brought to bear to establish that aspect of the painting.³²⁰

320. *See supra* Part III.D.



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