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A CHAOTIC PALETTE: CONFLICT OF LAWS IN LITIGATION BETWEEN ORIGINAL OWNERS AND GOOD-FAITH PURCHASERS OF STOLEN ART

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ABSTRACT

The 1990s saw an exponential growth in the number and political sensitivities of claims by original owners of stolen art against good-faith purchasers of that art. These cases have challenged courts, threatened international relations, created public relations nightmares for museums, and generally shaken the art world. In defining whose claim should prevail as between original owners and good-faith purchasers, states and nations have adopted significantly varied rules to reach divergent resolutions of complicated issues of public policy and private right. In the relatively rare case in which the original owner/good-faith purchaser dispute is connected with a single state or nation, the application of that sovereign's chosen rules presumably furthers the sovereign's interest. When, as is much more often the case, the journey of the art and the domicile of the claimants link the dispute to more than one state or nation, the multijurisdictional character of the case may substantially complicate the issue of ownership. When implicated jurisdictions have been driven by different policy preferences to adopt different ownership rules, the result on a micro-level will be a choice of law that may well further a single state or nation's interest. The result on a macro-level is virtually certain to undermine

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all relevant policy aspirations. This Article explores the cause and effect of this universally unattractive result.

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INTRODUCTION

Egon Schiele paintings on loan from an Austrian museum to New York's Museum of Modern Art are seized, first by state officials and later by federal officials, after heirs of the original owners claim that the paintings were stolen by the Nazis.[1] An ancient manuscript containing tenth-century copies of formulations of Archimedes, long in the possession of a French family and consigned for auction at Christie's in New York, is claimed by a Middle Eastern monastery.[2] A fifteenth-century portrait, stolen from a castle in Germany by an American soldier and sold to a private citizen on Long Island, is claimed by a German museum.[3] Sixth-century mosaics, stripped from the walls of a church in northern Cyprus, are sold in Switzerland to an Indiana gallery owner who offers them for sale in Indiana, where the Cypriot government and the church discover and reclaim them.[4] Paintings stolen from a Washington, D.C., family lie in pieces in a garbage bag in a Pennsylvania house before they are bought by a Pennsylvanian and later reclaimed by the family.[5] The son of a Czech painter seeks the return of one of his father's paintings from an Illinois art dealer working "out of a shopping bag," who had purchased it from "Fly-by-Nite Galleries," which had in turn purchased it from a hot tub dealer, who had seen it while buying fixtures from a defunct Chicago art gallery.[6]

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1. *In re* Grand Jury Subpoena Duces Tecum, 719 N.E.2d 897, 898-99 (N.Y. 1999), discussed *infra* at notes 382-411 and accompanying text.

2. Greek-Orthodox Patriarchate v. Christie's, Inc., No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257, at *8-9 (S.D.N.Y. Aug. 30, 1999); *see also infra* notes 224-47, 318-24 and accompanying text (discussing the history of the case).

3. Kunstammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 832 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). The case is discussed *infra* at notes 205, 307-17 and accompanying text.

4. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, 917 F.2d 278, 283-84 (7th Cir. 1990). For details of the case, see *infra* notes 175-97, 352-61.

5. Erisoty v. Rizik, No. 93-6125, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), discussed *infra* in note 199 and in notes 260-62 and accompanying text.

6. Mucha v. King, 792 F.2d 602, 612 (7th Cir. 1986). This case is discussed *infra* at notes 65, 76.

From the tragic to the ridiculous, these cases have challenged courts,[7] threatened international relations,[8] created public relations nightmares for museums,[9] and generally shaken the art world.[10] Although the seizures of the Schiele works from the Museum of Modern Art (MoMA) garnered the most international and domestic attention,[11] they reflect only one of many disputes between heirs of original owners and museums over artwork claimed to have been stolen by the Nazis and their sympathizers. A lawsuit filed against the Seattle Art Museum and later settled,[12] as well as claims against the Fogg Art Museum at Harvard, the Museum of Fine Arts in Boston, the Minneapolis Institute of Arts, Vienna's Art History Museum, and numerous museums in the former Soviet bloc,[13] present many of the same ownership tensions as are presented by the claimants to the Schiele

7. Not only do the cases pitting original owners against good-faith purchasers of stolen art present interesting glimpses at history, human motivation, artistic struggle, and national conflict, they also seem to provide the judges who decide them with an irresistible opportunity to escape the mundanity of the factual backgrounds presented in the "ordinary" case. In fact, as one opinion noted, the judicial task in resolving claims arising between original owners and good-faith purchasers of stolen art can resemble the process of observing and appreciating art itself. *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *29.

8. The Schiele seizures, for example, created considerable tension between Austria and the United States. *See infra* notes 394-95 and accompanying text.

9. *See infra* note 12; *see also* Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 15 (1998) (describing the "tug-of-war that now exists between two innocent parties: an American museum holding a work of art that may have been stolen by the Nazis during World War II and the heirs of the original owner who perished at the hands of the Nazis during the War").

10. *See infra* notes 396-99 and accompanying text.

11. The seizures, their legal implications, and their practical consequences are discussed *infra* at notes 382-414 and accompanying text.

12. In the summer of 1997, the heirs of Paul Rosenberg claimed "Odalisque," a 1927 painting by Henri Matisse. (For a sampling of Matisse's work, visit http://www.artchive.com.) Rosenberg, a French-Jewish art dealer, had owned the painting at the time it, along with most of Rosenberg's collection, was stolen by Nazi officials. The painting was, at the time of the heirs' demand, a part of the Seattle Art Museum's collection. After initially questioning the plaintiff's claim and later researching the painting's provenance with the help of the Holocaust Art Restoration Project, the museum agreed to return the work, valued at over $2 million, to the Rosenberg heirs. Regina Hackett, *Seattle's Matisse Will Go Back to Owners; Museum Returns Art Stolen by Nazis*, SEATTLE POST INTELLIGENCER, June 15, 1999, at A1. Commentators praised the museum for its "precedent-setting act of moral courage that will go a long way in helping to resolve future and pending cases in the United States involving artwork stolen by the Nazis during WWII." *Id.* (quoting Nancy Vineberg, director of the American Jewish Committee of Greater Seattle).

13. *Nazi's Pillaging Still Haunts the Art World; Museums Worldwide Have Works with Clouded Pedigrees*, ORANGE COUNTY REGISTER, Mar. 24, 1998, at A10.

paintings. The claims are being brought not only against museums but also against private collectors.[14]

Despite a 1987 prediction by the United States Court of Appeals for the Second Circuit that legal issues presented by efforts of original owners to recover stolen art from good-faith purchasers, although interesting, would not appear frequently,[15] the last decade has seen a sharp increase in cases raising these issues, and every indication at the beginning of a new century is that the number and complexity of original owner versus good-faith purchaser disputes over stolen art will increase.[16] As the seizure of the Schieles at MoMA suggests, provenance[17] issues will not solely be the subject of private lawsuits between owners and good-faith purchasers but will also strain relations between museums and, ultimately, between nations.[18]

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14. In *Hoelzer v. Stamford*, 933 F.2d 1131 (2d Cir. 1991), discussed *infra* at notes 68, 247, Judge Irving Kaufman commented on the general situation of good-faith private purchasers of stolen art:

> Collectors from all over the world have shown a willingness to pay exorbitant sums for the privilege of privately exhibiting paintings, many of which the artists could not sell during their lives. With this increase in value has come the inevitable increase in theft and illegitimate trade. It is not uncommon, however, for purchasers of fraudulently obtained art work to make their acquisitions from reputable art dealers and galleries.

Id. at 1132.

15. DeWeerth v. Baldinger, 836 F.2d 103, 108 n.5 (2d Cir. 1987), discussed *infra* at notes 153-74 and accompanying text.

16. There are numerous reasons to predict an increase in such disputes. Recent books have detailed and catalogued the scope of Nazi plunder of European art. *E.g.*, HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (1997); LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994). The World Jewish Congress is beginning to turn its attention away from claims to Swiss bank accounts to claims to stolen art, which ultimately may be more valuable. The fall of the Iron Curtain has also played a role, as former Soviet museums have now begun to display their collections. Ariella Budick, *Whose Art Is It? U.S. Courts Are Involved in Determining Ownership of Works Looted by Nazis*, NEWSDAY, Feb. 11, 1998, at B3. Finally, there are simply more pieces of looted art entering the art market. "As an older generation of collectors dies out, their holdings turn up on the auction-house circuit, where they can be identified either by the families themselves or by investigators who specialize in looted art." *Id.*

17. "The word 'provenance' has developed in the art world as a term for the subject of title to works of art." Morgold, Inc. v. Keeler, 891 F. Supp. 1361, 1363 (N.D. Cal. 1995). *Morgold* is briefly discussed below in notes 67, 80.

18. Not all museums have fought claims by original owners to recover stolen art. In 1997, the Wadsworth Athenium in Hartford, Connecticut, agreed to return a sixteenth-century painting to the Galleria Nazionale d'Arte Anticas in Rome, Italy. The painting had been stolen from the Italian Embassy in Berlin by Soviet troops near the end of World War II. The director of the museum stated at the time, "It was the right thing to do." Christopher Hume, *The Secret Museum Curators Hide Artifacts and Shy Away from Masterpieces . . . Welcome to the Repatria-*

Although theft by the Nazis has captured the most recent attention, American and Russian soldiers apparently stole significant works as well.[19] Of course, with the escalation of art prices, art is most often stolen in far less controversial circumstances. In fact, among the thefts described in the pages that follow are ones committed by common thieves, business associates, trusted advisors, friends, and in-laws.

Neither common law nor, with rare exception,[20] statutory law has "given works of art the distinction of a body of jurisprudence all its own."[21] Rather, in most states and nations, the laws that govern title issues with respect to art are those generally applicable to commercial transactions in any moveable property.[22] There are no statutory mechanisms for registering or recording title to works of art[23] such as

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tion Game, TORONTO STAR, Mar. 28, 1998, at M1. And, as discussed above in note 12, the Seattle Art Museum returned an artwork to its rightful owner after establishing that it was highly likely that it had been stolen with the acquiescence of the Nazis.

19. *E.g.*, *DeWeerth*, 836 F.2d at 105 (involving a Monet stolen by American soldiers); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1155-56 (2d Cir. 1982) (arising from the theft of two Duerers from Germany by American occupation forces).

20. *E.g.*, CAL. CIV. PRO. CODE § 338(c) (West Supp. 1999) ("The cause of action in the case of theft . . . of any article of . . . artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party . . . .").

21. *Morgold*, 891 F. Supp. at 1365.

22. *Id.* at 1366 (noting that "art is subject to any applicable provisions of the Uniform Commercial Code and various state analogues"); John Henry Merryman, *American Law and the International Trade in Art*, *in* GENEVA WORKSHOP, INTERNATIONAL SALES OF WORKS OF ART, 425, 426 (Pierre Lalive ed., 1985) [hereinafter GENEVA WORKSHOP]. In most states the source of these rules is the Uniform Commercial Code (U.C.C.). *See infra* notes 71-80 and accompanying text.

In Europe, transfers of art are similarly governed by general commercial codes. Quentin Byrne-Sutton, *Who Is the Rightful Owner of a Stolen Work of Art? A Source of Conflict in International Trade*, *in* GENEVA WORKSHOP, *supra*, at 500, 500; *see also* Francesca Galgano, *Legal Aspects of Trade in Art in Italy*, *in* GENEVA WORKSHOP, *supra*, at 129, 129 ("Works of art other than those belonging to the State have the legal status of any other object . . . ."); Jacques Ghestin, *French Domestic Law on the Sale of Works of Art and Collector's Items*, *in* GENEVA WORKSHOP, *supra*, at 155, 155 ("French law has no specific or general regulation on the sale of works of art . . . . As a result, an object of art is governed theoretically by the common law on sales.").

23. Private registries for stolen art do exist, however. The first major international computerized database, The Art Loss Register, maintained by the International Foundation for Art Research (IFAR), began operation in 1991. *The Art Loss Register*, *at* http://www.artloss.com/intro/about.htm (last visited Feb. 9, 2001) (on file with the *Duke Law Journal*). IFAR, a nonprofit corporation, is supported by, *inter alia*, Lloyd's of London, the British Institute for the Protection of Cultural Property, Christie's, and Sotheby's. For a description of The Art Loss Register, see Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2462-63 (1994).

exist for land or automobiles. Even so, monies paid to acquire art routinely rival the costs of automobiles and in many cases exceed tenfold even the priciest real estate.[24] It is precisely these prices that make art an increasingly attractive target for thieves.

One central feature characterizes disputes arising out of stolen art, whatever the motive for the original theft. The disputes are between two relative innocents: the original owner from whom the art was wrongfully taken or withheld and a person or entity who is, or at least claims the status of, a good-faith purchaser. Such a juxtaposition is one that renders it "impossible for the law to mete out exact justice."[25] The determination of which of the two prevails—owner or

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IFAR also publishes a magazine that reports on stolen or lost art. Erisoty v. Rizik, No. 93-6125, 1995 U.S. Dist. LEXIS 2096, at *15 (E.D. Pa. Feb. 23, 1995). This magazine, published ten times a year, circulates to law enforcement agencies, art dealers, museums, and private collectors. *Id.*

24. For example, in the 1980s, buyers paid $53.9 million for Vincent Van Gogh's *Irises* and $47.85 million for Pablo Picasso's *Yo Picasso*. Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1067 (1991). Although the passion for acquisition of art, or at least the willingness to pay large sums to satisfy that passion, waned in the 1990s, near-record auction prices remained newsworthy through that decade as well. *E.g.*, Paul Lieberman, *5 Paintings Set Auction Records; $60.5 Million Paid for a Cezanne*, L.A. TIMES, May 11, 1999, at A4 (reporting that the auction on May 10, 1999, brought more than double the price ever before paid at auction for a Cezanne).

25. RAY A. BROWN, THE LAW OF PERSONAL PROPERTY 193 (3d ed. 1975). It should be noted, however, that in many cases the harm to either innocent party, the owner or the good-faith purchaser, if the other prevails, may be minimized by other commercial realities. Often the owner will have had and collected on insurance coverage on the stolen art. *E.g.*, *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *3-4 (noting that the owners had collected on an insurance policy covering art that was stolen from the owners' home). Conversely, a good-faith purchaser who loses possession to the true owner may be able to recover from her seller on a breach of warranty claim. *See* U.C.C. § 2-312(1)(a) (1988) (granting an implied warranty by the seller that the title conveyed shall be good and its transfer rightful); Note, *Uniform Commercial Code Warranty Solutions to Art Fraud and Forgery*, 14 WM. & MARY L. REV. 409, 414-16 (1972) (suggesting that the U.C.C. may offer protection through provisions regarding express warranty, warranty of merchantability, or warranty of fitness for a particular purpose). This may be brought as a separately instituted action or as a third-party claim in the action brought by the original owner against the good-faith purchaser. *E.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 865 (N.J. 1980) (noting that the good-faith purchaser impleaded the seller). This and other remedies will not be available to all good-faith possessors, however. For example, after the Seattle Art Museum delivered "Odalisque" to the Rosenberg heirs, *see supra* note 12, it sued the New York art gallery that sold the painting to the Bloedels, who were the donors. The suit was dismissed by the United States District Court for the Western District of Washington on the ground that although there was evidence that the gallery had defrauded the Bloedels, the *museum* had not been defrauded because the museum had not acquired the right to sue from the donors at the time it acquired the painting. Rosenberg v. Seattle Art Museum, 70 F. Supp. 2d 1163, 1167 (W.D. Wash. 1999). The court rejected the argument advanced by the gallery that museums, as third parties to the original sale, could never prevail on a fraud claim. The outcome in the in-

good-faith purchaser—raises complicated issues of public policy as well as of private rights. As this Article later details, states and nations have chosen widely different rules to define these rights and prioritize these policy goals.

In the relatively rare case in which the original owner/good-faith purchaser dispute is connected with a single state or nation, the application of that sovereign's chosen rule, whomever it favors, presumably furthers the sovereign's interests. When, as is much more often the case, the journey of the art and the domicile of the claimants link the dispute to more than one state or nation, the multijurisdictional character of the case may substantially complicate the issue of ownership.[26] If the connected jurisdictions have been driven by different policy preferences to adopt different ownership rules, the result on a micro-level will be a choice of law that may well further a single state or nation's interest. The result on a macro-level, however, is virtually certain to undermine *all* relevant policy aspirations.

To explore the cause and effect of this universally unattractive result and suggest the proper method for its avoidance, this Article proceeds in four parts. Part I describes the substantive and procedural rules adopted by individual states and nations to define the relative rights of original owners and good-faith purchasers. Part II defines the way in which United States and European courts decide choice-of-law issues involving these rules when, because of multijurisdictional contacts of the artwork or the parties, multiple rules are available. Part III examines the consequences of the choice-of-law outcomes for the parties, the policies, the art world, the international

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stant case was based upon the fact that the museum had not obtained the cause of action from the Bloedels. *Id.* at 1166-67. The court later granted a motion for reconsideration and vacated its dismissal order after the museum secured from the Bloedels' heirs an assignment of the fraud claim. Rosenberg v. Seattle Art Museum, No. C98-1073L, 2000 U.S. Dist. LEXIS 7770, at *8 (W.D. Wash. Mar. 22, 2000).

26. The geographic scope of transactions involving a single work of art can literally be global:

> A review of the provenance of a single, well-documented, 100-year-old painting shows how complex a search can be. In her new book, *Portrait of Dr. Gachet*, Cynthia Saltzman tracks a single, celebrated canvas by Vincent van Gogh from the artist's studio near Paris in May 1890 to the collection of Japanese businessman Ryoei Saito, who paid $82.5 million for it in 1990. In that stretch of time, a short one relative to the history of art, the painting had 12 owners besides Saito: "two affluent avant-garde artists, three dealers, a German collector, a museum director, a member of the Nazi elite, an Amsterdam banker, and a Jewish exile," as Saltzman recounts.

John Marks, *How Did All That Art End Up in Museums?*, U.S. NEWS & WORLD REP., June 8, 1988, at 38. For a cinematic portrayal along the same theme, see THE RED VIOLIN (Lions Gate Films 1999).

exchange of art, the public, and international relations. Part IV offers observations regarding rules that may further the individual and collective interests of these polities and policies.

Having detailed what this Article will address, it is appropriate to devote a few words to what it will not address. The Nazi context of the most widely publicized of these cases poses unique and difficult issues with which claimants, organizations, museums, and governments are now just beginning to grapple.[27] Until a domestic or international consensus is reached as to if and how Nazi-tainted thefts are to be treated differently than other thefts, however, Nazi-tainted art ownership disputes will be decided by application of the same legal rules and subject to the same chaos as surrounds routine art theft cases.[28] This Article leaves to others the issue of whether Nazi-tainted cases should be subjected to different rules.[29]

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27. A case that might have contributed to the law in this area was settled before trial. The case involved conflicting claims of a good-faith purchaser and the heirs of the owners to Edgar Degas's "Landscape with Smokestacks." The Nazis stole the painting from Fredrich and Louise Gutmann, both of whom died in Nazi concentration camps. The painting was purchased in 1987 by Daniel Searle, of the eponymous pharmaceutical company, for $850,000. The heirs, grandchildren of the owners, brought suit in federal court in Chicago, Illinois, claiming ownership. In August 1998, just weeks before the trial, the parties settled the case by agreeing that the Art Institute of Chicago, of which Searle was a trustee, would become the owner of the painting. The Art Institute would pay the heirs approximately $500,000, representing one-half the then-value of the work, and Searle would donate his half to the institute. Judith H. Dobrzynski, *Settlement in Dispute over a Painting Looted by Nazis*, N.Y. TIMES, Aug. 14, 1998, at A17. Although the Institute clearly benefited, the heirs were left feeling the outcome was bittersweet. "Both sides spent a ton of money. . . . It was a terrible waste, in a way. . . . We're hoping this could be a landmark case that would show other families one way to do it, so that they don't have to go through what we did." Kevin M. Williams, *Degas Settlement Lands in Uncharted Territory*, CHICAGO SUN-TIMES, Aug. 16, 1998, at 43 (statement of Nick Goodman, one of the heirs). A sampling of Degas's work can be viewed at http://metalab.unc.edu/wm/paint/auth/degas.

28. *See infra* notes 365-432 and accompanying text. The unique problems arising out of theft of cultural property also will not be addressed here. For over three decades, the international community has been engaged in a global evaluation and adoption of specialized rules governing the export and import of objects of unique cultural significance. *E.g.*, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (attempting to prevent the loss of cultural property). For a brief overview of this and earlier efforts, see Barbara Hoffman, *How UNIDROIT Protects Cultural Property*, N.Y.L.J., Mar. 3, 1995, at 5 (summarizing the impact of the UNIDROIT Convention); *see also* Marilyn Phelan, *Cultural Property*, 32 INT'L LAW. 447 (1998) (reviewing the content of international conventions on the protection of cultural property).

29. *E.g.*, Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 77 (1998) (advocating that the United States Information Agency (USIA) be strictly held to the terms of the Cultural Property Implementation Act (CPIA)); Robert Schwartz, *The Limits of the Law: A Call for a*

Additionally, although original owner versus good-faith purchaser disputes have arisen outside the United States, particularly in Europe,[30] the major focus of this Article is on the United States. The increase in disputes centered in the United States is grounded on three factors: one economic, one cultural, and one legal. First, often art follows wealth. Thus, in the post–World War II era, art came here.[31] American museums, auction houses, and collectors were hungry to acquire European works. As a result, they now find themselves vulnerable. Second, Americans may desire to acquire foreign art out of a strong sense of ancestral connection.[32] Third, American courts are often "the claimant's battleground of choice."[33] As will become clear as this Article proceeds, certain American states, most notably New York, have adopted rules that substantially, and quite intentionally, favor the original owners.[34] In Europe, on the other hand, a buyer of stolen goods often is required to prove only that he bought an object in good faith.[35] Of course, as any good transnational lawyer knows, mere suit in an American court *should* not and does not automatically

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New Attitude Toward Artwork Stolen During World War II, 32 COLUM. J.L. & SOC. PROBS. 1, 4 (1998) (arguing for an "asserted effort on all fronts" to recover art stolen during World War II); Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 549, 607-15 (1999) (documenting a series of proposed solutions); Kelly Ann Falconer, Note, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 425 (2000) (calling for the creation of a unified international response to claims regarding art stolen by the Nazis); 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, 91 (1999) (arguing for "a statutory application of the Discovery Rule to title claims by Holocaust victims and other victims of Nazi dispossession").

30. For an excellent treatment of the law of European states on these issues, see generally GENEVA WORKSHOP, *supra* note 22, which includes various articles on the sale of works of art.

31. Budick, *supra* note 16 ("The size of the art market, the number of museums, the fact that so many pictures ended up here during and after the war—all mean that it is often up to American courts to resolve issues that date back to Europe half a century ago.").

32. As John Henry Merryman has noted,

> the United States is a nation of immigrants, who came from modest circumstances and brought little cultural baggage with them to the New World. As they and their descendants acquired education, wealth and status, however, they and the museums they established naturally sought to collect works from their ancestral cultures in Europe (and in Africa, Latin America, Asia and the Middle East). Like its people, the United States has had to import its art.

Merryman, *supra* note 22, at 425.

33. Budick, *supra* note 16.

34. *See infra* notes 204-19 and accompanying text.

35. Budick, *supra* note 16.

trigger the application of American rules.[36] The available rules regarding rights to stolen art from which an American court might choose, the mechanisms for making the choice among those rules, and the consequences of that choice are issues to which we turn in the next sections of this Article.

I. RIGHT-DEFINING RULES

When art is stolen, there is no question that the thief has committed, and the owner has suffered, a legal wrong. When stolen art finds its way into the hands of a good-faith buyer, one who has paid substantial value for the art, that buyer is the innocent victim of a chain of possession that began and remained wrongful. When the original owner finally locates the stolen art in the possession of the good-faith purchaser, the sympathy which each may have for the innocence of the other rarely translates into recognition of the superior legal right of the other. The demand for possession by the original owner, the refusal of that demand by the good-faith purchaser, and the litigation that often follows have provided the setting for the development of virtually the entire body of law defining the rights of claimants to stolen or misappropriated art.[37] The litigation vehicle for determination of these rights in American courts is an action for either conversion[38] or replevin.[39] Replevin is an action at law, normally treated as

36. *E.g.*, Greek Orthodox Patriarchate v. Christie's, Inc., No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 30, 1999) (analyzing whether to apply French or New York law when the suit was filed in New York).

37. Although the vast majority of cases involve the owner as plaintiff and the purchaser as defendant, occasionally the roles are reversed. In *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), the purchaser, believing he was required to do so, turned the paintings that were the subject of the dispute over to FBI agents who visited his home to demand them. The FBI returned the paintings to the true owners from whom the purchaser then sought their return. *Id.* at *17-19. Another example is *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784 (Ct. App. 1996), in which a New York owner demanded the return of stolen coins, prompting the good-faith purchaser to bring suit to quiet title in California. *Id.* at 787.

38. Conversion "is any unauthorized exercise of dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property." Morgold, Inc. v. Keeler, 891 F. Supp. 1361, 1367 (N.D. Cal. 1995) (quoting Meese v. Miller, 436 N.Y.S.2d 496, 500 (App. Div. 1981)).

Among the significant cases discussed in this Article in which the true owner sued for conversion are *Farkas v. Farkas*, 168 F.3d 638 (2d Cir. 1999), *Charash v. Oberlin College*, 14 F.3d 291 (6th Cir. 1994), and *Graffman v. Espel*, 96 Civ. 8247 (SWK), 1998 U.S. Dist. LEXIS 1339 (S.D.N.Y. Feb. 9, 1998).

39. Replevin is "[a]n action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken

sounding in tort,[40] through which the owner seeks to recover personal property.[41] Of the two, replevin is the cause favored by owners,[42] although occasionally the owner sells the art immediately after recovering it.[43]

Historically, an action in replevin allowed the contested property to be taken from the defendant's possession and placed in the plaintiff's possession prior to the trial. This was the central advantage of the action. The nature of this procedural right led to replevin's characterization as a "local" action and, thus, to the conclusion that the action could be brought only in the jurisdiction in which the property was located.[44] Today, an action in replevin has taken on broader purposes and varied names. Most states differentiate between an action in which the plaintiff seeks possession of the property but is content

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or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990).

40. This characterization of the action as one in tort is important to the choice-of-law issue discussed in Part II. *See infra* notes 325-61 and accompanying text.

41. At common law, separate actions were available depending upon whether the defendant's possession had been wrongfully *obtained*, or unlawfully *detained*. Replevin was the appropriate action for the former; detinue for the latter. These two actions were the only ones available for wrongful deprivation of personal property. C.R. McCorkle, Annotation, *Maintainability of Replevin or Similar Possessory Action Where Defendant, at the Time Action Is Brought, Is No Longer in Possession of Property*, 97 A.L.R.2d 896, 899-900 (1964). Over time, in large part due to its procedural advantages, the replevin action came to be used in both contexts.

42. *E.g.*, Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 291 (7th Cir. 1990) ("Cyprus adequately established the elements of replevin under Indiana law, on which ground alone we affirm the district court's decision to award possession of the mosaics to the Church of Cyprus."); Mucha v. King, 792 F.2d 602, 614 (7th Cir. 1986) (rejecting the defendant's assertion that the statute of limitations had run and returning the painting to the original owner); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1161 (2d Cir. 1982) (noting that the owner's demand for return of art work turns the possessor into a wrongdoer); DeWeerth v. Baldinger, 658 F. Supp. 688, 695 (S.D.N.Y.) ("To establish a cause of action sounding in replevin under New York law, Mrs. DeWeerth must show that she has an immediate and superior right to possession of the Monet."), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987); O'Keeffe v. Snyder, 416 A.2d 862, 865 (N.J. 1980) (holding that the statute of limitations tolls according to the discovery rule); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991) (rejecting the *DeWeeth* court's extrastatutory construction of the legal limitation period in New York and holding that "the imposition of a reasonable diligence requirement . . . would be inappropriate for purposes of the Statute of Limitations").

43. McCorkle, *supra* note 41, at 900-01. The Rosenberg heirs, to whom the Seattle Art Museum returned Matisse's "Odalisque," *see supra* note 12, immediately sold it to Steve Wynn, operator of the Bellagio Hotel and Casino in Las Vegas, for $2 million. Norm Clarke, *Wynn Expands Bellagio's Art Collection with $2 Million Purchase*, REV.-J. (Las Vegas), Oct. 4, 1999, at A3.

44. McCorkle, *supra* note 41, at 900.

to wait until adjudication of the parties' rights and that in which the plaintiff seeks a pretrial seizure of the property.[45]

The key difference between the two avenues for recovery of a chattel, for purposes of this Article, lies in the nature of each as *in personam* or *in rem*. Where an action is brought simply to recover a chattel, the action is *in personam*, that is, the court's jurisdiction is based on the presence or contacts of the defendant. An order of seizure, on the other hand, operates directly on the chattel and may be brought only in the jurisdiction in which the chattel is situated.[46] Thus, the plaintiff may make strategic decisions, including those aimed at choice of a particular law, by having the opportunity to sue the defendant in different jurisdictions in the former type of action,[47] but has no choice regarding the place of the suit nor the governing rules when the latter type of suit is contemplated.

Regardless of the cause of action chosen, the original owner seeking to establish his right to recover from the good-faith purchaser must first prove his own title to the art.[48] Particularly if the stolen art

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45. In New York, for example, the former goal is accomplished through an action for recovery of a chattel. N.Y. C.P.L.R. § 7101 (McKinney 1998). This action may proceed without seizure of the property. § 7102(d). If the plaintiff desires such seizure, either before or during the trial, New York requires a court order, which is issued after the defendant has been given proper notice and the plaintiff has provided a surety against loss by the defendant. The court must be satisfied and find that it is probable the plaintiff will succeed on the merits. § 7102(d)-(e).

46. *E.g.*, County Constr. Co. v. Livengood Constr. Corp., 142 A.2d 9, 12 (Pa. 1958) (noting that "because of its *in rem* characteristics [such an action] may be brought 'in the county in which the property . . . is found'").

47. *E.g.*, Hobbs v. Bolz Cooperage Co., 224 S.W. 968 (Ark. 1920) ("An action for the recovery of personal property is transitory, and can be brought in any county where the defendants may be found or may appear. The action is not local in its nature, and need not be brought in the county where the property is situated."); *see also* 42 PA. CONS. STAT. ANN. § 1072 (1987) ("The action may be brought in a county in which a civil action may be brought or in the county in which the property to be replevied is found.").

48. Republic of Croatia v. Trustee of the Marquess of Northampton 1987 Settlement, 610 N.Y.S.2d 263, 265 (App. Div. 1994). The Republic of Croatia and the Republic of Hungary brought suit in New York Supreme Court to recover treasure alleged to have been discovered within their respective borders. At trial, the jury rendered a verdict against the republics on the single ground that they had not proved by the preponderance of the evidence that the treasure was discovered within their borders. On appeal, the republics argued that the trial court had erred in not requiring the defendant trustee to prove the trust's claim of title. The appellate court affirmed the court's ruling that it was plaintiffs' burden to prove their title. Until plaintiffs met that burden, the defendant, being in possession, was not required to prove its status. *Id.* at 264.

The title of the plaintiff was similarly at issue in *Autocephalous Greek-Orthodox Church v. Goldman & Feldman Fine Arts, Inc.*, 917 F.2d 278, 290-93 (7th Cir. 1990). The plaintiff was the Autocephalous Greek-Orthodox Church, which owned the Kanakaria Church in

originated in pre-war Europe, this may be a daunting task. In *Kunstsammlungen zu Weimar v. Elicofon*,[49] the court's description of the plaintiff's proof of ownership of the Duerer paintings at issue took it on a historical, geopolitical, and jurisprudential foray through the major European political upheavals of the twentieth century.[50]

Once the plaintiff's right or title has been established, the key question is whether the good-faith purchaser or a successor to a good-faith purchaser can properly claim the benefit of either a substantive or procedural rule to establish the supremacy of his claim over that of the plaintiff. In all American jurisdictions and most foreign ones,[51] the

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northern Cyprus in 1974 when that part of Cyprus came under Turkish military rule. *Id.* at 280. The Turkish forces declared the northern third of Cyprus, which they occupied and controlled, to be the "Turkish Federated State of Cyprus" (TFSC) and later the "Turkish Republic of Northern Cyprus" (TRNC). *Id.* Only Turkey granted recognition of the TRNC; all other nations continued to recognize the Republic of Cyprus (Republic) as the only legitimate government for Cyprus. *Id.*

A mosaic that had been affixed to the Kanakaria Church for centuries was taken from it, presumably by theft, after the Turkish invasion. *Id.*; *see also* The Kanakaria Mosaics, *at* http://www.greekvillage.com/hcaao/kanakaria.html (last visited Feb. 9, 2001) (containing details on the theft and a picture of a portion of the mosaic) (on file with the *Duke Law Journal*). In the suit by the church to recover the mosaic from the Indiana gallery that came to be in possession of it, the gallery asserted that the plaintiff was not the owner of the mosaic, and thus was not entitled to its return, because decrees of the TFSC and TRNC had divested the church of its title. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 291.

In response to this argument on appeal, the Seventh Circuit Court of Appeals noted that it would not comment on the validity of the Turkish administration of northern Cyprus itself. Rather, it simply relied on the fact that the United States had never recognized the TFSC or TRNC and declined the defendant's invitation to give those entities "de facto" recognition. *Id.* at 293. In light of the fact that, "despite their best efforts," Turkish forces did not completely displace the Republic and the fact that the "Republic of Cyprus remains the only recognized Cypriot government, the sovereign nation for the entire island," the decrees were ineffective to divest plaintiff of its title. *Id.* For further discussion of the *Autocephalous* case, see *infra* notes 175-97, 352-61 and accompanying text.

49. 678 F.2d 1150 (2d Cir. 1982).

50. The Second Circuit Court of Appeals described its task as "a labyrinthian journey through 19th century German dynastic law, contemporary German property law, Allied Military Law during the post-War occupation of Germany, New York State law, and intricate conceptions of succession and sovereignty in international law." *Id.* at 1153. Similarly, an English judge, required to resolve various claims to a painting stolen at the end of World War II, described the case "as packed with [as many] different characters and issues as the images of the painting. I have been introduced to SMERSH, trophy brigades, the art smugglers of Moscow and 'Big Mamma' in order to resolve disputes of fact and to the learning of commentators on the German civil code in order to resolve disputes of German law." Gotha City v. Sotheby's, slip op. at 6-7 (Q.B. Sept. 9, 1998) (on file with the *Duke Law Journal*).

51. Richard Crewdson, *Some Aspects of the Law as It Affects Dealers in England*, *in* GENEVA WORKSHOP, *supra* note 22, at 47, 50; Henri Steinauer, *The Transfer of Ownership of Art in Swiss Law*, *in* GENEVA WORKSHOP, *supra* note 22, at 118, 118-19.

original owner who did not intend to part with title[52] begins in a superior legal position to the good-faith purchaser whose chain of possession was at one point, and may continue to be, "wrongful."[53] As a result, the burden is typically on the good-faith purchaser to prove his entitlement to the benefit of a rule trumping the owner's title. This rule may be substantive in nature, in the sense that the good-faith purchaser relies on a rule that directly converts his title to a position above the title of the original owner.[54] Alternatively, and more often, this rule, specifically the bar of the statute of limitations, is procedural in nature.[55] In such cases, the superior title of the original owner cannot be asserted against the purchaser or the purchaser's successors because of the limitation, and this bar often is described as resulting in a de facto recognition of a superior title in the good-faith purchaser.[56] A number of courts addressing the issue in the art theft context have concluded that, although statutes of limitations are designed to bar actions and not divest title, the effect is in fact to divest title.[57]

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52. This often is a factual question at trial. In *O'Keeffe v. Snyder*, 416 A.2d 862 (1980), the defendant, a good-faith purchaser, claimed title based on the alleged fact that the artist's husband had sold the painting to the defendant's predecessor in interest, in essence arguing that his chain of possession began rightfully. The plaintiff, artist Georgia O'Keeffe, argued that the paintings had been stolen. *Id.* at 865; *see also* Charash v. Oberlin Coll., 14 F.3d 291, 294 (6th Cir. 1994) (stating that the possessor claimed title through gift by the artist to possessor's donor). The same issue would have been raised in the *Searle* litigation, described *supra* note 27. Adam Zagorin, *Saving the Spoils of War; The Nazis Looted Them. America Bought Them. Now Holocaust Victims Want Them Back*, TIME, Dec. 1, 1997, at 87 (reporting that Searle's [the purchaser's] lawyers assert that the Degas in issue was legitimately sold by the Goodman's uncle [the original owner], not stolen by the Nazis).

53. As will be seen, the owner-purchaser conflict arises precisely because the owner's continued dispossession is deemed wrongful, either because the art was stolen or because a bailee, rightfully in possession of the art, converted it. *See infra* notes 63-123 and accompanying text. The question of exactly when and under what circumstances the possession is and remains wrongful is a central one for both substantive law and choice-of-law purposes. *See infra* notes 289-94 and accompanying text.

54. *See infra* notes 63-89 and accompanying text.

55. In most cases pitting the original owner against the good-faith purchaser, the purchaser does not claim to have received good title directly. *See infra* notes 90-93 and accompanying text. The purchaser's claim is grounded initially in rights as a possessor. The fact of the purchaser's possession then gives the owner a claim against the possessor, and the core issue focuses on when this claim became time-barred.

56. *See infra* notes 94-219 and accompanying text.

57. *E.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 873-74 (N.J. 1980) (holding that the discovery rule does not change the effect of the statute of limitations, which effectively vests title in the possessor, and that subsequent transfers of chattel are not separate acts of conversion which start the statute of limitations running).

> Before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. The only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes.[58]

Because title is treated as having vested in the good-faith purchaser, he may transfer that title without resurrecting a new right of the owner against the successor.[59] The rules, whether substantive or procedural, defining the relative rights of original owners and good-faith purchasers are referred to generally throughout this Article as "right-defining rules." Each of the major right-defining rules is discussed in the sections that follow.

A. Substantive Right-Defining Rules

Substantive right-defining rules are those that directly favor the rights of the good-faith purchaser over the original owner by immediately shifting title to the good-faith purchaser at the moment of the purchase. As the following sections explain, such rules are extremely rare in American jurisdictions.

1. *Rules Recognizing the Immediate Title of the Good-Faith Purchaser of Stolen Art*. The substantive rule that most favors the rights of the good-faith purchaser over the rights of the original owner is that which vests title in the purchaser immediately upon his good-faith acquisition. A few foreign nations, including some in Europe from which much stolen art originates, apply such a rule in limited circumstances. Italy, for example, embraces such a rule when the victim of the theft is a private person or entity, but not when the victim is a public institution.[60] England has a more limited rule, of ancient origin, known as "market overt." This rule will immediately

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58. *Id.* at 874. As Dean Ames of the Harvard Law School wrote more than 100 years ago, and *O'Keeffe* noted, "[a]n immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand." J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 319 (1890), *quoted in O'Keeffe*, 416 A.2d at 874.

59. Even before title is recognized in the good-faith purchaser, successive purchasers, all of whom meet the standard of good faith, may "tack" their periods of possession such that the owner does not benefit from a new statute of limitations clock with each transfer. "Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner." *O'Keeffe*, 416 A.2d at 874-75.

60. Galgano, *supra* note 22, at 129.

vest title in a purchaser if the object was offered for sale in a public market and purchased in good faith.[61] These "immediate vesting" rules represent a minority position among nations, however, at least where the owner has been involuntarily dispossessed through theft. No American state has embraced such a rule where the owner has been involuntarily dispossessed of his property through theft.

2. *Rules Recognizing the Immediate Title of the Good-Faith Purchaser After Voluntary Dispossession by the Original Owner.* Under American law and the law of many foreign states there is only one scenario in which a good-faith purchaser's claim of title is immediately recognized over that of the original owner. This scenario will arise when the owner *voluntarily* parts with possession by the creation of a bailment,[62] the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title.[63] Such a situation might arise out of a loan of the art for exhibit, the turning over of the art to a restorer, the consignment[64] of the art to a gallery for sale,[65] or

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61. Crewdson, *supra* note 51, at 50. The differences between the Italian rule and the English rule presented a difficult conflict of law issue in *Winkworth v. Christie, Manson & Woods, Ltd.*, [1980] 1 Ch. 496, discussed *infra* at notes 299-302 and accompanying text.

62. A bailment arises when one who is not the owner of a chattel is in possession of it:

> A bailment "may be created by operation of law. It is the element of lawful possession, and the duty to account for the thing as the property of another, that creates the bailment, whether such possession results from contract or is otherwise lawfully obtained. It makes no difference whether the thing be intrusted to a person by the owner or by another. Taking lawful possession without present intent to appropriate creates a bailment."

Martin v. Briggs, 663 N.Y.S.2d 184, 187-88 (App. Div. 1997) (quoting Seaboard Sand & Gravel Corp. v. Moran Towing Corp., 154 F.2d 399, 402 (2d Cir. 1946)).

63. Graffman v. Espel, No. 96 Civ. 8247 (SWK), 1998 U.S. Dist. LEXIS 1339, at *9-11 (S.D.N.Y. Feb. 9, 1998). This is not a rule unique to American states. Steinauer, *supra* note 51, at 118 ("[I]f the alienator does not have the power to dispose of the object because it was simply *left in his care* . . . the acquirer is protected and becomes owner if he believes in good faith that the alienator had the power to dispose of the chattel . . . .").

64. A consignment arises out of the transfer of possession from the owner to the consignee, who is to attempt to sell the item to a third party:

> Under a "true" consignment, the owner of goods delivers them to a consignee for sale. If the consignee sells them, he must account to the owner-consignor for the proceeds of sale less his commission. If he does not sell the goods, he must return them, but he does not in any case become liable to the consignor for the price of the goods if they are not sold. Title to the goods remains in the consignor during the consignment and passes, when the goods are sold, directly to the purchaser.

1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 3.5, at 73-74 (1965).

65. *E.g.*, Mucha v. King, 792 F.2d 602 (7th Cir. 1986). *Mucha* involved what the United States Court of Appeals for the Seventh Circuit described as "a 59-year bailment." The artist,

myriad other ways unknown to the ultimate purchaser.[66] The essential fact in all these scenarios is that the owner has voluntarily parted with possession and the bailee has wrongfully sold or transferred the art, either completely without authorization of the owner or in excess of limited authorization given by the owner.[67] A slightly different type of

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Alphonse Mucha, a Czech who is widely credited as the originator of "Art Nouveau," (for a brief biography of Mucha and a sampling of his work, visit http://www.nymuseum.com/Mucha.htm) in 1921 consigned the painting at issue, "Quo Vadis," and many other works to the Newcomb-Macklin Gallery of Chicago. At the time, Mucha was a resident of Paris. The consignment letter to the gallery listed a suggested price for "Quo Vadis" at $10,000. In a somewhat unusual arrangement, Mucha provided, in effect, that the gallery would retain the difference between the price at which the paintings sold and the price it was to remit to Mucha. A normal consignment agreement then and now would provide for the gallery retaining a fixed percentage of the final cost. As the court noted, "[u]nder this arrangement . . . [the owner of the gallery] if he anticipated that the paintings would appreciate would have an incentive to store them rather than sell them, since the appreciation would benefit him exclusively." *Mucha*, 792 F.2d at 606. Given this fact, it was perhaps not surprising that the gallery's owner placed "Quo Vadis" and other works in a warehouse rather than exhibiting them in the gallery.

For many years after 1930, first Mucha and then his widow and son, Jiri, made written inquiry of the gallery to determine the status of Mucha's paintings in its possession. None of the gallery's correspondences mentioned "Quo Vadis." *Id.* at 608-10.

In 1979, the then-owner decided to close the gallery and liquidate its contents. One Rupprecht, of Great Lakes Hot Tubs, Inc., having purchased a fan and icebox from the gallery's assets, asked the owner whether he could have any of the rolled-up paintings he had seen in the gallery basement. The owner consented. One year later, Rupprect sold "Quo Vadis," one of those rolled-up paintings, for $150 to a Chicago art dealer who did business under the name "Fly-by-Nite Galleries." King, an art dealer whom the court describes as working "out of a shopping bag," purchased "Quo Vadis" for $5000 from the "Fly-by-Nite" owner in 1981. *Id.* at 612.

In 1982, one of King's friends wrote Jiri Mucha seeking information about the painting. After concluding that the Newcomb-Macklin Gallery had improperly either sold or given away the painting, Jiri Mucha brought suit against King in 1983. *Id.* at 612-13. At the time of the suit, "Quo Vadis" was in the hands of a restorer to whom King had brought the painting for restoration. It remained in her custody until determination of the title and payment of the remainder of her fee, King having already paid $8500, representing half the fee. *Id.* at 604. For the outcome of the dispute, see *infra* note 76.

66. Crewdson, *supra* note 51, at 47.

> A person who offers to sell an object to a dealer may have obtained possession by a trick; or he may have it on loan, or it may be in his custody for some other reason such as revaluation or repair. The true owner may be the wife or the husband or another close relation of the person with whom the dealer is negotiating, or the object may belong to a trust so that it is only the trustees who have the right to sell.

Id. at 51.

67. *E.g.*, Morgold, Inc. v. Keeler, 891 F. Supp. 1361, 1366-67 (N.D. Cal. 1995). One of the two owners of an oil-on-canvas painting by Alfred Bricher entitled "Marlton's Cove, Grand Manan, Maine," sold the painting in violation of a written agreement with his co-owner. The court acknowledged that a good-faith purchaser could acquire good title in spite of the allegedly unauthorized action. *Id.* at 1365. (For a brief biography of Bricher and sample of his work, visit http://www.whitemountainart.com/Biographies/bio_atb.htm.)

bailment occurs in the rare situation where the owner loses or misplaces the work.[68]

The key to understanding why substantive rules arose to favor a good-faith purchaser[69] in this scenario is to note that, with the exception of property that is lost, it is the owner who purposefully triggered the chain of events that ultimately led to the unauthorized sale to the purchaser. As a California court put it, "[a]n owner who *entrusts* his property to another bears some responsibility for creating a situation whereby an innocent purchaser is led to buy goods from an agent who is acting in excess of his authority."[70]

This policy is reflected in the Uniform Commercial Code (U.C.C.) rule that an owner who entrusts possession of goods to a merchant who deals in that kind of goods gives that merchant the power to transfer all rights to a buyer in the ordinary course of busi-

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Essentially the same issue was presented in *Leonardo Da Vinci's Horse, Inc. v. O'Brien*, 761 F. Supp. 1222 (E.D. Pa. 1991). The plaintiff-owner alleged that the sale of the disputed art violated the consignment agreement. Although noting that a good-faith purchaser could acquire title, the court suggested that the "bargain basement" price paid by the purchaser undermined its claim of good-faith: "A 'bargain basement' price is often a sign that the seller's rights to dispose the object are not on the level." *Id.* at 1228. *See* discussion *infra* notes 77-88 and accompanying text. A similar issue was presented in *Graffman v. Espel*, No. 96 Civ. 8247 (SWK), 1998 U.S. Dist. LEXIS 1339 (S.D.N.Y. Feb. 9, 1998). In 1992, Sture Hjalmar Graffman, the owner of a Picasso painting, "Le Peintre et Son Modele," contracted with Miguel Espel, acting on behalf of his trading company, MTS, to make MTS the exclusive agent for the sale of the painting. The contract authorized MTS to sell the painting through intermediaries. At least 90% of the proceeds were to go to Graffman. Graffman v. Delecea, No. 96 Civ. 7270, 1997 U.S. Dist. LEXIS 15525, at *2 (S.D.N.Y. Oct. 8, 1997). After selling the painting, Espel pocketed the proceeds. *Espel*, 1998 U.S. Dist. LEXIS 1339, at *3. The remainder of the facts of this and related cases are set forth *infra* in note 79.

68. *E.g.*, Hoelzer v. Stamford, 933 F.2d 1131 (2d Cir. 1991). The story of the artwork at issue in this case began with the Works Progress Administration, a creation of President Franklin D. Roosevelt's administration, which was intended to provide public work for unemployed Americans during the 1930s. One of the elements of the program was designed to sponsor work in the arts. "Among its other achievements, the arts project generated creation of thousands of murals for display in public buildings around the country." *Id.* at 1133.

One set of such murals was painted by James Daugherty for the walls of Stamford High School, a public school in Stamford, Connecticut. These murals, eight feet tall and more than 100 feet long, hung in the high school from 1934 until 1970.

In 1970, when the school was being renovated, the murals were to be removed carefully and stored to prevent their being damaged. Instead, unbeknownst to school officials, workmen removed the murals and placed them with construction debris near an outdoor dumpster. Fortunately, a student discovered the murals and took them home. *Id.* at 1134. (The remainder of the *Hoelzer* facts are described *infra* at note 247.)

69. Good-faith status is a central factor when artwork is purchased from a seller who is in lawful possession but unauthorized to sell the artwork. *See infra* notes 71-74 and accompanying text.

70. Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 789 (Ct. App. 1996).

ness.[71] The U.C.C. defines entrustment broadly, including within the term "any delivery and any acquiescence in retention of possession."[72] The significance of this definition is that it captures not only the consignment situation but also the situation in which the owner leaves the art with the bailee for repair[73] or exhibit. The result is that "a merchant may vest good title in the [good-faith] buyer even as against the owner."[74] The lack of authority of the merchant to make the sale does not affect this result.[75]

Under these rules, however, in order to prevail over the original owner, the buyer must qualify as "a buyer in ordinary course of business."[76] The U.C.C. defines such a buyer as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights . . . of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind."[77] A merchant, as purchaser, will be held to a higher standard of good faith than will other purchasers.[78] Thus, an art gallery owner purchasing a work of art will be held to a heightened standard, but the individual

71. U.C.C. § 2-403(2) (1977). The entrustment rule is "designed to enhance the reliability of commercial sales by merchants (who deal with the kind of goods sold on a regular basis) while shifting the risk of loss through fraudulent transfer to the owner of the goods, who can select the merchant to whom he entrusts his property." Porter v. Wertz, 421 N.E.2d 500, 500-01 (N.Y. 1981).

72. U.C.C. § 2-403(3). Whether there is an entrustment is a question of fact, although Professor Grant Gilmore, "father" of the U.C.C., once wrote that the Code "defines 'entrusting' as including everything short of armed robbery." Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 618 (1981).

73. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 175-76 (3d ed. 1988).

74. O'Keeffe v. Snyder, 416 A.2d 862, 873 (N.J. 1980).

75. *See* Graffman v. Espel, No. 96-8247, 1998 U.S. Dist. LEXIS 1339, at *9 (S.D.N.Y. Feb. 9, 1998) ("Even where an agent has violated his or her instructions, Section 2-403 may operate to bind the principal such that the purchaser acquires good title from the principal's agent.").

76. U.C.C. § 2-403(2). In *Mucha v. King*, King did not prevail over Mucha because Rupprecht, who had originally purchased the work from the gallery, could not qualify as "a buyer in the ordinary course of business." 792 F.2d 602, 612 (7th Cir. 1986). Therefore, Rupprecht did not gain title to "Quo Vadis" and could not transfer title to a subsequent buyer. *Id.*

77. U.C.C. § 1-201(9).

78. *Espel*, 1998 U.S. Dist. LEXIS 1339, at *15 ("Merchants are held to a higher standard of good faith than other purchasers."). The U.C.C. provides that "[g]ood faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2-103(1)(b).

purchaser from the gallery will be held to the "normal" standard.[79] Most jurisdictions leave the precise height of the bar of "reasonable commercial standards" to the trier of fact.[80]

Where the U.C.C. does not govern the case,[81] common law agency principles may also favor the good-faith purchaser over the owner in the voluntary dispossession scenario. Following basic agency principles, "if the seller of a painting has authority to sell it, a buyer and all subsequent buyers will gain whatever title to the painting the seller initially possessed."[82] Whether authority exists is a question for the trier of fact.[83] Such authority may be actual, implied, or apparent,[84]

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79. An example of the significance of this difference is well illustrated by *Espel*. Both the ultimate purchasers and the Avanti Gallery, through which the Picasso had passed, sought summary judgment claiming the status of good-faith purchasers from a merchant to whom the Picasso had been entrusted. As to the gallery, the court denied summary judgment, noting that the question was one for the trier of fact:

> Whether the Avanti Defendants met the reasonable commercial standards of the art industry is a question for the trier of fact. Whether the standards of the art industry required the Avanti Defendants to make an inquiry into the provenance of the Painting is also a question for the trier of fact. If the trier of fact were to determine that reasonable commercial standards require an investigation into provenance only when there are warning signs the questions of whether there were warning signs, and what degree of investigation was reasonable, are factual inquiries. Thus, there are questions of fact as to whether the Avanti Defendants acted in good faith and are entitled to the protection of Section 2-403.

Espel, 1998 U.S. Dist. LEXIS 1339, at *16-17 (citation omitted).

With respect to the ultimate purchasers (the "Does"), however, the court held "[a]s a matter of law, [they] had no obligation to investigate the provenance of the Painting." *Id.* at *18. As purchasers who were "honest in fact," they met the good-faith standard. *Id.* at *17-19.

80. *See id.* at *15-16 (noting that whether a merchant applied reasonable standards is a question for the trier of fact); Morgold v. Keeler, 891 F. Supp. 1361, 1368 (N.D. Cal. 1995) (considering whether the purchasers had taken reasonable steps to verify title). In *Morgold*, the court concluded that the ultimate and penultimate purchasers acted with the required good faith inasmuch as "both conducted themselves in a manner reasonable in the art industry." *Id.* at 1368. In the absence of "warning signs" regarding the provenance of the disputed Bricher painting, industry practice would not require "a buyer to require a seller to make disclosures about the chain of title or the prices paid at every link in the chain." *Id.*

81. All states have adopted the U.C.C. Issues arise, nonetheless, in which the circumstances of the case do not strictly meet the requirements of U.C.C. section 402, the entrustment section, such as where the bailee is not a merchant who deals in that kind of goods as required. Additionally, the U.C.C. does not govern in foreign nations.

82. *Espel*, 1998 U.S. Dist. LEXIS 1339, at *6 (denying the plaintiff-owner and the defendant-sellers' cross-motions for summary judgment on the plaintiff's action to recover the painting and for damages; the court granted the good-faith purchasers' motion for summary judgment).

83. *Id.* at *7.

84. Actual authority is express authority given by the principal (the owner) to the agent. Graffman v. Delecea, No. 96 Civ. 7270, 1997 U.S. Dist. LEXIS 15525, at *8-10 (S.D.N.Y. 1997). Implied authority is "actual authority given implicitly . . . [or a] kind of authority arising solely

although most disputed art title cases involving the owner's voluntary disposition of the art to a bailee turn on the issue of apparent authority.[85] Under agency principles, apparent authority doctrine leads to the conclusion that "the loss should fall on the principal who has armed the agent with apparent authority and thus has enabled him to obtain the advantage of the person with whom he trades, rather than on the purchaser."[86] Although it is always the case that the purchaser's reliance on the representations of the agent must be reasonable, where apparent authority exists, "the [purchaser] ordinarily has no duty to inquire as to the agent's actual authority, except when the transaction is conducted under extraordinary circumstances that should alert the third party to the danger of fraud," or where the third party is under a special duty.[87] As is true in the entrustment context, art dealers have been held to have a heightened duty to inquire as to such authority.[88]

In both the entrustment and the apparent authority context, the good-faith purchaser is able to claim the benefit of a rule that bestows good title on him immediately upon purchase. Although the acts of the seller or a predecessor to the seller may be wrongful to the original owner,[89] the possession by the good-faith purchaser is never wrongful as to that owner. Thus, a cause of action never accrues in favor of the owner against the purchaser.

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from the designation by the principal of a kind of agent who ordinarily possesses certain powers." *Id.* at *10 (quoting Marfia v. T.C. Ziraat Bankasi, 100 F.3d 243, 251 (2d Cir. 1996)).

Implied authority is "dependent on verbal or other acts by the principal which reasonably give an appearance of authority to conduct the transaction." *Id.* Apparent authority, grounded on estoppel principles, "arises when a principal places an agent in a position where it appears that the agent has power to act for the principal, although the agent does not actually possess such power." *Id.* at *11-12.

85. *Delecea*, 1997 U.S. Dist. LEXIS 15525, at *10.

86. Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 790 (Ct. App. 1996) (quoting Carter v. Rowley, 211 P. 267, 268 (Dist. Ct. App. 1922)).

87. *Delecea*, 1997 U.S. Dist. LEXIS 15525, at *12; *see also Naftzger*, 49 Cal. Rptr. 2d at 790:

> Under agency law principles, a similar result may be had if the court precludes the defrauded owner from disputing the validity of the innocent purchaser's title. The court will estop an owner who, by his conduct, has led the purchaser to believe that the agent was authorized to sell the property.

88. *See supra* notes 67, 79.

89. The owner will normally have a cause of action for misdelivery against the bailee. For examples of this, see *Graffman v. Espel*, 1998 U.S. Dist. LEXIS 1339 (S.D.N.Y. 1998), and *Delecea*, 1997 U.S. Dist. LEXIS 15525, in which the original owner brought claims against all bailees in the chain that ultimately vested title in the good-faith purchaser.

B. *Procedural Right-Defining Rules: The Bar of the Statute of Limitations*

The far more common scenario in which the claim of the original owner of art against the good-faith purchaser arises is that following the involuntary dispossession of the original owner through theft of the art. The rules that have emerged in this context are grounded in policy considerations born of the wrongfulness of the act that parted the owner from his property. When art is stolen, the thief's possession is immediately wrongful, and because the owner's claim accrues immediately, the statute of limitations on that claim is triggered immediately.[90] This rule applies even when the owner is unaware of the theft at the time of its occurrence.[91] Thus, a thief who holds the stolen art beyond the statutory period in which a claim for conversion must be made is not subject to a civil recovery by the owner, although he does not gain title against the owner. Of course, what the bar of the statute of limitations gives the thief, the criminal law takes away.[92] Far more immediate motivations, primarily monetary ones, usually inspire the thief to part with possession long before the conversion limitations period would bar suit by the true owner. Interestingly, however, the influence of the statute of limitations becomes far more complicated when the art, initially in the hands of a thief, comes to rest in the hands of a good-faith purchaser.

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90. *See* Sporn v. M.C.C. Records, Inc., 448 N.E.2d 1324, 1326-27 (N.Y. 1983) (holding that exclusive control and use of a "master tape" constituted a conversion, rather than an ongoing trespass).

A similar outcome occurs in other scenarios involving an immediate characterization of wrongfulness. For example, in *New York City Transit Authority v. New-York Historical Society*, 635 N.Y.S.2d 998 (Sup. Ct. 1995), the Transit Authority brought an action to recover items in the possession of the Society. These items had been given to the Society over the course of four decades by the New York City Board of Transportation. The court noted that "[i]t is well settled that where the initial possession of a chattel is wrongful or unlawful, the cause of action to recover the chattel accrues and the Statute of Limitations begins to run at the time of the initial unlawful possession." *Id.* at 1000. Because Article VIII, section 1 of the New York constitution prohibits agencies such as the Board from making gifts, the gifts to the Society were unlawful from the time of each transfer, and the statute of limitations having been thus triggered, the plaintiff's cause of action was time-barred as early as 1949. *Id.* at 1001.

91. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991); *see also New-York Historical Soc'y*, 635 N.Y.S.2d at 1001 ("A transfer may be wrongful and constitute a conversion even where the defendant acted in good faith and the plaintiff was unaware at the time that the taking was wrongful. All that is necessary is that the defendant had no right to possess the property in question." (citations omitted)).

92. *E.g.*, N.Y. PENAL LAW § 450.10(5) (McKinney 2000) ("If stolen property comes into the custody of a court, it must . . . be delivered to the owner, on satisfactory proof of his title . . . .").

Both American and foreign jurisdictions are essentially in accord about the immediate consequences of a transfer by a thief. A thief cannot transfer title because he does not have title.[93] The significance of the good-faith purchaser's lack of title lies in the fact that the title-holder, the owner, has a right to sue the purchaser for the return of the work and, in some circumstances, for damages arising out of the purchaser's wrongful possession. The question is when the statute of limitations begins to run on the owner's claim against the good-faith purchaser.

1. *Accrual at Acquisition: Good-Faith Possession as an Immediate Wrong*. The traditional rule in American states, and the modern rule in many foreign countries, treats the purchase by a subsequent possessor from a thief, even in good faith, as wrongful from the instant that possession begins.[94] This fact of wrongfulness immediately triggers the clock of the statute of limitations on the owner's cause of action for replevin or conversion against the good-faith purchaser. The fact of immediate wrongfulness may, in the short

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93. *See* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 291 (7th Cir. 1990) (applying Indiana law); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 833 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (applying New York law); Naftzger v. Am. Numismatic Soc'y, 499 Cal. Rptr. 2d 784, 788 (Ct. App. 1996) (stating California law); O'Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980) (stating New Jersey law). British law recognizes the principle "*nemo dat quod non habit*," meaning simply that a person who does not have good title may not pass good title. Crewdson, *supra* note 51, at 50.

It is often said that a purchaser from or through a thief can acquire only what the thief has. This statement is misleading in a crucial way, because subsequent purchasers, even purchasers in good faith, in fact may get less than what the thief has. Such an arguably absurd result occurs when the subsequent possessor is not entitled to claim the benefit of the same rules with respect to time limitations on the owner's right to reclaim the property as would have been available to the thief. In *Guggenheim*, the New York Court of Appeals acknowledged but was not moved to remedy the "seemingly anomalous" result that a good-faith purchaser cannot take advantage of the favorable application of the statute of limitations accrual date available to a thief. *Guggenheim*, 569 N.E.2d at 429.

94. For the American rule, see, for example, RESTATEMENT (SECOND) OF TORTS § 229 (1965) (describing purchase by a subsequent possessor from a thief, even in good faith, as wrongful from the instant that possession begins); *Christiansen Grain, Inc. v. Garden City Cooperative Equity Exchange*, 391 P.2d 81, 85 (Kan. 1964) (same); *Bozeman Mortuary Ass'n v. Fairchild*, 68 S.W.2d 756, 759 (Ky. 1934) (same); and *Shelby v. Shaner*, 115 P. 785, 786 (Okla. 1911) (same). For foreign countries, see, for example, Hans Hanisch, *Legal Aspects of International Trade in Art in the Federal Republic of Germany*, *in* GENEVA WORKSHOP, *supra* note 22, at 191, 193 (stating that the German statute of limitations runs in ten years from a good-faith purchaser's acquisition, so long as the purchaser remains in good faith through the ten-year period) and Steinauer, *supra* note 51, at 119 (stating that under Swiss law, an owner who has been dispossessed of an object through theft has five years from the loss of possession to bring a suit for recovery of the object).

run, expand the legal exposure of the possessor by opening the full range of liabilities that attend the torts of conversion and replevin.[95] Significantly, in the context of stolen art and the statute of limitations, this characterization in fact benefits the subsequent purchaser.[96] Because the possession is immediately characterized as wrongful, a claim for replevin or conversion has accrued, often despite the fact that neither the owner nor the good-faith purchaser knows it. Unless tolled, the statute will run on the original owner's right to sue relatively quickly and often before the owner is able to discern where and by whom the art is wrongfully possessed.[97]

What, if anything, will toll a statute of limitations to prevent such an outcome varies significantly among states. One ground recently emerging as relevant in the context of good-faith possession of stolen art is the "fraudulent concealment" rule.[98] In most states, a defendant's fraudulent concealment *of a cause of action* tolls the statute of limitations for the period during which the claim is undiscovered or reasonably undiscoverable by the plaintiff, in essence estopping the

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95. *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1404 ("[D]amages may be awarded for loss of the use of the property in a replevin action."), *aff'd*, 917 F.2d 1374 (7th Cir. 1990). For additional discussion, see DeWeerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987), *infra* at notes 153-74 and accompanying text.

96. *See* Stephen L. Foutty, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839, 1843 (1990) ("While this rule, which considers the good faith purchaser to be in unlawful possession upon receipt of the property . . . seems to favor the true owner, the rule actually benefits the good faith purchaser in replevin actions.").

97. The limitation periods themselves for replevin or conversion normally fall in a range from two to five years. *E.g.*, CAL. CIV. PROC. CODE § 338 (West Supp. 2001) (three years); FLA. STAT. ANN. § 95.11(3)(h)-(i) (West Supp. 2001) (four years); 735 ILL. COMP. STAT. ANN. 5/13-205 (West 1992) (five years); N.Y. C.P.L.R. LAW § 214(3) (McKinney Supp. 2001) (three years); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West Supp. 2001) (two years).

98. One notable source states:

> [F]raudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations, postponing the commencement of the running of the statute until discovery or reasonable opportunity of discovery of the fact by the owner of the cause of action; under this rule, one who wrongfully conceals material facts and thereby prevents discovery of his wrong or the fact that a cause of action has accrued against him is not permitted to assert the statute of limitations as a bar to an action against him, thus taking advantage of his own wrong, until the expiration of the full statutory period from the time when the facts were discovered or should, with reasonable diligence, have been discovered.

34 AM. JUR. *Limitation of Actions* § 231 (1941); *accord* 51 AM. JUR. 2D *Limitation of Actions* § 147 (Cum. Supp. 1999).

defendant from asserting the limitations defense.[99] "[T]he rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties; its rationale 'is that the culpable defendant should be estopped from profiting by his own wrong to the extent that it hindered an 'otherwise diligent' plaintiff in discovering his cause of action.'"[100] The essential fact necessary to a showing

99. An excellent example of estoppel to bar the defense of the statute of limitations in a claim concealment context is *Farkas v. Farkas*, 168 F.3d 638 (2d Cir. 1999). In this intra-family dispute, which reads like a modern Grimm Brothers' tale, the mother-in-law, Ruth, brought suit against her estranged daughter-in-law, Arlene, for conversion of several pieces of art that for years had resided in the home of Arlene and Ruth's son, Bruce. Arlene, in turn, counterclaimed against Ruth for fraud and conversion of art, money, and other marital assets. Ruth died before trial, and Bruce continued as her representative. The jury returned a verdict finding that Arlene had converted nothing and that Ruth had converted more than $700,000 of art and other property. *Id.* at 639-40.

Bruce moved to set aside the verdict against Ruth on the ground that the statute of limitations on Arlene's counterclaims had run. The district court agreed and vacated the jury's verdict against Ruth. *Id.*

Before examining the Second Circuit's reversal, it is both illuminating and darkly entertaining to consider the underlying facts. Bruce and Arlene were married for thirty years before Bruce left and entered into a bigamous marriage with the mother of his children. Not surprisingly, Arlene sued and Bruce countersued for divorce. In 1994, two years after the divorce actions commenced, Ruth asked Arlene to return to her certain pieces of art that were hanging in Bruce and Arlene's apartment, in which Arlene still lived. Ruth claimed that this art had been on loan to the couple. Arlene refused to deliver possession to Ruth, claiming that the art had been a gift. When Ruth then sued Arlene, Arlene countersued, claiming that Ruth improperly removed from the couple's apartment a Dali painting, a Hassam painting, and a Rodin sculpture, among other things. The court described the following scheme, which the jury apparently believed Arlene had proven:

> Ruth had given various pieces of art to the couple over the years; Bruce engineered the removal of the art from the marital home; Ruth and Bruce then arranged for the art to be sold and for the proceeds to go to Ruth, who in turn then lent the money to Bruce. Evidence to prove that Ruth and Bruce engaged in this scheme included a direct correlation between the amounts of money received from the sale of individual pieces of art and the amounts of money Ruth "lent" to Bruce.

Id. at 640.

In holding that Arlene's claims against Ruth were barred, the district court set the latest date at which the conversion occurred as 1990. Because Arlene did not bring her claim for conversion until 1995, it was beyond the applicable three-year statute of limitations. *Id.* at 639. The court further held that Arlene had not presented sufficient evidence to support equitable estoppel as a bar to the statute's running.

The Second Circuit Court of Appeals reversed on the ground that the district court had "misapprehended" the standard for equitable estoppel under New York law. *Id.* at 641. The Second Circuit concluded that intentional concealment of the conversion by the defendant barred the use of a statute of limitations defense. In the instant case, Arlene had offered more than ample evidence that, at a minimum, Ruth intentionally engaged in a scheme to convert and conceal the monies derived from the sale of the artwork. *Id.* at 642.

100. Bernson v. Browning-Ferris Indus., Inc., 873 P.2d 613, 615 (Cal. 1994) (quoting Sanchez v. South Hoover Hosp., 553 P.2d 1129, 1133-34 (Cal. 1976)).

of fraudulent concealment is that the defendant has done something affirmatively to prevent discovery of the claim.[101]

Significantly, however, although courts have held that fraudulent concealment of the *existence* of the cause of action tolls the statute of limitations, several courts called upon to address the issue have refused to extend the doctrine where the cause of action is known to the plaintiff but the *identity of the defendant* is fraudulently concealed. The distinction between "concealed claims" and "concealed identities" is crucial in the art theft context, because most owners know of the theft, and thus of the cause of action, long before they know the identity of the current possessor.[102]

A significant minority of states has been willing to extend the doctrine to the situation where the identity of the defendant is fraudulently concealed. *Bernson v. Browning-Ferris Industries of California, Inc.*[103] is illustrative. The California appellate court noted that the general rule that concealed identity does not toll the statute of limitations was an outgrowth of an assumption that the normal limitations period, often extended by the filing of a *Doe* complaint,[104] usually provides sufficient time to discover the identity of the wrongdoer.[105] "The question here, however, is whether the general rule should apply when, as a result of the defendant's intentional concealment, the plaintiff is not only unaware of the defendant's identity, but is effectively precluded as a practical matter from ascertaining it

101. Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1990). If the plaintiff establishes fraudulent concealment, the burden shifts to the defendant to show that the plaintiff could have discovered the cause of action through the exercise of due diligence. Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984).

102. This is not always true. *Naftzger v. American Numismatic Society*, 49 Cal. Rptr. 2d 784 (Ct. App. 1996), involved the claims of a good-faith purchaser of rare coins against the museum from which they were stolen. Although the theft took place sometime prior to 1970, it was disguised by the substitution of identical but inferior coins. Only in December 1993 was the fact of the theft determined. *Id.* at 787.

103. 873 P.2d 613 (Cal. 1994). Prior to *Bernson*, California had followed the traditional rule, which was accepted in almost every state, that "ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." *Id.* at 616 (citing Gale v. McDaniel, 13 P. 871 (Cal. 1887)).

104. Under California law, plaintiffs in civil actions may file such a complaint where the name of the defendant is unknown. CAL. CIV. PROC. CODE § 474 (West 1979) ("When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint . . . and such defendant may be designated in any pleading or proceeding by any name . . . ."). The purpose of this section is to enable the plaintiff to file suit before the statute of limitations runs. Olden v. Hatchell, 201 Cal. Rptr. 715, 718 (Ct. App. 1984).

105. *Bernson*, 873 P.2d at 616.

through normal discovery procedures."[106] Although *Bernson* is not an art theft case,[107] the court acknowledged that "[t]he problem arises not infrequently when the owner of stolen artwork discovers its whereabouts many years after the theft and files an action to recover the property."[108] As is true when the cause of action itself is concealed, fraudulent concealment of the identity of the defendant tolls the statute only until the plaintiff discovers or, through the exercise of due diligence, should have discovered the identity of the defendant.[109]

Only one court has applied the "concealed identity" variant of the fraudulent concealment doctrine in an art theft case to toll the statute of limitations for the owner in a replevin action against the possessor, and that court did so as an alternate ground for its holding.[110] In *Autocephalous Greek-Orthodox Church v. Goldberg*, the church brought suit against an Indiana art gallery and its owner to recover extremely valuable mosaics that had been stolen from the Kanakaria Church in northern Cyprus.[111] The bulk of the district court's opinion discussed the application of the discovery rule[112] to

106. *Id.* at 617.

107. *Bernson* involved a defamation suit in which the plaintiff knew of material defaming him but did not know the identity of its authors. *Id.* at 614.

108. *Id.* at 617. In 1983, the California Legislature amended the statute of limitations period for seeking the return of stolen art to make clear "that the cause of action does not accrue until the owner, the owner's agent, or the investigating law enforcement agency discovers the whereabouts of the stolen articles." Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 786 (Ct. App. 1996) (discussing CAL. CIV. PROC. CODE § 338(c) (West 1979)).

109. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 288 (7th Cir. 1990) (noting that the plaintiff must exercise due diligence during the period of fraudulent concealment).

110. *See* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1376 (S.D. Ind. 1989) (concluding that the doctrine of fraudulent concealment would toll the running of the statute of limitations in favor of the original owner), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (declining to address the issue after having affirmed the district court's statute of limitations conclusion on another ground). *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980), hinted at the applicability of the doctrine, noting in the context of the discovery/due diligence rule, discussed *infra* at notes 128-203 and accompanying text, that "[i]f a chattel is concealed from the true owner, fairness compels tolling the statute during the period of concealment." *Id.* at 872.

Although the fraudulent concealment doctrine applies when the possessor actively conceals the art in order to gain the benefit of the limitations bar, principles of adverse possession offer analogies to support the acquisition of title in a possessor who does precisely the opposite. Where possession is "hostile, actual, visible, exclusive and continuous," adverse possession will eventually extinguish the title of the original owner and recognize a new title in the adverse possessor. *Id.* at 870.

111. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1375. For additional discussion of this case, see *infra* notes 175-97 and accompanying text.

112. The discovery rule is discussed *infra* at notes 128-203 and accompanying text.

postpone the *accrual* of claims against the good-faith purchaser, the primary ground upon which the court found the church's action to be timely.[113] The court then turned to the alternate ground of its holding, that the church's action was timely under the doctrine of fraudulent concealment.[114]

The court began by noting that the doctrine of fraudulent concealment presupposes that the defendant is in wrongful possession of the property and thus that the plaintiff's cause of action has accrued.[115] Indiana law had already embraced the fraudulent concealment doctrine as applicable in suits for conversion of personal property, including stolen property,[116] and no Indiana case foreclosed application of the doctrine to concealed identity in the art theft context.[117] The court concluded that the plaintiff's inability to discover the possessor of the stolen mosaics was due to the fraudulent concealment of the mosaics by the defendants' predecessors.[118] The court also noted that the plaintiff had exercised due diligence to discover the fraud, as required by Indiana law, and was therefore entitled to invoke the doctrine of fraudulent concealment to toll the statute.[119]

The application of the "concealed identity" variant of the fraudulent concealment doctrine in art theft cases serves the policy interest of barring a defendant from gaining repose through his own fraudulent acts. "[W]here the bar [of the statute of limitations] becomes a sword rather than a shield, wielded by a party that has intentionally cloaked its identity, factors of fairness and unjust enrichment come into play, which courts are bound to consider in equity and good conscience."[120] Nevertheless, the doctrine will rarely be of use to

113. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391.

114. *Id*.

115. *Id.*

116. *Id.*

117. One Indiana case had held that the doctrine did not extend to concealment of the identity of the defendant. Landers v. Evers, 24 N.E.2d 796, 797 (Ind. Ct. App. 1940). The *Autocephalous Greek-Orthodox Church* court found that that case did *not* foreclose recognition of the doctrine in concealed identity cases because *Landers* involved a situation where the plaintiff easily could have discovered the proper identity of the defendant. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1392-93 n.13.

118. *Id.* at 1392.

119. *Id.* The Seventh Circuit Court of Appeals affirmed, but only on the first ground, the applicability in art theft cases of the discovery rule. *Autocephalous Greek-Orthodox Church*, 917 F.2d 278, 290 (7th Cir. 1990). Because it found no error, legal or factual, in the district court's adoption and application of that rule, it declined to pass on the fraudulent concealment issue. *Id*.

120. Bernson v. Browning-Ferris Indus., Inc., 873 P.2d 613, 618 (Cal. 1994).

plaintiffs in art theft cases. Although the thief and those with knowledge of the theft might intentionally conceal their identity,[121] good-faith purchasers are unlikely to do so. Such purchasers are not required to be open and notorious in their possession, as might be the case if they were affirmatively claiming title by adverse possession.[122] Rather, in the scenarios where their possession is deemed wrongful from its inception, the statute of limitations will begin to run at that inception, and the toll will occur only in the rare case where the good-faith purchaser has acted affirmatively to prevent discovery of the claim. As a result, in virtually all cases of an owner seeking recovery from a good-faith purchaser deemed to be in *wrongful possession*, the uninterrupted running of the statute will bar the suit and give title to the purchaser.[123]

2. *Accrual Delayed: Wrongfulness of the Good-Faith Purchaser's Possession Postponed*. An increasing number of jurisdictions do not characterize possession by a good-faith purchaser as wrongful from its inception, even in situations where the dispossession of the owner originally occurred through theft. These jurisdictions postpone the legal finding of wrongfulness until either the owner demands return of the item and the possessor refuses the demand (the "demand and refusal" rule),[124] or until the time at which the owner, through the exercise of due diligence, knows the identity of the possessor (the discovery rule).[125] The fact that the legal conclusion of wrongfulness is postponed delays the accrual of the plaintiff's claim. This delay of accrual in turn delays the triggering of the statute of limitations. In limited respects, these rules deferring the characterization of wrongfulness protect the good-faith purchaser from liabilities flowing from wrongful possession.[126] This benefit is

121. This fact has led one influential court to conclude that owners of stolen art are justified in doing nothing to publicize the theft for fear that publicity will encourage continued concealment. *See Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 430-31 (N.Y. 1991), discussed *infra* at notes 206-20 and accompanying text.

122. *See supra* note 110.

123. *See supra* note 97 and accompanying text.

124. *See infra* notes 204-19 and accompanying text.

125. *See infra* notes 128-203 and accompanying text.

126. *See* Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982):

> The rule is a reasonable and just one, that an innocent purchaser of personal property from a wrongdoer shall first be informed of the defect in his title and have an opportunity to deliver the property to the true owner before he shall be made liable as a tortfeasor for wrongful conversion.

essentially illusory, however. Although intended to protect innocent purchasers, delayed wrongfulness rules actually benefit original owners in suits to recover stolen art. By delaying the point at which the statute of limitations would begin to run, delayed wrongfulness rules delay the point at which the original owner's suit would be barred.[127]

a. Accrual delayed: the discovery rule. The discovery rule delays the accrual of a cause of action against the good-faith purchaser, thus postponing the triggering of the statute of limitations, until "the injured party [the owner] discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of the cause of action,"[128] including the identity of the possessor.[129] This rule is comprised of two parts. First, it asks when the owner learned enough facts to form the basis of a cause of action "which must include the facts that the works are being held by another and who, or at least where the 'other' is."[130] Second, the rule demands that instead of accepting the invitation to "laziness" that might appear to be tolerated or encouraged by the nature of the first inquiry, the true owner must throughout this time "exercise due diligence to investigate the theft and recover the works."[131]

(internal quotations omitted).

127. Foutty, *supra* note 96, at 1862; *see also* DeWeerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987) ("[The 'demand and refusal' rule] may disadvantage the good-faith purchaser, however. . . . For if demand is delayed, then so is accrual of the cause of action, and the good-faith purchaser will remain exposed to suit long after an action against a thief or even other innocent parties would be time-barred."). The facts of *DeWeerth* are described *infra* at notes 156-69 and accompanying text.

128. O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980); *see also* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1389 (S.D. Ind.) 1989) (noting that the "discovery rule prevents the statute [of limitations] from beginning to run in situations where a plaintiff, using due diligence, cannot bring suit because he is unable to determine a cause of action"), *aff'd*, 917 F.2d 278 (7th Cir. 1990); Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *29 (E.D. Pa. 1995) (reciting the same rule).

129. *O'Keeffe*, 416 A.2d at 870. This rule differs in key respects from the "fraudulent concealment" rule, which acknowledges the wrongfulness of defendant's possession but tolls the running of the statute of limitations while the identity of the possessor is concealed. There, the focus is on the *mala fides* of the possessor in seeking to conceal possession in part to gain the benefit of the otherwise applicable statute of limitations, which would eventually bar the plaintiff's claim. The discovery rule, examined here, focuses instead on the acts of the true owner in a situation where the possessor is assumed to be acting in good faith.

130. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 289.

131. *Id.*

The seminal art theft case incorporating the discovery rule into an owner/good-faith purchaser dispute is *O'Keeffe v. Snyder*.[132] In 1976, artist Georgia O'Keeffe[133] brought suit to recover three of her paintings from a New Jersey art gallery owner named Barry Snyder. O'Keeffe alleged that the paintings had been stolen in 1946 from a New York art gallery operated by her husband, the famous photographer Alfred Stieglitz.[134] O'Keeffe did not immediately inform anyone, including her husband, of the theft.[135] Although she did tell her husband later, neither he nor she informed the police or any other law enforcement agency, nor did they advertise the loss of the paintings. They did mention the loss to associates in the art world. Not until 1972 did O'Keeffe authorize the reporting of the theft to the Art Dealers Association of America, which maintained a private registry of stolen paintings.[136] In early 1976, O'Keeffe learned from a New York City art gallery that the paintings had been sold for $35,000 to defendant Snyder. When O'Keeffe demanded that Snyder return the paintings, he refused.[137]

Snyder's claim to the paintings traced back through one Ulrich Frank. Frank had sold the paintings through the New York gallery where Snyder had purchased them. Frank claimed possession through a gift from his father in 1965. Frank had kept the paintings in his homes in New Jersey and Pennsylvania and, in 1968, had publicly exhibited them anonymously in a one-day art show in New Jersey.[138]

The two parties filed cross motions for summary judgment. The trial court granted summary judgment to Snyder, the good-faith purchaser.[139] The intermediate appellate court reversed and granted summary judgment to O'Keeffe.[140] Both courts felt constrained by then-existing precedent to treat the issue as one of adverse possession

132. 416 A.2d 862 (N.J. 1980).

133. Unlike many of the other artists whose works have been the subject of the disputes chronicled in this Article, Georgia O'Keeffe led a long life, dying just short of her 100th birthday. She began studying art in 1905 and continued painting until just before her death in 1986. A sampling of her work can be found at http://www.michelangelo.com/okeeffe.

134. Some of Stieglitz's most notable photographs can be viewed at http://masters-of-photography.com/S/stieglitz/stieglitz.html.

135. *O'Keeffe*, 416 A.2d at 865.

136. *Id.* at 866.

137. *Id.*

138. *Id.*

139. *Id.* at 865.

140. *Id*.

of chattels,[141] and both courts held that Frank had not held the paintings "visibly, openly and notoriously."[142] Notwithstanding this finding, the trial court held that the statute of limitations commenced at the time of theft and expired before O'Keeffe's suit.[143] The intermediate court treated the defenses of adverse possession and the statute of limitations as identical, and thus its resolution of the former governed the latter.[144]

The New Jersey Supreme Court overruled the earlier case[145] that had applied the adverse possession doctrine to chattels and announced that henceforth New Jersey would follow the discovery rule. The court, therefore, remanded the issues of whether in fact the paintings had originally been stolen and the discovery rule's impact upon the timeliness of the plaintiff's claim.[146] Because it left such issues for determination below, the significance of the court's opinion lies in its approval of the application of the discovery rule in the art theft context and in its articulation of broad factors relevant to defining what constitutes due diligence in a given case.

According to *O'Keeffe*, the underlying purpose of the discovery rule is equitable: "to mitigate unjust results that otherwise might flow from strict adherence to a rule of law."[147] The discovery rule is highly fact-sensitive and flexible.[148] Courts adopting the rule have identified numerous factors relevant to the determination of whether the owner is entitled to its benefit. These factors include the particular efforts undertaken by the owner to search for the stolen art,[149] whether those efforts were reasonable and sufficient given the nature and value of the art and the circumstances of the theft,[150] and whether the owner's

141. *See* discussion in *supra* note 110.

142. *O'Keeffe*, 416 A.2d at 871.

143. *Id.* at 865.

144. *Id.*

145. Redmond v. N.J. Historical Soc'y, 28 A.2d 189 (N.J. 1942).

146. *O'Keefe*, 416 A.2d at 867.

147. *Id.* at 869.

148. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 289 (7th Cir. 1990); *see also* Soc'y of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 873 (Ct. App. 1996) ("The steps a party should take to recover stolen art objects vary according to the facts of each case and are, therefore, subject to proof of the relevant standard in the particular community affected."). It is precisely this case-specific sensitivity of the discovery rule that has led to its rejection in art theft cases by at least one influential jurisdiction. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991); *infra* notes 207-16 and accompanying text.

149. *O'Keeffe*, 416 A.2d at 870.

150. *Id.* at 873.

efforts were sufficiently continuous.[151] The burden is on the owner "to establish facts that would justify deferring the beginning of the period of limitations."[152] A brief discussion of the facts of two cases involving the discovery rule illustrates the application of the rule.

In the first case, *DeWeerth v. Baldinger*,[153] the Second Circuit Court of Appeals predicted that New York would impose a duty of reasonable diligence on owners of stolen art for purposes of the statute of limitations.[154] Although this prediction proved wrong,[155] the Second Circuit's opinion offers valuable insight into what constitutes a lack of due diligence for purposes of the rule.

DeWeerth involved competing claims to "Champs de Ble á Vetheuil," a painting by Claude Monet, valued at the time of suit at $500,000.[156] In 1922, Gerda DeWeerth, a citizen of West Germany, inherited the painting from her father, who had purchased it in 1908.[157] The painting hung in DeWeerth's home until 1943, when she sent it to her sister's home, a castle in Oberbalzheim in southern Germany, for safekeeping during the remainder of World War II.[158] After the War, American soldiers were quartered in the castle.[159] Upon their depar-

151. *See Autocephalous Greek-Orthodox Church*, 917 F.2d at 289 (requiring the plaintiff to "all the while . . . exercise due diligence to investigate the theft and recover the works"); *see also O'Keeffe*, 416 A.2d at 870 (directing courts to consider whether the owner exercised due diligence after the theft). Although the fact of successive possession, *see supra* note 59, may not in and of itself defeat the good-faith possessor's claim of title by virtue of the limitations bar, it may strengthen the owner's argument that the statute of limitations has been tolled in discovery/due diligence jurisdictions. As *O'Keeffe* noted, "subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule." *O'Keeffe*, 416 A.2d at 875.

152. *O'Keeffe*, 416 A.2d at 873.

153. 836 F.2d 103 (2d Cir. 1987).

154. *Id.* at 108.

155. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429-30 (N.Y. 1991) (noting that the "Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations"); *infra* notes 210-16 and accompanying text.

156. *DeWeerth*, 836 F.2d at 104. To view a sampling of Claude Monet's work, visit http://www.ocaiw.com/monet.htm. The *DeWeerth* court describes Monet as "perhaps, the most well-known and widely admired member of the school of impressionist painters active in France in the late nineteenth and early twentieth centuries," whose work reflected "unsurpassed ability to capture on canvas the dazzling and magical play of light on the natural world." *DeWeerth*, 836 F.2d at Id. at 104.

157. *Id.*

158. *Id.* at 105.

159. *Id.*

ture, DeWeerth's sister noticed that the painting was missing.[160] The sister notified DeWeerth in the fall of 1945.[161] In 1946, DeWeerth informed the military government of her loss.[162] She also asked her lawyer about insurance coverage for the theft.[163] In 1955, she wrote to an art professor in Germany, sending him a picture of the Monet and asking him to investigate.[164] He returned the picture, stating that the photo was insufficient evidence upon which to begin a search.[165] In 1957, DeWeerth informed the Bundeskreminalamt, the West German equivalent of the FBI, of the theft.[166] None of these efforts were fruitful, and she made no further effort to locate the painting.[167]

The Monet surfaced in the international art market in 1956, when it was consigned by a Swiss art dealer to a New York art gallery. Edith Baldinger purchased the painting from the gallery in June of 1957 for $30,900. From 1957 until 1983, the painting hung in Baldinger's apartment. On two occasions during this time it was publicly exhibited in New York, on one of the occasions for two days and on the other for a month.

In 1981, DeWeerth learned of Baldinger's possession of the painting through her nephew, who saw a picture of it in a published volume of Monet's work. The volume had been published in 1974, and the nephew saw it in a museum not twenty miles from DeWeerth's residence.[168] In 1982, DeWeerth retained counsel in New York and brought an action against the gallery listed in the volume to compel disclosure of the current possessor. The court ruled in her favor, and the gallery identified Baldinger. Two months later, DeWeerth demanded that Baldinger return the Monet, and Baldinger refused.[169]

In holding that the plaintiff's suit was time-barred, the court contrasted DeWeerth's "minimal" efforts with the "'continuous and dili-

160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 106.

gent search'" undertaken by owners in other cases.[170] The court noted not only the limited utility of what DeWeerth did but also the significance of what she did not do. "Conspicuously absent from her attempts to locate the painting is any effort to take advantage of several mechanisms specifically set up to locate art lost during World War II."[171] Additionally, DeWeerth did not take advantage of what the court considered "potentially fruitful" search channels by publicizing her loss to museums, galleries, or collectors.[172] Most significantly, DeWeerth conducted no search at all for twenty-four years.[173] During this time "if DeWeerth had undertaken even the most minimal investigation . . . she would very likely have discovered the Monet, since there were several published references to it in the art world."[174]

By contrast, the second case provides an example of diligent effort by an original owner. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*[175] involved the claim of the Autocephalous Greek-Orthodox Church of Cyprus to recover a mosaic held by an Indiana art gallery. The mosaic had been affixed to the Church of the Panagia Kanakaria in the sixth century.[176] Over the ensuing centuries, it had become a holy relic to Eastern Orthodox Christians.[177] Although the mosaic survived until the middle of the twentieth century intact, it did not survive tension in Cyprus between Greek Cypriots and Turkish Cypriots. By 1974, Cyprus was a divided country, with Turkish military forces occupying the north of the island, Greek Cypriot forces in the south, and a United Nations peacekeeping force in between.

After Turkey invaded in 1974, the Turkish military began forcing an exodus of Greek Cypriots to the south. By 1976, virtually all Greek Cypriots had been forced to flee, including the priests who until then continued services at Kanakaria. By late 1979, officials in the Republic of Cyprus[178] received word that Kanakaria Church, like many oth-

170. *Id.* at 111 (quoting Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 852 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982)).

171. *Id.*

172. *Id.* at 112.

173. *Id.*

174. *Id.*

175. 917 F.2d 278 (7th Cir. 1989).

176. *Id.* at 279.

177. *Id.*

178. This is the government recognized as the only legitimate government of Cyprus by every nation in the world except Turkey. *Id.* at 280.

ers in the north, had been plundered by vandals, who had ripped the mosaic from the church wall in pieces.[179]

The Republic of Cyprus immediately contacted and sought the assistance of international organizations, museums, and Byzantine scholars worldwide, including journalists, scholars, museums, and collectors in the United States.

> The overall strategy behind these efforts was to get word to the experts and scholars who would probably be involved in any ultimate sale of the mosaics. These individuals, it was hoped, would be the most likely (only?) actors in the chain of custody of stolen cultural properties who would be interested in helping the Republic and Church of Cyprus recover them.[180]

These efforts paid off, leading the Republic to the mosaics.

The mosaics had been purchased by Peg Goldberg, the owner of an Indiana art gallery. In 1988, when Goldberg was on a trip to Europe to purchase works for her gallery, a friend who was also an art dealer encouraged her to consider purchasing "four Christian mosaics."[181] The friend arranged a few meetings between himself, Goldberg, a Dutch art dealer, and a California lawyer.[182] The Dutchman, whom Goldberg knew had been convicted of art forgery by a French court, showed Goldberg pictures of the mosaics.[183] He told her that the seller was a Turkish antiquities dealer who had found the mosaics in northern Cyprus, exported them to Germany with the permission of the Turkish Cypriot government, and now needed cash.[184] The dealer, said the Dutchman, wanted $3 million for the mosaics.[185] Goldberg asked the California attorney to inform the seller of her interest, which he did. The next day the four met again and agreed to purchase the mosaics jointly and split any profits on resale.[186]

After securing financing in Indiana, Goldberg traveled to Geneva, Switzerland, and was allowed to view the mosaics in crates at the airport there.[187] She then waited in Geneva for the purchase

179. *Id.* at 281.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 282.
185. *Id.*
186. *Id.*
187. *Id.*

money to arrive.[188] Her testimony, which the trial judge found doubtful, was that she contacted the International Foundation for Art Research (IFAR) and other similar organizations to determine whether any of the mosaics had been stolen from Cyprus. IFAR had no record of Goldberg's inquiry.[189] The Seventh Circuit Court of Appeals noted:

> The only things of which [the trial judge] was sure was that Goldberg did *not* contact the Republic of Cyprus or the TRNC [Turkish Republic of Northern Cyprus] (from one of whose lands she knew the mosaics had come); the Church of Cyprus; "Interpol," a European information-sharing network for police forces; nor "a single disinterested expert on Byzantine art."[190]

When the purchase money arrived, in $100 bills, Goldberg packed it into two satchels and returned to the Geneva Airport.[191] There she exchanged the money for the mosaics. The following day, Goldberg returned to the United States "with her prize."[192]

Once back in Indiana, Goldberg began attempting to resell the mosaics.[193] Her efforts alerted an expert at California's Getty Museum to her possession of the mosaics, and he contacted Cypriot authorities.[194] Not surprisingly, Goldberg refused the Cypriot Republic's demand for return of the mosaics.[195]

Applying the discovery rule, as suggested by Indiana law, the district court held, and the Seventh Circuit Court of Appeals affirmed, that the cause of action did not accrue until Cyprus learned of the gallery's possession.[196] "[A]s a necessary precondition to the application of the discovery rule," the court found first that Cyprus had exercised due diligence and second that it would not reasonably have been on notice of the location of the mosaics until the gallery made its purchase and possession public.[197]

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188. *Id.* at 283.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 288-89.
197. *Id.* As a result, Cyprus recovered the mosaics. As a gesture of good will, the government of Cyprus and officials of the Autocephalous Greek-Orthodox Church allowed the mosaics to be displayed for a month in the Indianapolis Museum of Art. Nearly 40,000 people visited

One of the interesting respects in which the due diligence/discovery rule is fact-sensitive is in the sophistication of the owner. Several courts have recognized that more may be required of institutional or sophisticated art owners than of private owners who lack sophistication about, or a relationship to, the art world.[198] A lack of familiarity with the art world and the devices within it for the recovery of stolen art will render the failure to employ these devices less damaging to the owner's claim to have satisfied the due diligence standard.[199]

The policy behind the discovery rule is clear. The rule is intended to place responsibility on the owner and to remove from the good-faith purchaser the burden of meeting a particular standard of behavior[200] in order to rest assured of title. As *O'Keeffe* expressly acknowledged, "[t]he discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner" by inquiring "whether the owner has acted with due diligence in pursuing his or

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the exhibit. Isabel Wilkerson, *Hoosiers Glimpse Bit of Byzantium*, N.Y. TIMES, July 8, 1991, at A6.

Ironically, in 1998, Peg Goldberg found herself the direct victim of art theft when her home was robbed of art and other property worth $15,000. John M. Flora, *2 Men Tie Up, Rob Art Dealer in her Home During Daylight*, INDIANAPOLIS STAR, Feb. 24, 1998, at N1.

198. Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *38 (E.D. Pa. Feb. 23, 1995).

199. *Erisoty* is illustrative. Paintings by Corrado Giaquinto were stolen from a family home in Washington, D.C., in 1960. The family immediately reported the theft to District police and the FBI and, through the FBI, Interpol. Law enforcement officials discouraged the family from hiring a private investigator. For nearly twenty years, the family and the FBI were in contact. In 1974, the family reported the theft to the Art Dealers Association of America, which had then recently begun maintaining a registry of stolen art. From 1979 through 1993, when the FBI found the paintings, the family had no contact with the FBI.

What the family did not do was publicize the theft. They did not place notices in art journals or other periodicals. They did not provide museums, galleries, or scholars with information about the paintings. Although they periodically visited museums to look for the paintings, they were "neither art collectors nor participants in the so-called fine arts community. They neither subscribe[d] to nor read periodicals covering fine arts or antiques." *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *8.

In interpreting the significance of what the family failed to do, the court specifically noted that the family members "are neither a government entity nor even serious art collectors; rather, they are merely a family in search of lost art work that decorated the walls of their family home." *Id.* at *37-38. The court found that the owners exercised the required due diligence.

For a sampling of the work of Corrado Giaquinto, visit http://www.artcyclopedia.com/artists/giaquinto_corrado.html.

200. This burden is lifted only if the good-faith purchaser is not engaged in fraudulent concealment of either the fact of the theft or the fact of his possession. *See supra* notes 98-119 and accompanying text.

her personal property."[201] If such diligence is exercised, "owners may prevent the statute of limitations from running."[202] In placing this burden on the owner, the discovery rule "should encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's [or owner's] ability to recover stolen artworks."[203]

b. Accrual delayed: the "demand and refusal" rule. The "demand and refusal" rule holds that a good-faith purchaser's possession does not become wrongful until the owner has made a demand for return of the art and the purchaser has refused that demand.[204] This rule inures to the enormous benefit of true owners in their effort to recover art that has been stolen from them.[205] This is

201. O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

202. *Id.* at 873.

203. *Id.*

204. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991). The court acknowledged the "seemingly anomalous" distinction between the rule for accrual when the stolen property is in the hands of a thief, *supra* note 90-92 and accompanying text, and the much later accrual event when the stolen property is in the hands of a bona fide purchaser for value. *Guggenheim*, 569 N.E.2d at 429; *see also* Golden Budha Corp. v. Canadian Land Co. of Am., 931 F.2d 196, 201-02 (2d Cir. 1991) (holding that a claim against an innocent art possessor did not accrue, and thus the statute of limitations did not begin to run, until a demand and refusal).

205. *See* Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981) (stating that the statute of limitations does not start to run on the true owner's claim until demand and refusal), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). *Kunstsammlungen zu Weimar* involved the claim of the then–East German museum, owner of two Albrecht Duerer paintings, against the New York good-faith purchaser of the paintings. Fearing bombardment by the Allies during World War II, the director of the Staatliche Kunstsammlungen zu Weimar, a museum in Germany, had valuable items at the museum, including the Duerers, transferred to a storeroom in a nearby castle, Schloss Schwarzburg. When the war ended, the Land of Thuringia, in which the castle was located, was designated a part of the zone over which the Soviet Union had military authority. Between the surrender of Germany and the takeover of the zone by the Soviet military, American soldiers were in control of areas of Thuringia, including Schloss Schwarzburg. According to the director of the museum, the disappearance of the Duerers coincided with the departure of American soldiers from Schloss Schwarzburg at the latest on July 1, 1945. *Id.* at 831.

The defendant, Edward Elicofon, purchased the paintings, not knowing they were Duerers, from a young American soldier who appeared at his home in Brooklyn in 1946. The soldier allegedly stated that he had purchased the paintings in Germany. The paintings hung in Elicofon's home until 1966, when a friend told him he had seen the paintings in a list of stolen art. Elicofon then made public his possession of the paintings. Shortly thereafter, the Kunstsammlungen zu Weimar, successor to the Staatliche Kunstsammlungen, demanded return of the paintings. Elicofon refused to return them. The museum was not immediately able to press its claim for return of the paintings in American courts, because at the time the German Democratic Republic, of which the museum was a state agency, was not recognized by the

not an incidental result of the "demand and refusal" rule as applied to stolen art; it is the intended purpose of the rule. The rule takes on added significance because it is the one embraced by New York, the state that is arguably the art center of the world.[206] Not surprisingly, the leading case affirming the "demand and refusal" rule and explaining the value it serves in the art world is a case decided by the New York Court of Appeals. Quite simply, *Solomon R. Guggenheim Foundation v. Lubell*[207] has become synonymous with the "demand and refusal" rule.

The *Guggenheim* court was unabashed in embracing the value of protecting the rights of owners of property to recover that property

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United States. *Id.* at 833. The Republic gained such recognition in late 1974 and the court recognized the museum's right to assert its claim in February 1975.

The court, applying New York law, held that the plaintiff's suit was timely. The cause of action accrued at the point of Elicofon's refusal of the museum's demand. The plaintiff being under a legal disability (nonrecognition), the statute of limitations was tolled until the disability was removed, and the plaintiff's suit was timely after the removal of its disability. *Id.* at 847-48.

206. *See Guggenheim*, 569 N.E.2d at 431 ("[O]ur decision today is in part influenced by our recognition that New York enjoys a worldwide reputation as a preeminent culture center.").

207. 569 N.E.2d 426. *Guggenheim* arose out of the theft of a Marc Chagall gouache from the Guggenheim Museum in New York City. *Id*. at 427. For a sampling of the work of Marc Chagall, see http://www.artchive.com/artchive/ftptoc/chagall_ext.html. According to officials at the Guggenheim, a museum employee stole the gouache sometime after the spring of 1965. *Id.* at 427 (noting that the painting was last seen in 1965 and that a museum employee was "suspected of the theft").

Among the factual issues in dispute between the parties was precisely when the museum learned that the gouache had been stolen. *Id.* at 428. The museum acknowledged that it knew the gouache was missing earlier, but it claimed it did not know the gouache was stolen until a complete inventory of the museum's collection was finished in 1970. *Id.* Mrs. Lubell asserted that the museum knew of the theft as early as 1965. *Id.*

There was no factual dispute that the museum did *not* alert the police, the FBI, Interpol, other museums, galleries, or artistic organizations of the theft. *Id*. At trial and throughout appeal, the museum asserted that "this was a tactical decision based upon its belief that to publicize the theft would succeed only in driving the gouache further underground and diminishing the possibility that it would ever be recovered." *Id*. In 1974, believing the gouache would never be recovered, the museum removed it from its records. *Id*.

In 1967, Rachel Lubell and her husband bought the painting for $17,000 from a well-known Madison Avenue gallery. *See id.* They exhibited the painting twice, both times at the gallery from which they had purchased it. *Id*. In 1985, the museum learned that the Lubells possessed the gouache after a private art collector brought a transparency of it to Sotheby's for an auction estimate. *Id*. The Sotheby's employee who evaluated it had previously worked at the Guggenheim and recognized the gouache. *Id*. In January 1986, the museum wrote Mrs. Lubell and demanded return of the gouache. *Id*. Mrs. Lubell refused. *Id*. At the time of trial, the gouache was valued at $200,000. *See id*. (noting that this amount was demanded in the alternative).

even where it is in the hands of a good-faith purchaser for value.[208] Although the court recognized that the "demand and refusal" rule "is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property."[209]

Because the United States Court of Appeals for the Second Circuit had earlier predicted that New York courts would apply the discovery rule,[210] the New York Court of Appeals addressed the reasons for its preference for, and reaffirmance of, the "demand and refusal" rule.[211] First, the court found no reason to obscure "clarity and predictability" and the "straightforward protection of true owners" provided by the "demand and refusal" rule.[212] Adoption of a discovery rule would impose "arbitrary rules of conduct that all true owners of stolen artwork would have to follow to the letter if they wanted to

208. *Id.* at 429. This interest in protecting owners is described by the court as one of long standing. *Id.*

209. *Id.* at 430. The court described the "[l]ess protective" models as including (1) recognizing accrual at the time of the theft even when the stolen work finds its way into the hands of a good-faith purchaser; (2) recognizing accrual at the time the good-faith purchaser acquires possession; and (3) the discovery rule. *Id.*

210. DeWeerth v. Baldinger, 836 F.2d 103, 110 (2d Cir. 1987). After the *Guggenheim* court rejected the Second Circuit's *DeWeerth* prediction that New York would apply a discovery rule to suits by owners against good-faith purchasers of artworks, DeWeerth brought a motion to vacate the original judgment in her case. DeWeerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir. 1994). Federal Rule of Civil Procedure 60(b) permits a federal district court to relieve a party from a final order in five enumerated circumstances and for "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60(b)(6). The Second Circuit had indicated that Rule 60(b)(6) is "properly invoked where there are extraordinary circumstances . . . or where the judgment may work an extreme or undue hardship." Matarese v. LeFevre, 801 F.2d 98, 107 (2d Cir. 1986). The Second Circuit disagreed with the trial court's determination that the import of the *Guggenheim* case was an extraordinary circumstance under Rule 60(b)(6). DeWeerth v. Baldinger, 38 F.3d 1266, 1272 (2d Cir. 1994). It therefore reversed the trial court's vacatur of its earlier judgment, leaving intact the original outcome, which had held DeWeerth's claim time-barred. *Id.*

211. New York had earlier committed itself to the "demand and refusal" rule in *Menzel v. List*, 253 N.Y.S.2d 43, 44 (App. Div. 1964). Erna Menzel, owner of a Chagall painting, left the Chagall behind when he fled the German invasion of Belgium in 1940. Menzel v. List, 246 N.E.2d 742, 743 (N.Y. 1969). For twenty years, the Menzels did not know the whereabouts of the painting. *Id.* Then, in 1962, Mrs. Menzel noted a reproduction of the painting in an art book and traced the painting to Albert List, who had purchased the Chagall in good faith from a New York art gallery. *Id.* The New York intermediate appellate court rejected List's argument that the statute of limitations had run on Mendel's claim. 253 N.Y.S.2d at 44. The court instead held that the statute did not even begin to run until the owner locates the work, demands that the possessor return it, and is refused. *Id.*

212. *Guggenheim*, 569 N.E.2d at 427, 430.

preserve their right to pursue a cause of action in replevin."[213] Second, the court noted the influence on its decision of the rather discordant facts that New York is both "a preeminent cultural center"[214] and a venue where "illicit dealing in stolen merchandise is an industry all its own."[215]

> To place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art. Three years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art unless the true owner were able to establish that it had undertaken a reasonable search for the missing art. This shifting of the burden onto the wronged owner is inappropriate. In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.[216]

In light of its potential significance to choice of law,[217] it is crucial to reiterate the precise function of demand and refusal under this rule. Although the requirement of a demand in many contexts is simply a procedural prerequisite to the bringing of the claim,[218] in this context the demand and refusal are *substantive* requirements of a cause of action to recover chattels under New York law.[219] That cause of action does not accrue until the last act necessary to its creation—the refusal to deliver possession—occurs.

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213. *Id.* at 431. The court expanded on this point by noting:

> All owners of stolen property should not be expected to behave in the same way and should not be held to a common standard. The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property. We conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner.

Id.

214. *Id*.

215. *Id*. at 427.

216. *Id.* at 431.

217. *See infra* notes 289-94 and accompanying text.

218. Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981) (stating that a procedural demand is one which is "a 'condition of maintaining the action and not an essential part of it'") (quoting Dickinson v. Mayor of New York, 92 N.Y. 584, 590 (1883)), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

219. N.Y. City Transit Auth. v. New-York Historical Soc'y, 635 N.Y.S.2d 998, 1001 (Sup. Ct. 1995). This case is discussed *supra* note 92.

c. The bar of equity: the laches defense to recovery by the original owner. After *Guggenheim*, it was clear not only that the New York Court of Appeals had closed the door to the use of the discovery rule for statute of limitations purposes but also that it had left open a window: good-faith purchasers could use the original owner's lack of diligence in locating the work to support a laches defense. This defense, "directed at the conscience of the court and its ability to bring equitable considerations to bear in the ultimate disposition of the painting,"[220] may be applied "where it is clear that a plaintiff unreasonably delayed in initiating an action and a defendant was prejudiced by the delay."[221] Because the parties in *Guggenheim* settled their dispute prior to determination of Lubell's equitable defense, it remained unclear precisely how a good-faith purchaser would be able to show the requisite prejudice beyond the fact of payment of the purchase price.[222]

The scope and effect of the laches defense in art theft cases has been considered in two cases since *Guggenheim*.[223] By far the most

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

221. Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 423 (2d Cir. 1992) (considering a claim to land confiscated during the American Revolution from a loyalist to the British crown).

222. Two days into the trial, the case settled. Richard Perez-Pena, *Stolen Chagall; An Art Museum and a Collector Reach a Quiet Compromise*, N.Y. TIMES, Jan. 2, 1994, § 4, at 2. The exact terms of the settlement were kept confidential. *Id.* They apparently allowed Lubell to keep the painting but obliged her and the two art dealers through whom she had bought the work to pay the Guggenheim approximately $200,000. *Id.* Although the settlement involved shared victory and "shared sacrifice" by the parties, as with the *Goodman v. Searle* settlement described *supra* at note 27, it left the art world and lawyers hungering for more.

> [The] balance of principles and responsibilities [at issue in the case] is a serious matter to lawyers and art collectors, and answers in this case, one of the most closely watched in years in the art world, could have been instructive to all those who buy and sell art whose provenance might be questioned. Instead, the law worked as it usually does, except on television and in film, away from the public eye, through rough compromise rather than ringing conclusion.

Id.

223. A case currently being litigated in state court in Manhattan may provide additional instruction regarding the details of the laches defense. Czartoryski-Borbon v. Turcotte, N.Y. L.J., Apr. 28, 1999, at 27 (Sup. Ct. N.Y. County Apr. 28, 1999). Prince Czartoryski, an heir of the pre–World War II Polish nobility, claims ownership of a painting entitled "Portrait of a Lady, Presumably Anne of Bretagne" by Jan Mostaert. *Id.* (For a small sampling of the work of Jan Mostaert, visit http://users.pandora.be/bernard/Artpics.ENP.htm.) Donald Turcotte claims the painting by virtue of a 1963 gift from his mother, who had purchased it in 1959 from the Knoedler Art Gallery in New York. *Czartoryski-Borbon*, *supra*, at 27.

In 1996, Turcotte consigned the painting with Sotheby's for sale at auction. *Id.* The sale was scheduled for January 1997. *Id.* Before the sale took place, Czartoryski requested that So-

significant contribution in this regard is provided by *Greek-Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*,[224] a case involving conflicting claims to an invaluable palimpsest.[225] Known as the Archimedes Palimpsest, the manuscript is of considerable importance. Its original text was a tenth-century copy of two of the most significant works of Archimedes, "On Floating Bodies" and "Method of Mechanical Theorems."[226] In the twelfth or thirteenth century, due to limited supplies of paper, the original writing on the Archimedes Palimpsest was partially washed away and replaced with Greek liturgical text. For an undetermined period of time thereafter, it was kept in the library of the Mar Saba monastery in Palestine.[227] In the nineteenth century, the monastery's collection was incorporated into the

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theby's withdraw the painting from sale, which it did. *Id.* After he was notified by Sotheby's of Czartoryski's claim, Turcotte declined to return the painting to the prince. *Id.*

Czartoryski brought suit in May 1997 and immediately moved to bar sale of the painting. *Id.* His request for a preliminary injunction was granted in December 1997. *Id.* Both Czartoryski and Turcotte sought summary judgment regarding ownership of the painting. *Id.*

Many of the facts were undisputed, including the fact that the painting had been owned by Czartoryski's family prior to the German invasion of Poland in 1939, that the painting had been stolen by the Nazis, and that the Prince had succeeded to ownership of the painting through the will of his uncle. *Id.* Expert opinion confirmed that the painting stolen by the Nazis was the one consigned by Turcotte to Sotheby's. *Id.*

Citing *Guggenheim*, the court noted that the Prince's claim was unquestionably timely under the "demand and refusal" rule relevant to triggering the statute of limitations. *Id.* The laches issue was more difficult, however, and led the court to deny both summary judgment motions. *Id.* The court noted that "[t]he party asserting the laches defense must establish that there was an unreasonable delay and that this resulted in prejudice." *Id.* (citation omitted). Because the prince had not established as a matter of law that he and his family had exercised due diligence in pursuing the claim, and Turcotte had not established that they had not, disposition by summary judgment was deemed inappropriate. *Id.*

224. No. 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999).

225. "[A] palimpsest is a text from which the original writing has been washed off, so that the paper can be reused." *Id.* at *2.

226. Judge Kimba Wood offered the following background on these works:

> The originals of these texts are believed to have been destroyed in the fire that consumed the library of Alexandria, Egypt, in the third century. . . . According to legend, Archimedes conceived of the principles of "On Floating Bodies" while in the bathtub. The story holds that King Hiero II of Syracuse asked Archimedes if he could determine whether the King's goldsmith had delivered to the King a crown made of gold, as ordered, or of gold mixed with silver, without damaging the crown. Archimedes was thinking of this problem while taking a bath, and realized that he could evaluate the composition of the crown by the amount of water it displaced. Archimedes leapt from the bathtub and ran naked through the streets, exclaiming "Eureka!" meaning "I've found it!"

Id. at *2-3 (citations omitted).

227. *Id.*

Library of the Patriarchate of Jerusalem.[228] The Palimpsest and a substantial number of other documents were at some later time transferred to Constantinople, now Istanbul, to be held in the Metochion of the Holy Sepulchre, owned by the Patriarchate.[229] As recently as 1908, the Archimedes Palimpsest was still there.[230]

At some unknown point thereafter, Mr. Marie Louis Sirieix, a French civil servant and businessman, acquired the Palimpsest.[231] Significantly, as we shall see, the circumstances of Sirieix's purchase are not known. Sirieix kept the Palimpsest in his Paris home until a few years before his 1956 death when his daughter, Anne Guersan, took over care of the manuscript.[232] In the early 1960s, Madame Guersan, who was concerned about the Palimpsest's condition, consulted experts and eventually had the manuscript treated and restored in Paris. The experts she consulted also advised her about the Palimpsest's provenance.[233] In the early 1970s, Guersan first considered selling the Palimpsest. Her family prepared and circulated two hundred brochures about the manuscript, one hundred in French and one hundred in English. The brochures drew numerous expressions of interest, but no sale resulted from this effort.[234]

The Palimpsest was brought to New York in 1998 after Guersan entered into a consignment agreement with Christie's. In August 1998, Christie's informed the Greek government that an auction of the Palimpsest was planned. In September 1998, Christie's publicly announced that the auction would be held the following month.

The Archimedes Palimpsest, which had survived for nearly ten centuries without turmoil, became, in a single week in late October 1998, the subject of frenetic attention and legal maneuvering. After reviewing the Patriarchate's rather sudden attention to its claim, the court pointed out that prior to the lawsuit, "the Patriarchate had never asserted claims over other Metochion manuscripts in private

228. *Id.* at *4. The Patriarchate is an order of monks "devoted to large-scale educational and philanthropic activities and to protecting Christian holy places in the territory which is now Israel, Jordan, and the Palestinian authority." *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at *6.

232. *Greek-Orthodox Patriarchate*, 1999 U.S. Dist. LEXIS 13257, at *6.

233. *Id.* at *7.

234. *Id.* Among other sources, these inquiries came from Yale University's Beinecke Rare Book Library, New York's H. P. Kraus Rare Books and Manuscripts, the University of Texas's Humanities Research Center, and the University of Pittsburgh. *Id.* at *8.

hands or announced the disappearance, loss, or theft of any Metochion manuscripts."[235]

After a limited amount of discovery, the defendants moved for summary judgment. The initial issue relevant to that motion was whether French or New York law applied.[236] The court held that French law was applicable.[237] French law recognized title in the possessor, so the court's laches discussion is dicta. It is useful, however, as a clear explication of the role of the laches defense, because it takes the analysis of the defense two steps further than had *Guggenheim*[238] or *Czartoryski-Borbon*.[239] The first step was a more defined explanation of the prejudice that must be shown by the party relying on the defense, in this case the good-faith purchaser. Quoting the Second Circuit, the court explained that such prejudice can arise "either because it would be inequitable, in light of a change in defendant's position, to allow plaintiff's claim to proceed or because the delay makes it difficult to garner evidence to vindicate his or her rights."[240] The prospect of prejudice resulting from the increased difficulty in preserving or garnering evidence over great time or distance is more easily envisioned in the art theft context than is prejudice due to a detrimental change of defendant's position.

The second step, facilitated in part by the first, was the court's willingness to grant summary judgment on the laches issue. The court found no genuine issue of material fact on either the reasonableness of the plaintiff's behavior or the evidence-garnering prejudice suffered by the defendant. On the first issue—whether the Patriarchate was sufficiently diligent—the court concluded that it "was not diligent at all."[241] The Patriarchate had been unaware that the manuscript was missing until Christie's publicized the auction, and it had never suggested that any of the Metochian manuscripts were missing.[242] The Patriarchate sought to have its ignorance and inaction excused on the ground that "as an order of monks, it could not be expected to search

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235. *Id.* at *9.

236. The resolution of that issue is discussed in Part II. *See infra* notes 318-24 and accompanying text.

237. *Greek Orthodox Patriarchate*, 1999 U.S. Dist. LEXIS 13257, at *18.

238. *See supra* notes 204-16 and accompanying text.

239. *See supra* note 223.

240. *Greek Orthodox Patriarchate*, 1999 U.S. Dist. LEXIS 13257, at *32 (quoting Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 424 (2d Cir. 1992)).

241. *Id.* at *30.

242. *Id.* at *30-32.

for a painting."[243] The court did not hesitate to note that "if the Patriarchate was able to retain counsel with impressive speed to bring this action the night before the Christie's auction, it could have retained counsel to search for the Palimpsest, or at least make some inquiries, at some point during the previous seventy years."[244]

The prejudice to the defendant resulting from the plaintiff's lack of diligence was equally clear. According to the court, the Patriarchate's delay in claiming ownership made it nearly impossible for the Guersans to prove the circumstances of their predecessor's acquisition.[245] Mr. Sirieix was dead, memories had faded, and key documents that may have existed were missing. The distance over which the Palimpsest may have traveled during the century—from Constantinople to Paris, with any number of possible stops in between—exacerbated the difficulty in preserving evidence.[246] "It is because this case turns on ancient and unascertainable facts that the law favors repose."[247]

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243. *Id.* at *31.

244. *Id.*

245. *Id.* at *32.

246. *Id.* at *33.

247. *Id.* at *34 (quoting Robins Island Pres. Fund, Inc. v. Southold Dev. Corp., 959 F.2d 409, 424 (2d Cir. 1992)). Equity also may step in to recompense one who loses possession to the true owner. Where a good-faith purchaser or possessor has expended funds to restore or preserve the art, the owner may be required to render compensation in quantum meruit. *Hoelzer v. City of Stamford*, 933 F.2d 1131 (2d Cir. 1991), is illustrative. The circumstances under which the city lost possession of the artwork are described *supra* in note 68. The murals passed from their finder, who stored them in his mother's garage, to the federal General Services Administration, which delivered them to Hiram Hoelzer, a New York art restorer, in 1971. *Hoelzer*, 933 F.2d at 1134. The restoration project was described by the court as "massive." *Id.* The city learned that the murals were in Hoelzer's possession in 1980 and ultimately demanded their return in 1986. *Id.* at 1135. Hoelzer claimed ownership and refused to return them. *Id.* In 1989, Hoelzer brought suit in New York state court seeking a declaratory judgment to quiet title. *Id.* The city removed the case to federal court. *Id.* By 1990, the murals were appraised at as much as $1.25 million. *Id.*

Applying New York law, the court chose New York's statute of limitations. *Id.* at 1136. The court held that the cause of action accrued in 1986 and that the city's claim was not time-barred either by the statute of limitations or by laches. The latter determination was based on the fact that Hoelzer had suffered no prejudice and that his expenses would be recoverable in his then pending quantum meruit action. *Id.* at 1137-39.

In the quantum meruit action, the trial court judge awarded Hoelzer $557,200. Hoelzer v. City of Stamford, Conn., 972 F.2d 495, 496 (2d Cir. 1992). The city appealed, contending that Hoelzer was not entitled to equitable relief because he had not performed the restoration in good faith. Additionally, the city claimed that the damages against it were excessive in light of the benefit received by the city. *Id.* The Second Circuit affirmed but modified the lower court's judgment to allow the city to exercise the option of paying the damages or abandoning their claim of ownership and returning the murals to Hoelzer. *Id.* at 498; *see also* Mucha v. King, 792

C. *Reflections on Right-Defining Rules*

When the original dispossession of the owner is voluntary, the range of possible rules to govern the rights of original owners and good-faith purchasers is relatively narrow, even as cases cross national borders. Although jurisdictions may vary at the margins in the exact definition of what constitutes conversion after a voluntary dispossession, and in the precise contours of good-faith purchaser status, on the core issue of who shall prevail as between the original owner and a subsequent good-faith purchaser, American and foreign jurisdictions are remarkably consistent in giving superiority to the rights of the purchaser.

There is no such constancy in the more common scenario—where the original owner has been dispossessed through theft. Here, the range of applicable rules extends from those that recognize title in the good-faith purchaser immediately upon purchase, through those that characterize possession after such purchase as immediately wrongful with a concomitant immediate triggering of the limitations period, through those that find such immediate wrongfulness but toll for fraudulent concealment, through those that delay wrongfulness while due diligence by the owner would not accomplish discovery, through those that delay wrongfulness until actual discovery, and finally to those that delay wrongfulness until demand and refusal. At one end of this spectrum are rules that reward the purchaser with title or so favor the purchaser's rights that title is likely to be the purchaser's reward sooner rather than later.[248] At the other end of the spectrum lie rules that will virtually always result in the owner's retention of title.[249]

Not only is this range remarkably wide, but there are also sovereign adherents to every point within it. The trend in recent cases favors a discovery rule, but the jurisdictions that have rejected the discovery rule have not simply disfavored it, but condemned it; and there remain a large number of jurisdictions that have yet to declare their allegiance to any of the rules in a stolen art context.

Given the various rules without the influence of choice-of-law considerations, it would seem that the original owner would be highly

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F.2d 602, 604 (7th Cir. 1986) (holding that the true owner, upon recovery of possession of the stolen art, must reimburse the cost of restoration incurred by the purchaser).

248. *See supra* discussion in Part I.A.1, Part I.B.1.

249. *See supra* discussion in Part I.B.2.b.

motivated to bring suit,[250] if possible, in a forum that has wedded itself to rules at the owner-favoring end of the spectrum. In this light, the seizure in New York of the Schiele paintings on loan from an Austrian museum[251] and the suit in New York by a Jerusalem monastery against a French purchaser who consigned the painting for sale in New York[252] would make obvious sense.

Although original owners might await physical presence of the claimed artwork in such an owner-favoring venue, the original owner would not necessarily be required to exhibit such patience. If the owner were satisfied, at least initially, with a simple declaration of his rights vis-à-vis the good-faith purchaser, all that is necessary is the exercise of constitutionally sustainable personal jurisdiction[253] over the defendant in an owner-favoring venue. A determination reached by such a state or nation based on its own law, assuming the choice of that law was permissible under constitutional or international standards, would be entitled to recognition and enforcement in the state or nation in which the art was located under applicable full faith and credit[254] or comity[255] standards.

From the owner's standpoint, would that it were so easy. In fact, as Part II now details, in the typical art-theft scenario, the parties and the art have touched multiple jurisdictions, and the forum cannot be counted on to apply its own rule. Instead, should either party raise the issue, the court must choose among right-defining rules that may span the entire range. The palette of rules for choosing among conflicting

250. Although the original owner is normally the plaintiff, *see supra* note 37 and accompanying text, the good-faith purchaser may turn the tables. Knowing that the owner is likely to sue for replevin of the art, the good-faith purchaser may bring suit in the available forum of his choice for a declaration of relative rights. *E.g.*, Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 787-88 (Ct. App. 1996) (examining a situation in which the purchaser sued for declaratory relief against an original owner).

251. *See infra* notes 382-411 and accompanying text.

252. Greek Orthodox Patriarchate v. Christie's, Inc., No. 98 Civ. 7664(KMW), 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999).

253. *See infra* notes 415-32 and accompanying text.

254. The federal Full Faith and Credit Clause requires each state to give "Full Faith and Credit . . . to the . . . judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

255. Where either the court rendering the judgment or the court asked to recognize and enforce it sits in a foreign nation, the mandate of the Full Faith and Credit Clause is inapplicable. Instead, courts are generally moved by broad principles of sovereign respect, known as comity, to give full effect to foreign country judgments that are based on fair and impartial proceedings. *E.g.*, Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("'Comity,' in the legal sense . . . is the recognition which one nation allows within its territory to the . . . acts of another nation . . . ."). *See generally* Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966) (examining the comity doctrine as adopted by American courts).

right-defining rules offers an equally broad spectrum of techniques, but with remarkably predictable outcomes.

II. RIGHT-DEFINING RULES IN CONFLICT—THE CHOICE OF LAW CHALLENGE

Before setting forth into the abstract world of conflicts of laws as it manifests itself in the art theft context, it should be noted that not every art theft case, even those most notable for articulating competing rules regarding the relative rights of original owners and good-faith purchasers, presents conflict-of-laws issues.[256] This may be so for any one of three reasons. First, the case may present no multistate or multinational aspects.[257] Second, even where such multijurisdictional connections exist, the significance of these connections and their relevance to the possible application of another state or nation's laws must be raised by one of the parties. Thus, the parties may "localize" or "domesticate" a case by either failing to recognize or choosing to minimize multijurisdictional links.[258]

Third, what appears for other purposes to involve multistate or multinational contacts may not be so viewed in the conflicts setting. The party asserting the applicability of a foreign[259] state or nation's law must plead and prove the content of that law and must establish that the forum law and the foreign law conflict not only on their face but also when applied to the instant case. Differences in law without litigation consequences are not "conflicts" with which choice-of-law rules are concerned. For example, in *Erisoty v. Rizik*,[260] three jurisdictions, Maryland, Pennsylvania, and the District of Columbia, were connected to the parties and transfers of the stolen art. All three used the discovery rule,[261] and therefore there was no conflict about the definition of when the owner's cause of action accrued. Although

256. *E.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991) (reiterating New York's commitment to the "demand and refusal" rule).

257. *E.g.*, Soc'y of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 866-69 (Ct. App. 1996) (reciting the relevant connections, all in California); *Guggenheim*, 569 N.E.2d at 426 (noting that all relevant connections are in New York).

258. Mucha v. King, 792 F.2d 602, 604 (7th Cir. 1986) ("Where, as in this case, the parties either explicitly or by implication agree to be governed by the substantive law of the forum state, their agreement will be enforced.").

259. When used in a conflict of laws context, "foreign" is synonymous with "nonforum," encompassing sister states as well as foreign nations.

260. No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995).

261. *Id.* at *28 n.5.

Pennsylvania had a two-year statute of limitations, and Maryland and the District gave owners three years to bring suit, the owners in *Erisoty* did not act within either period. Therefore, the conflict was irrelevant, and the court applied Pennsylvania law, the law of the forum, by default.[262]

In the dispute between original owners and good-faith purchasers over the title to artworks, this third scenario is most likely to arise in the misappropriation context, where the owner has voluntarily relinquished possession to a bailee who then wrongfully sells the work.[263] This is because American states and European nations are remarkably consistent in their preference for the good-faith purchaser under such circumstances. Quite the contrary is true in the more common case in which the dispute between the owner and the good-faith purchaser originated in a theft of the claimed work. In this context, as Part I details,[264] widely varying rules have been embraced by states and nations. Significantly, this embrace is a passionate rather than a casual one: it encompasses policy goals and party preferences to which sovereigns are deeply committed. When multijurisdictional contacts exist and rules are in conflict in a given case, the choice of governing law to resolve the dispute is likely to further one sovereign's policies and preferences and defeat another's.[265] Although such an outcome is one that accompanies a true conflict of laws in any case,[266] the broader consequences for *all* owners, *all* good-faith purchasers, *all* art dealers, *all* museums, and *all* sovereigns make the conflicts issues in these theft-originated cases so disquieting.

Before turning to that disquietude in Part III, this part examines how those courts that have resolved these conflicts have done so. This examination will illustrate that the methods employed to choose the right-defining rules by which owner-purchaser disputes are to be resolved are as divergent as the right-defining rules themselves.[267]

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262. *Id.* at *28.

263. *See supra* notes 62-89 and accompanying text.

264. *See supra* notes 90-247 and accompanying text.

265. *See* discussion *infra* notes 366-75 and accompanying text. This can be seen most notably where the owner is domiciled in a jurisdiction with owner-favoring rules and the good-faith purchaser is domiciled or the purchase occurs in a purchaser-favoring jurisdiction. *E.g.*, Winkworth v. Christie, Manson & Woods, Ltd., [1980] 1 Ch. 496, discussed *infra* notes 299-302 and accompanying text.

266. *See infra* note 415 and accompanying text.

267. The multistate or multinational connections that characterize title contests arising out of art thefts will not only affect the law that will be applied to those contests but also influence in which court system—federal or state—the contest is staged. The fact that the art has crossed

This divergence flows from the fact that courts undertaking choice-of-law analysis to determine the relative rights of owners and purchasers are not even in accord in their characterization of the conflict. Characterization of the context in which a conflict is embedded is a crucial step in most choice-of-law analyses, because different choice-of-law models are often employed depending upon the characterization. Within a given jurisdiction, one choice-of-law model may be applicable to torts, another to contracts, and a third to issues of procedure.[268] Such a multifocal view can be blurred enough at the in-

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borders often will mean that the parties themselves are linked by citizenship to different states or to a state or foreign nation. This diversity of citizenship will, in nearly all cases, give the plaintiff or defendant access to federal court either on the basis of diversity or alienage. 28 U.S.C. § 1332(a) (1994). It is, therefore, not surprising that the majority of cases examined in Part I were decided by federal courts.

The fact that federal courts often hear these cases should not, however, change in the slightest the substantive law issues or the resolution of the conflicts of laws presented in them (although, as note 210 details, Mrs. DeWeerth could be forgiven for ultimately believing otherwise inasmuch as a misprediction of state law denied her title to and possession of her claimed property). In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), the United States Supreme Court specifically directed that a federal court sitting in diversity apply the choice-of-law rule of the state in which it sits. Each of the federal court cases discussed in Part I expressly noted that obligation.

In *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986), the United States Court of Appeals for the Seventh Circuit called attention to a common misstatement of this obligation. The lower court stated, "[a]s this Court's jurisdiction is grounded upon the parties' diversity of citizenship, Illinois law governs this case." *Id.* at 604. The appeals court commented:

> This implies that in a diversity suit the substantive law of the state where the federal court is located always governs. Not so. The federal court in a diversity suit applies the choice of law rules of the forum state, and those rules may or may not make the substantive law of that state the governing law for the suit.

Id. (citations omitted). For citation to the general point in the stolen art context, see, for example, *Charash v. Oberlin College*, 14 F.3d 291, 296 (6th Cir. 1994) ("It is well settled that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits.") and *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 286 (7th Cir. 1990) ("As a federal court sitting in diversity, the district court was obligated to . . . apply the law of the state in which it sat . . . . This included Indiana law as to which body of substantive law to apply to the case, i.e. Indiana's choice of law rules.") (citations omitted).

268. New York provides an excellent illustration. New York applies the traditional rule that in matters characterized as procedural, forum law governs (although that law may defer to the rule of another state). *See infra* notes 269-81 and accompanying text. If the conflict of laws is one involving contract rules, New York applies a "center of gravity" or "grouping of contacts" test. Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 939 (N.Y. 1993); Auten v. Auten, 124 N.E.2d 99, 102 (N.Y. 1954). If the conflict is one between rules arising in tort, New York draws a distinction between those rules that regulate conduct and those that allocate loss. Schultz v. Boy Scouts, Inc., 480 N.E.2d 679, 684-85 (N.Y. 1985). As to conduct regulating rules, New York simply applies what is known in conflicts parlance as the "*lex loci delicto*," that is, the law of the place of the wrong. *E.g.*, Padula v. Lilarn Props. Corp., 644 N.E.2d 1001, 1002-03 (N.Y. 1994). As to loss-allocating rules, the conflict is resolved by reference to three rules that flow from the

dividual state level, but it becomes positively obscure when multiple states are available venues and each state draws such distinctions and makes such characterizations in differing ways. The art theft cases provide a perfect illustration. As the next sections indicate, the conflict between differing rules on the continued existence of owners' conversion and replevin claims has been characterized as a procedural issue, a property issue, and a tort issue, all with varying methods and potential outcomes.

A. Characterization—The Issue as a Conflict of Statutes of Limitations

As Part I detailed, the ground upon which the original owner/good-faith purchaser battle is fought most commonly, at least in American jurisdictions, is the issue of whether the owner's claim for return of the art, or its value, is timely. If so, the owner's title prevails; if not, title is recognized in the good-faith purchaser. Seen as a timeliness issue, the conflict would initially seem to be a rather straightforward question of which jurisdiction's statute of limitations rules apply. This characterization, while facile, is faulty.

When examining cases in which theft-originated owner/purchaser disputes are so analyzed, it is useful to understand the methods courts generally employ to resolve limitations conflicts. The traditional choice-of-law rule, to which a number of states remain committed,[269] deemed statutes of limitations to be procedural.[270] Thus, with rare exception,[271] conflicts involving statutes of limitations were subjected to the general command that the procedural rules to be applied in multijurisdiction cases were those of the forum. Because this rule pro-

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juxtaposition of two variables, the domicile of the parties and the place where the tort occurred. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 458 (N.Y. 1972).

269. *E.g.*, Charash v. Oberlin Coll., 14 F.3d 291, 296-97 (6th Cir. 1994) (interpreting Ohio law such that where Ohio is the forum, the Ohio statute of limitations applies regardless of where the claim arose and whether Ohio law governs the substantive aspects of the case).

270. The underlying notion of the traditional view, that statutes of limitations were procedural for choice-of-law purposes and thus that forum law applied, flowed from the view that "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld . . . . [T]he right subsists, and the forum may choose to allow its courts to provide a remedy, even though the jurisdiction where the right arose would not." Sun Oil Co. v. Wortman, 486 U.S. 717, 725 (1987).

271. *E.g.*, Bournias v. Atl. Mar. Co., 220 F.2d 152, 155 (2d Cir. 1955) (applying the exception that "where the foreign statute of limitation is regarded as barring the foreign right sued upon, and not merely the remedy, it will be treated as conditioning that right and will be enforced by our courts as part of the foreign 'substantive' law").

vided a strong incentive toward forum shopping[272] and often did not serve forum policy goals, many courts, having acknowledged that "[s]ound sense and policy reasons dictate that a suit on a foreign cause of action should be processed and tried according to the procedural rules of the forum state,"[273] questioned whether statutes of limitations should be considered strictly procedural for this purpose.[274]

The "sound sense and policy reasons" supporting a general preference for forum procedural rules flow from two variables. The first is the difficulty of discovering and properly applying foreign procedural rules and practices, and the second is the unlikelihood that application of the foreign rule would change the outcome of the case.[275] "The more inconvenient it would be to find and apply a foreign rule and the less likely it is that the rule will affect the result, the greater the justification for a 'procedural' label."[276] As courts have noted, a statute of limitations issue presents the converse situation.[277] A foreign state's statute of limitations will often be easier to discover and determine than many aspects of that state's substantive law that choice-of-law rules may well direct the forum to apply.[278] Correlatively, if the choice of statutes of limitation matters, as it must to present a choice-of-law issue at all,[279] then that choice is quintessentially outcome-determinative.[280] On such reasoning, the characterization of the stat-

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272. *E.g.*, Keeton v. Hustler Magazine, 465 U.S. 770, 772-73 (1984) (adjudicating the claim of the plaintiff, a New York resident, who sued the defendant, an Ohio corporation, for libel in New Hampshire, the only state in which her claim was not time-barred).

273. Heavner v. Uniroyal, Inc., 305 A.2d 412, 415 (N.J. 1973).

274. *Id.*; *see also* Johnson v. Pischke, 700 P.2d 19, 24 (Idaho 1985) (noting that statutes of limitations are designed to protect defendants from stale claims); Cameron v. Hardisty, 407 N.W.2d 595, 597 (Iowa 1987) (noting that statutes of limitations do have substantive rationales).

275. This variable is akin to that employed for *Erie* purposes to determine whether a given federal or state rule should be chosen by the federal court sitting in diversity. In *Guaranty Trust v. New York*, 326 U.S. 99 (1945), the United States Supreme Court cautioned against the conclusory labels of statutes of limitations as substantive or procedural for purposes of determining whether state or federal law applied. Rather, the appropriate inquiry is whether the choice "significantly affect[s]" the result of the litigation. *Id.* at 109.

276. MAURICE ROSENBERG, PETER HAY, RUSSELL J. WEINTRAUB, CONFLICT OF LAWS, CASES AND MATERIALS 402 (10th ed. 1996).

277. *E.g.*, *Heavner*, 305 A.2d at 415 (noting that there is less difficulty with statutes of limitations from foreign jurisdictions than with "strictly procedural matters").

278. *See id.* ("The limitation period of the foreign state can generally be ascertained even more easily and certainly than foreign substantive law.").

279. *See supra* notes 259-62 and accompanying text.

280. As the Court noted in *Guaranty Trust v. New York*, 326 U.S. 99 (1945), if the federal rule of laches, which arguably would have allowed plaintiff's claim to proceed, displaced the

ute of limitations issue as procedural, thus requiring the use of the forum's rule, is frequently abandoned. Instead, the court analyzes the question of the governing limitations period through less mechanical approaches. The connections of the parties and the transaction or events underlying the plaintiff's claim with the forum become prime inquiries. As applied, such tests often result in a domestic plaintiff getting the benefit of the forum's longer statute of limitations, despite the fact that the cause of action arose elsewhere, but a domestic defendant gaining the benefit of the shorter statute in the place the claim arose when sued by a foreign plaintiff.[281] As we shall see, this differing result can create a particularly unattractive result in the art theft context.

O'Keeffe v. Snyder[282] offers a straightforward example of a court treating the conflict of law as simply a conflict of statutes of limitations. In *O'Keeffe*, the choice was between New York and New Jersey law.[283] The theft of the art at issue had occurred in New York. The art was in the possession of the defendant in New Jersey, where the demand for, and refusal of, return was made.[284] If the court chose New

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state rule, which appeared to time-bar the suit, the outcome of the case would be significantly affected. *Id.* at 109. The district court was directed to apply the state rule. *Id.* at 112.

281. *E.g.*, *Heavner*, 305 A.2d at 417-48. The results are illustrated well by two New Jersey cases, *Heavner* and *Pine v. Eli Lilly & Co.*, 492 A.2d 1079 (N.J. Super Ct. App. Div. 1985). *Heavner* was a suit brought in the courts of New Jersey by North Carolina plaintiffs against a New Jersey defendant and a Delaware corporation on causes of action arising out of an automobile accident in North Carolina. In choosing the shorter North Carolina statute to time-bar the claim, the New Jersey Supreme Court stated:

> We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred. In essence, we will "borrow" the limitations law of the foreign state. We presently restrict our conclusion to the factual pattern identical with or akin to that in the case before us, for there may well be situations involving significant interest of this state where it would be inequitable or unjust to apply the concept we here espouse.

Heavner, 305 A.2d at 418.

An example in which such significant interest of the state presents itself is *Pine*, in which the court noted that if the plaintiff were a New Jersey domiciliary, the New Jersey statute, under which the suit was timely, would apply over the foreign statute, where the cause arose and under whose law it was time-barred. In such case, "New Jersey's interest in compensating its domiciliary is paramount [and] outweighs our policy of discouraging forum shopping." *Pine*, 492 A.2d at 1083.

282. 416 A.2d 862 (N.J. 1980), discussed *supra* at notes 132-52.

283. *See supra* notes 142-52 and accompanying text.

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

York law, O'Keeffe's claim would unquestionably be timely as dated from the demand and refusal.[285]

The court noted that New Jersey had abandoned the traditional rule that applied the statute of limitations of the forum in all but the rarest situations.[286] Instead, New Jersey applied its own statute unless the cause of action arose in another state, all parties were amenable to jurisdiction in that state, New Jersey had no substantial interest in the matter, the other state's substantive law would be chosen, and the limitation period of that state had expired.[287] Because *O'Keeffe* involved a painting located in New Jersey and none of the parties were from New York, the court determined that New Jersey's statute of limitations provided the applicable rule.[288]

This characterization of the conflict as one involving statutes of limitations was pointedly referred to as a "misstep"[289] by the dissent in *O'Keeffe*:

> [T]he Court . . . declines to follow the New York law on the theory that the New York law is a statute of limitations and that the New Jersey statute of limitations, rather than that of New York, should be applied. The issue, however, is not whether the New Jersey statute of limitations should be followed rather than that of New York. The New York rule of subsequent conversions, rejected by the majority, is not a "statute of limitations," but rather is a *substantive* principle of the law of torts. The majority simply sidesteps the question of which state's *tort* law ought to be applied to this case.[290]

The dissent is exactly right on this point. The characterization of the dispute as one turning on differing limitations rules is tempting but wrong. The conflicts were produced not by differing limitations periods, but rather by different conceptions of what triggered the inception of the period. The triggering event that commences the limitations period is the accrual of the cause of action. An action typically accrues on the date of injury or, put another way, "upon the occurrence of the last element essential to the cause of action."[291] The cru-

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285. *See supra* notes 207-16 and accompanying text.

286. *See supra* notes 269-71 and accompanying text.

287. *O'Keeffe*, 416 A.2d at 868 (citing Heavner v. Uniroyal, Inc., 305 A.2d 412, 412 (N.J. 1973)).

288. *Id*.

289. *Id.* at 879 (Handler, J., dissenting).

290. *Id.* (Handler, J., dissenting).

291. Neel v. Magana, Olney, Leuy, Cathcart & Gelfand, 491 P.2d 421, 428 (Ariz. 1971).

cial issue is precisely what is the "last event" essential to a cause of action.[292] As earlier stated, New York views the "last event" essential to a cause of action by an original owner and the good-faith purchaser of stolen art as the purchaser's refusal of the owner's demand for return of the art.[293] New Jersey views the cause of action as accruing at the moment reasonable diligence by the owner would disclose the identity and whereabouts of the purchaser.[294] Therein lies the most substantive of conflicts.

B. Characterization—The Issue as a Conflict of Moveable Property Rules

The dispute between the original owner and the good-faith purchaser of stolen art is more properly characterized as a question of title to moveable property. The vast majority of American jurisdictions and the Restatement (Second) of Conflict of Laws[295] support the view

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292. In other contexts, courts have treated the issue of when and where a cause of action arose as a relatively straightforward one, resisting invitations to obscure it by introducing policy considerations into its determination. A recent New York case, not involving stolen art, illustrates judicial resistance to clouding the accrual issue. In *Global Financial Corp. v. Triarc Corp.*, 715 N.E.2d 482, 483 (N.Y. 1999), the New York Court of Appeals identified the question as "where does a nonresident's contract claim accrue for purposes of the Statute of Limitations?" *Id.* New York would normally apply its own statute of limitations but for its "borrowing" statute, which in a case brought against a nonresident would direct application of a shorter statute *of the place where the cause of action accrued*. *Id.* The plaintiff, seeking to have New York's longer statute of limitations applied, argued that its claim accrued in New York because that is where the contract had been negotiated, executed, substantially performed, and allegedly breached. *Id.* These connections would clearly suggest application of New York's substantive law, but the question was whether the substantiality and quantity of contacts suggested that the cause of action accrued in New York rather than in the two places, Delaware and Pennsylvania, that the plaintiff suffered its injury. *Id.* The court refused to abandon the traditional definition of accrual—"the time when, and place where, the plaintiff first had the right to bring the cause of action." *Id.* at 484. The court concluded its analysis by noting that the goal of New York's borrowing statute, to further interests in clarity and "the certainty of uniform application to litigants," would not be as well served by the substitution of "a rule dependent on a litany of events relevant to the 'center of gravity' of . . . the dispute." *Id*. at 485-86.

293. *See supra* notes 219-23 and accompanying text.

294. *See supra* notes 132-52 and accompanying text.

295. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 244 (1971):

> Validity and Effect of Conveyance of Interest in Chattel
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> (1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law.

that the validity and effect of transfers of interests in tangible moveable property are governed by the law of the situs of the property at the time of the transfer.[296] This is the view of foreign nations as well.[297] As a consequence, if the situs validates the transfer of title, the state or nation to which the chattel is later taken will recognize that title, despite the fact that its law would not have validated the transfer.[298]

Effect of Conveyance on Pre-Existing Interests in Chattel

> (1) The effect of a conveyance upon a pre-existing interest in a chattel of a person who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the chattel was at the time of the conveyance.
>
> (2) These courts would usually apply their own local law in determining such questions.

296. *E.g.*, Dobbins v. Martin Buick Co., 227 S.W.2d 620, 621 (Ark. 1950) (applying the laws of Tennessee to an action in replevin to recover an automobile where the sale took place in Tennessee); Auto Auction, Inc. v. Riding Motors, 10 Cal. Rptr. 110, 112 (Dist. Ct. App. 1960) (applying Louisiana law, as law of situs, to determine the effectiveness of a sale); Ellison v. Hunsinger, 75 S.E.2d 884, 889 (N.C. 1953) (applying South Carolina law as law of situs to determine the question of title to cotton).

There are strong policy concerns that underlie the so-called "*lex situs*" rule, including "effectiveness, certainty, stableness of title, and general business convenience." Peter B. Carter, *Transnational Trade in Works of Art: The Position in English Private International Law*, *in* GENEVA WORKSHOP, *supra* note 22, at 317, 324.

297. For example, British law recognizes that "[t]he validity of a transfer of a tangible moveable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the moveable is at the time of the transfer (*lex situs*)." 2 ALBERT V. DICEY & JOHN H. C. MORRIS, CONFLICT OF LAWS 942 (11th ed. 1987). Spanish, Swiss, and Italian law are in accord. *See* Julio D. Gonzalez-Campos & Miguel Virgos Soriano, *International Art Trade in Spanish Law*, *in* GENEVA WORKSHOP, *supra* note 22, at 355, 355-56 (stating that Spanish law adopts a *lex situs* choice-of-law rule for determining the governing law regarding acquisition, transfer, and ownership of moveable property, including art); Francois Knoefpler, *Art Trade and Swiss Private International Law*, *in* GENEVA WORKSHOP, *supra* note 22, at 385, 386 (stating the *lex situs* rule under Swiss law); Riccardo Luzzatto, *Trade in Art and Conflict of Laws: The Position of Italy*, *in* GENEVA WORKSHOP, *supra* note 22, at 409, 415 (stating that "the valid transfer of title on the basis of the foreign law of the *situs* while the object was situated abroad shall be recognised by the Italian law once the object has been brought to Italy").

298. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 247 (1971):

> Moving Chattel Into Another State: Effect on title interests in a chattel are not affected by the mere removal of the chattel to another state. Such interests, however, may be affected by dealings with the chattel in the other state.

See also Carter, *supra* note 296, at 329:

> It would seem . . . that the mere fact of moving property across a frontier ought not in itself to affect title. A contrary rule would be liable to promote chaos. Title should only be affected by virtue of the occurrence of a new transfer taking place in the new *situs*.

The converse is equally true, such that the mere removal of a chattel to a state that would have recognized an interest had the transfer occurred there will not perforce validate an invalid transfer under the law of the state or nation where the purported transfer occurred. *Id.*

This rule is best illustrated in the art theft context by one of England's most famous art theft cases, *Winkworth v. Christie, Manson & Woods, Ltd.*[299] Works of art were stolen from an English domiciliary in England. The works were subsequently sold in Italy to a good-faith purchaser who brought them back to England and delivered them to an auction house for sale. The owner brought suit in an English court to affirm his title and recover the works. The purchaser pled that he had acquired good title. English law maintained title in the plaintiff; Italian law recognized title in the defendant.[300] The English court, applying the *lex situs* rule, held that title was to be determined by Italian law.

In so holding, the court resisted pleas by the owner-plaintiff to give decisive significance to several strong connecting factors to England, including that the theft had occurred there, the owner was domiciled there, the owner did not know that the art had ever been removed from England, the art had been returned voluntarily to England, and an English court was hearing the action.[301] It concluded instead that "[i]ntolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional English situs when applying the principle to a particular case, merely because the case happened to have a number of other English connecting factors."[302]

The one widely-recognized exception to the *lex situs* rule in this context occurs when the chattel's presence in the situs is a transitory or casual one.[303] For example, the district court judge in *Autocephalous Greek-Orthodox Church*[304] applied this exception to avoid application of the law of the situs, Switzerland, because the mosaics had

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These rules are grounded in the policy that "[c]ommercial convenience and the needs of the international and interstate relations alike require that interests in a chattel should not be affected simply by its removal from one state to another." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 247(a) (1971); *see also* Luzzatto, *supra* note 297, at 415 (stating that under Italian law a change of situs cannot give rise to a valid title if title was not validated by the law of the previous situs).

299. [1980] 1 Ch. 496.

300. *Id.* at 500.

301. *Id.* at 502-03.

302. *Id.* at 509.

303. For example, under British law the *lex situs* rule does not apply when the moveable item is in transit and its situs is either casual or unknown. 2 DICEY & MORRIS, *supra* note 297, at 946-47. In such cases, the law of the place most closely connected to the parties and the transfer is chosen. *Id.*

304. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 1374 (7th Cir. 1990).

been in Swiss territory for only four days and had never cleared customs there. The court characterized this contact as "fortuitous and transitory."[305]

When the conflict between the owner and the good-faith purchaser is characterized as one involving title to property, a proper analysis begins by focusing on the place at which the dispossession of the true owner occurred. The place of the dispossession determines the consequence of this dispossession. As noted in Part I, domestic and foreign jurisdictions distinguish between good-faith purchases that originated from voluntary disposition of the original owner and those that originated from involuntary disposition.[306]

The law that characterizes the nature of the dispossession ought to be that of the place where the dispossession occurred at the time it occurred. For example, in *Kunstsammlungen zu Weimar v. Elicofon*,[307] the district court addressed in depth the good-faith purchaser's contention that he had acquired good title directly, rather than through prescription, under the German law of "good faith acquisition."[308] This issue focused on the circumstances of the original owner's dispossession, and the court decided it under German law because all relevant connections with respect to the issue were with Germany.[309] The original owner was German, the person alleged by defendant to

305. *Id.* at 1376. The court bolstered its conclusion that Swiss law should not apply by noting that Switzerland's choice-of-law principles would recognize and apply the exception as well. Because the situs of the property at the time of its sale was transitory, the general Swiss rule would have displaced the law of the place of sale in favor of the law of the intended destination. *Id.* at 1395. Furthermore, considering *arguendo* that Swiss law governed, the trial judge concluded that the same result would be appropriate because Swiss law would not recognize a valid title in the purchaser where she purchased in "suspicious circumstances." *Id.* at 1400.

306. *See supra* notes 37-255 and accompanying text.

307. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). *Elicofon* is discussed *supra* note 205.

308. *Elifocon*, 536 F. Supp. at 839. The court described this German law, at least as it was agreed to by the parties, as containing the following elements required to obtain title from one lacking title:

> (1) the owner must have voluntarily parted with his dominion over the paintings, i.e., the paintings must not have been taken from the owner without his consent; (2) the person from whom the purchaser acquired the paintings must have been in possession of them; and (3) the purchaser must have believed in good faith that the person was the actual *owner* of the paintings, and that belief must not have been grossly negligent.

Id. at 840.

309. *Id.* at 839-46.

have originally accomplished the dispossession was German, and the act of dispossession took place in Germany.[310]

This reference to the law of the place of original dispossession of the true owner can ultimately determine the rights of the owner and the good-faith purchaser. For example, if that law had vested title in the purchaser or his predecessor and stripped the owner of his title, that legal outcome would not be reversed by the application of the law of another jurisdiction with a later connection to the parties or the artwork. If, as in *Elicofon*,[311] the law applicable to the dispossession does not dislocate title from the true owner, ensuing events and contacts gain legal relevance.

Here again, *Elicofon* is illustrative. As noted immediately above, the court determined that German law did not divest the owner of his title at the time he was dispossessed of the painting. It then turned to the good-faith purchaser's alternative argument that German law vested title in him as a result of his "good faith acquisition of the property plus possession of it in good faith, and without notice of a defect in title, for the statutory period of ten years from the time the rightful owner [lost] possession."[312] The court did not reach the question under German law, deciding that on this issue New York law applied rather than German law.[313] Because the key focus was on the purchaser's behavior, which took place entirely beyond Germany's borders, Germany's protective policy with respect to good-faith purchasers was not implicated. The purchase and possession occurred entirely in New York, so New York had an "interest in regulating the transfer of title . . . in a manner which best promotes its policy."[314] Although it was not the case in *Elicofon*, it is entirely possible, and under the discovery rule[315] likely, that the application of the situs rule will give a good-faith purchaser title by extinguishing the owner's

310. *Id.* at 839.

311. The *Elicofon* court concluded that Elicofon could not establish a "good faith acquisition" under German law because he could not establish that the alleged dispossessor met the definition of a possessor. *Id.* at 840-43. The court further held that the law of good-faith acquisition, had it resulted in a legal determination that the true owner lost title, would have been superseded by Allied Military Law No. 52, which rendered void any attempted transfer of cultural property. *Id.* at 843.

312. *Id.* at 845.

313. *Id.*

314. *Id.* at 846. The Second Circuit Court of Appeals affirmed the ruling that New York law applied "substantially for the reasons stated in the district court's opinion." Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982).

315. *See supra* notes 128-203 and accompanying text.

claim against him. This would occur when situs law treats the owner's cause of action as accruing at the point when the owner's diligence would likely have disclosed the purchaser's possession. The legal recognition of the owner's cause of action triggers limitations periods and, upon the close of those periods, recognizes at the least "de facto" title in the possessor.[316] The recognition of this title by situs law should then be recognized by sister states and nations even if their laws, had they been applicable, would not have reached the same result.[317]

This was exactly the situation in *Greek-Orthodox Patriarchate of Jerusalem v. Christie's, Inc*.[318] A choice between France and New York as the source of governing law was required because, although French law recognized a good-faith purchaser's title by prescription over a thirty-year period,[319] New York favored the true owner by applying the "demand and refusal" rule of accrual. As had the *Elicofon* court, the district court applied New York's choice-of-law rule, which directed application of the law of the place where the property was located at the time of the alleged transfer to the question of the validity of that transfer.[320] That rule chose French law to determine the French claimant's title.[321] The court noted that the relevant transfer was not that from Madame Guersan, the French possessor through purchase, to Christie's in New York. Instead, the relevant transfer was the transfer to Madame Guersan's father in France, and the Guersans claimed acquisition by prescription during more than thirty years of possession in France.[322]

The Patriarchate argued unsuccessfully that public policy concerns suggested that New York would choose her own law. These concerns flowed from New York's desire "as one of the leading centers of international commerce in art . . . [to avoid] a reputation as a place where stolen art may be freely bought and sold."[323] Although recognizing that New York's policy concerns were "not insignificant,"

316. *See supra* note 56 and accompanying text.

317. *See supra* notes 296-98 and accompanying text.

318. No. 98 Civ. 7664, 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. Aug. 18, 1999). The facts of this case are discussed *supra* at notes 224-47 and accompanying text.

319. *Id.* at *12.

320. *Id.* at *13 (citing Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982)).

321. *Id.* The court recognized the Guersans' title under Articles 2262 and 2229 of the French Civil Code on the basis of possession that was "continuous and uninterrupted, peaceful, public, unequivocal, and as owner." *Id.* at *18-19.

322. *Id.* at *14.

323. *Id.* at *14-15.

the court noted that the differences between New York law and French law did not violate New York's "fundamental notions of justice or prevailing concepts of good morals."[324] Because title passed to Guersan by the law of France while the Palimpsest was in France, New York's "demand and refusal" rule would not be applied to accomplish a resurrection of the Patriarchate's title, even if the equities had favored the Patriarchate.

C. Characterization—The Issue as a Conflict of Tort Rules

The third approach in multijurisdiction art theft cases is to characterize the choice-of-law dispute by the nature of the wrong claimed by the plaintiff. Two cases well illustrate the characterization of choice-of-law problems in a multistate owner-possessor dispute over title to stolen art as a tort issue.

The first is *Charash v. Oberlin College*.[325] The dispute involved works of art painted by Eva Hesse[326] that were donated to Oberlin College, located in Ohio. Plaintiff Helen Charash, a New Jersey citizen, was Hesse's sister and sole heir at law. At the time of her death, Hesse was a New York resident, and the alleged conversion probably occurred in that state.[327] The paintings came into the possession of Donald Droll, a New York art dealer, who was also a friend and advisor to Hesse.[328] Droll gave the paintings to his brother, Phillip, who in turn gave them to the college.[329]

It was Charash's belief that Donald Droll "misappropriated" the property.[330] Oberlin claimed that Hesse had given the paintings to Droll.[331] Charash brought suit for conversion in the United States Dis-

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324. *Id.* at *15. This conclusion was supported by the court's finding that New York would here favor the rights of the good-faith purchaser over the rights of the original owner on the equitable principle of laches. *See supra* notes 234-44 and accompanying text.

325. 14 F.3d 291 (6th Cir. 1994).

326. Hesse has been described as the "James Dean of Art." Gregory Beals, *Suit Asks For Return of Stolen Artworks*, THE RECORD, Mar. 31, 1991, at A3. She died of a brain tumor at age 34. A sample of Eva Hesse's work is available at http://www.artchive.com.

327. According to the plaintiff's deposition, it had been necessary immediately after Hesse's death to remove all her possessions from the New York City loft in which she lived. A trunk containing a large number of Ms. Hesse's drawings disappeared either from the loft or from the warehouse where the possessions were moved. *Charash*, 14 F.3d at 294.

328. *Id.*

329. *Id.*

330. *Id*.

331. *Id.* at 295.

trict Court for the Northern District of Ohio. Sitting in diversity, that court applied Ohio's choice-of-law rules.[332]

Charash differs from the other cases discussed in this Article because the defendant did not base its claim of ownership on its status as or through a good-faith purchaser. Instead, Oberlin claimed its ownership by transfer from the original owner's alleged donee. The key question was whether Droll was a wrongful converter or a rightful donee. The first conflict-of-laws issue was the appropriate burden of proof on this issue.

Ohio, the place of suit and the state under whose laws Oberlin College was organized, placed the burden of proof on the plaintiff, requiring her to prove that the property was converted.[333] New York "holds that people deal with property at their own risk, and therefore the defendant must prove that his or her title is valid. In other words, the defendant must prove there was *no* conversion."[334] Because Hesse and Droll were both dead, meeting the burden of proof on the circumstances through which Droll obtained possession would be difficult. Charash therefore argued that New York law should apply, placing that burden on Oberlin; Oberlin College argued that Ohio provided the applicable rule and placed the applicable burden on Charash.[335]

Ohio had committed itself in tort cases to the choice-of-law methods suggested by the Restatement (Second) of Conflicts of Laws. The Restatement Second specifically addresses choice of law in tort suits alleging injury to tangible things, and it directs application of the local law of the state of injury unless another state has a "more significant relationship . . . to the occurrence."[336] The comments to this section of the Restatement address conversion expressly.[337] These comments indicate an intent to bypass the state of the injury as the presumptive source of law in favor of the state with the most significant relationship to "the occurrence, the chattel, and the parties."[338]

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332. *Id.* at 296 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)); *supra* note 269 and accompanying text.

333. *Id.* at 295 (citing Burson v. Peoples Bank, No. 16-92-31, 1993 WL 373523, at *1 (Ohio Ct. App. Sept. 1, 1993)).

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

335. *Id.* at 294.

336. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 (1971).

337. *Id.* § 147 cmt. i.

338. *Charash*, 14 F.3d at 296 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 147 cmt. i).

The court described the nature of the plaintiff's dual burden. Whether the suit is in conversion or replevin, the plaintiff is first required to establish his or her title. This is true in most jurisdictions, including both Ohio and New York,[339] so no conflict of law[340] was presented on the first aspect of Charash's burden. Second, the plaintiff is required to prove that a conversion has occurred. The court held that if a conversion occurred, it occurred in Ohio, because this was the only state in which Oberlin, the alleged converter, acted.[341] Thus, Ohio law should apply unless some other state had the more significant relationship to the parties and the chattels. Applying the section 145 principles[342] to such an analysis, the court found "little support under any of these [principles] for holding that New York law governs this case."[343] In the court's opinion, the alleged original conversion by Donald Droll in New York was irrelevant, because the only relevant behavior was that of the defendant currently in possession, Oberlin College.[344] The court concluded that Charash had failed to establish that the conduct that had caused the injury originated in New York.[345] The other two Restatement factors, the residence of the parties and the place where any relationship of the parties was centered, also pointed away from New York.[346] The court did acknowledge, however, that "[i]f the drawings had been identified and included in the inventory of the artist's estate following her death, and if Ms. Charash were suing on behalf of the estate of a New York decedent [rather than in her own right as a New Jersey resident], there might be some reason to consider her claims of New York's inter-

339. *Id.*

340. *See supra* note 260 and accompanying text.

341. *Charash*, 14 F.3d at 296. The court held that Ohio was the place of the injury, because that is where Oberlin exercised its dominion over the property without Charash's consent or authority. *Id*.

342. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145.

343. *Charash*, 14 F.3d at 297.

344. *Id.* at 297-98.

345. *Id.* As described *supra* note 330 and accompanying text, Charash sought to prove that Droll had originally misappropriated the property in New York. Considering this effort, the court concluded, "[a]lthough she had ample opportunity to establish that Donald Droll took wrongful possession of the drawings in New York, Ms. Charash's proof was speculative at best." *Id.* at 297.

346. *Id.* at 298 (holding that neither party had a domiciliary, residential or business connection to New York and that there was no proof that the parties' relationship was ever "centered" in New York).

est."[347] The court concluded that, should the district court reach the merits of the case, Ohio law was to govern.[348]

The court then turned to the remaining choice-of-law issue, what statute of limitations rules Ohio would apply in the instant circumstances. The court upheld the district court's determination that Ohio would apply her own limitations law.[349] Under Ohio law, the cause of action does not accrue "until the wrongdoer is discovered."[350] Oberlin had conceded that Charash did not have actual notice of its possession of the drawings early enough to support the bar of the statute of limitations, so the sole issue was whether she had constructive notice of that possession. Because there were material issues of fact with respect to whether Charash had such notice, the court concluded the summary disposition was not appropriate and remanded to the district court.[351]

The second case that illustrates the characterization of the choice of right-defining rules in the art theft context as a tort is *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts*.[352] The court chose this characterization despite the defendant-purchaser's assertion that the question was one involving transfer of chattels and thus was subject to the property situs rules.[353] Applying Indiana's choice-of-law rules applicable to issues in tort,[354] the Seventh Circuit affirmed the trial court's determination that "Indiana law and rules govern every aspect of this action, from the statute of limita-

347. *Id.*

348. *Id.* at 299.

349. *Id.*

350. OHIO REV. CODE ANN. § 2305.09 (West 2000).

351. *Charash*, 14 F.3d at 300.

352. 917 F.2d 278 (7th Cir. 1990).

353. The Greek Orthodox Church sought return of the mosaics through a replevin action. Neither the trial court nor the court of appeals could find any Indiana case that characterized replevin actions, but both courts choose to treat replevin as a tort action because it "is identical in all relevant respects to a tort claim for conversion." *Id.* at 286 n.10.

354. Indiana's choice-of-law methodology in torts had been defined in *Hubbard Manufacturing Co. v. Greeson*, 515 N.E.2d 1071, 1073-74 (Ind. 1987). That case called for a two-step inquiry. First, courts were to focus on the place of the wrong to determine its connection to the legal action. If that connection was significant or substantial, the substantive law of the place of the wrong was to be chosen. If that connection was insubstantial or insignificant that law was not chosen, and the court was to consider additional factors, including the place of the conduct causing the injury, the residence of the parties, and the place where the relationship of the parties, if any, was centered, to determine which state had the most significant contact. That state's law was then chosen. *Id.*

tions issues through the application of the substantive law of replevin."[355]

The district court in *Autocephalous* began by noting that although Switzerland was the place of the wrong, because that is where the purchaser took possession of the stolen mosaics,[356] Switzerland bore little connection to the cause of action. None of the parties or significant actors in the sale of the mosaics was Swiss.[357] The mosaics were never in the stream of commerce in Switzerland and in fact were only on Swiss soil for four days.[358] The court characterized Switzerland's connection to "the heart" of the suit as "fortuitous and transitory" and concluded that "Switzerland [had] no significant interest in the application of its law to [the] suit."[359]

Indiana's choice-of-law rules instead pointed to Indiana as the appropriate source of governing law. Among the contacts suggesting this conclusion were that Indiana was the purchaser's state of citizenship, the purchase had been effected largely through the efforts of another Indiana citizen, the purchase was financed by a loan from an Indiana bank, the agreement as to sharing the profits from resale of the mosaics was expressly made subject to Indiana law, and the mosaics were present in Indiana.[360] In the opinions of both the trial and appellate courts, Indiana had "the more significant contacts with and interest in [the] action."[361]

D. Reflections on Choosing Law in Stolen Art Cases

The choice-of-law model that best serves the shared policies of certainty, predictability, uniformity of result, and protection of the justified expectations of the parties is that which characterizes the issue of the relative rights of original owners and good-faith purchasers of stolen art as one involving title to moveable property.[362] The moveable property model focuses attention on the crucial question of the legal patina that surrounds the art in any place where it has more than

355. *Autocephalous Greek-Orthodox Church*, 917 F.2d at 287.

356. Autocephalous Greek-Orthodox Church v. Goldberg, 717 F. Supp. 1393, 1393 (S.D. Ind. 1989), *aff'd*, 917 F.2d 1374 (7th Cir. 1990).

357. *Id*. at 1394.

358. *Id.*

359. *Id.*

360. *Id.*

361. Autocephalous Greek-Orthodox Church v. Goldman & Feldman Fine Arts, Inc., 917 F.2d 278, 287 (7th Cir. 1990).

362. *See supra* notes 295-324 and accompanying text.

a temporary or transitional presence. The moveable property model is also the model most likely to lead a court from the "misstep"[363] of seeing the question as one involving conflicting limitations periods. It is that misstep that most seriously undermines the policies at stake, because it permits the forum of the plaintiff's choice to apply its own rule despite limited and insignificant connections of the forum with the parties and the art.[364] The choice-of-law rules governing title to moveable property ensure that the source of the governing rule is or was intimately connected to the property for which title is in issue.

III. THE CONSEQUENCES OF THE CHAOS

The introductory section of this Article noted that the variance of right-defining rules and the multijurisdictional character of most stolen art cases combine to create a legal regime that undermines all private expectations of the parties, all public policies of states and nations connected to the parties, and all individuals and institutions that comprise the art world. This part examines these consequences and explores the extent to which this chaos is different or more disturbing than that which is created when multijurisdictional contacts mandate a choice among differing rules in any legal context.

A. The Consequences Considered

Whenever a choice must be made between competing rules, one of these rules, and the private interests and public policies that underlie it, will be advanced and the other subordinated. The subordination of public and private concerns linked to the rule not chosen may be felt in the individual case, but rarely will the choice undermine the public and private interests in a universalized sense. In the art theft context, however, the prospect of subordination of those interests in an individual case virtually assures that public and private interests will be undermined universally.

1. *The Interests of the Parties*. To appreciate the extent to which this chaos undermines the interests and reasonable expectations of the parties, imagine the legal advice counsel might give an original owner or good-faith purchaser of stolen art. The owner, having discovered the theft immediately, inquires what he must do to protect

363. O'Keeffe v. Snyder, 416 A.2d 862, 879 (Handler, J., dissenting).

364. *See supra* notes 289-94 and accompanying text.

his rights. If the owner is domiciled or the theft occurred in a state or nation whose right-defining rules allowed immediate acquisition of good title by a good-faith purchaser, the lawyer and client could only hope for movement of the art across state or national borders, such that the foreign good-faith acquisition would at least offer the possibility of application of more owner-favoring rules. If the law of the owner's domicile required the exercise of due diligence, the owner would be well-advised to exercise that diligence, even if later multijurisdiction connections might result in application of a legal rule that did not require that exercise. By far the most problematic scenario, however, is that of the owner who is domiciled and suffers the theft in a "demand and refusal" state. His home state tells him not only that he does not have to use reasonable diligence to recover the art but also that the exercise of that diligence is likely to make recovery far less probable. Thoughtful legal counsel to that owner would never recommend sanguine reliance on the domicile rule, because the owner cannot be assured that his domicile's rule will be the ultimate governing standard in any situation save that where the art never passes outside of his state or nation. In addition, because the owner in this situation does not know the location of the stolen art, reliance on stasis would be ill-advised. Thus, the original owner must do exactly what his domicile rule discourages.

The good-faith purchaser is in a similarly unattractive position. First, in order to claim a superior status over the owner, the purchaser must establish his good faith. Specifically, he must show that at the time of purchase he did not know and did not have reason to know that the art being purchased was stolen.[365] Assuming that the purchaser meets this standard, how, when, and from what source would such a purchaser find repose with respect to the certainty of his title? Because it is possible that the law of the owner's domicile or the place of theft may apply, and because the identity or even existence of an original owner not in the purchaser's known chain of title is unknown, and often unknowable, the purchaser's rights are subject to definition by virtually any rule. The possibility that an unknown owner's domicile has a "demand and refusal" rule is present in any good-faith purchase, and this possibility assures significant disquietude to the purchaser. Such disquietude would be more than a psychic one. As a matter of law or practicality, any claim the current purchaser might

365. On the complexity of this effort, see *supra* notes 77-79 and accompanying text and *infra* note 440.

have against his seller if a defect in title later emerges may be precluded. Perhaps more disconcerting would be the concern of such a good-faith purchaser contemplating future sale of the art and fearful of liabilities that might attach should the art, once sold, ultimately prove to have been stolen. Whether focusing on his seller or his anticipated buyer, the good-faith purchaser would hope for provenencial—and providential—help from the owner-linked source, particularly in the form of a substantive rule that either vested title in the purchaser or his predecessor at sale or treated the owner's action as accruing immediately such that the purchaser could, with the passage of time, rest with certainty of his own title.

2. *The Interests of States and Nations*. When valuable art is stolen and both the original owner and the good-faith purchaser claim it, the determination reached by individual states and nations as to the proper balance between the two is not one that is casually reached. Those jurisdictions adopting the "demand and refusal" rule have done so expressly to protect the rights of owners.[366] They have rejected the discovery rule, not only because it undermines owners' rights but also because they perceive it as driving stolen art underground; thus preventing not only reacquisition by the owner but also acquisition by a good-faith purchaser.[367] It is significant that "demand and refusal" adherents do not simply favor that rule as more effective in accomplishing policy goals. They view the alternative as destructive to those goals.[368]

In the absence of a universal "demand and refusal" rule, however, even an owner domiciled in a "demand and refusal" state cannot rely on the favor of that rule. This is because his case is as likely to be subject to a discovery rule or any other purchaser-favoring rule as it is to be decided by the "demand and refusal" rule, assuming the case has multijurisdictional connections.[369] The only safe course for *any* owner seeking to ensure the continued vitality of his title would be to undertake precisely the destructive course of action that "demand and refusal" states seek to avoid, a search for the stolen art. Put simply, the policy goals to which "demand and refusal" states are committed cannot be achieved unless the owner is willing to gamble

366. *See supra* notes 208-09 and accompanying text.
367. *See supra* notes 211-19 and accompanying text.
368. *See supra* notes 213-16 and accompanying text.
369. *See supra* note 365 and accompanying text.

on the unknown and the unknowable—that the stolen art has at all times remained in the "demand and refusal" jurisdiction or that if the stolen art has links to multiple jurisdictions the court in the place of suit will choose the "demand and refusal" rule.

The policies underlying the discovery rule fare no better under the current chaotic regime. Those policies, essentially grounded in notions of repose,[370] reflect a concern not only for the integrity of transactions but also for the security of acquisition. "Integrity of transactions" means the goal of honest transfers by requiring that buyers make a careful investigation and is reflected by the requirement that the purchaser meet the standard of good faith.[371] "Security of acquisition" means the goal of protecting markets by ensuring that buyers of art, especially art of considerable monetary value, do not suffer disquietude or uncertainty regarding title to that which they purchase.[372] As *Winkworth* concluded in refusing to abandon the *lex situs* rule,[373]

> [w]ere the position otherwise, it would not suffice for the protection of a purchaser of any valuable moveables to ascertain that he was acquiring title to them under the law of the country where the goods were situated at the time of the purchase; he would have to try to effect further investigations as to the past title, with a view to ensuring so far as possible, that there was no person who might successfully claim a title to the moveables by reference to some other system of law; and in many cases even such further investigations could result in no certainty that his title was secure.[374]

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370. More than a century ago, the United States Supreme Court noted that limitations periods "promote repose by giving security and stability to human affairs." Wood v. Carpenter, 101 U.S. 135, 139 (1879).

371. Some of the defendants in the cases discussed earlier failed to clear this bar and would have lost to the original owner whether a "demand and refusal" or a discovery rule were applied. *See* Mucha v. King, 792 F.2d 602 (7th Cir. 1986) (noting that King was not a good-faith purchaser); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1989) (noting that the circumstances of Peg Goldberg's purchase suggested a lack of good-faith status).

372. RAY A. BROWN, THE LAW OF PERSONAL PROPERTY 193 (3d ed. 1975) ("The recognition of the original owner's claim as against that of the innocent purchaser is moreover injurious to the interests which society has in fostering trade and commerce. Business will suffer if purchasers cannot be assured of the title to the goods which they buy."); Alejandro M. Garro, *The Recovery of Stolen Art Objects from Bona Fide Purchasers*, *in* GENEVA WORKSHOP, *supra* note 22, at 503, 514-15.

373. *See supra* notes 299-301 and accompanying text.

374. Winkworth v. Christie, Manson & Woods, Ltd., [1980] 1 Ch. 496, 512-13.

The result is "undesirable uncertainty in the commercial world."[375] Even so, states and nations committed to rules that seek to protect the security of acquisition and that offer repose to a purchaser cannot achieve those goals in a multijurisdictional context. No security or repose is possible in a legal world that admits the possibility of choice of a "demand and refusal" rule.

3. *The Interests of Museums, Galleries, and the Art World*. The interests of the art world are as varied as the interests of the persons and institutions that inhabit it. Although it is true that nearly all who are part of that world desire to protect the rights of art owners, defining who is the owner whose interests are to be protected somewhat begs the question. Certainly the involuntarily dispossessed owner can claim the legitimacy and propriety of rules that preserve and protect his title. It is just as certain that the good-faith purchaser, who has paid significant value and felt the attachment of long possession, thinks of himself as the owner as surely as does his dispossessed predecessor. The schizophrenia of the concept "owner" can best be seen in the position of museums, which may well find themselves cast at different times in each role:

> In some situations, a work of art is in the possession *of* a museum, where it has remained for many years after purchase from a reputable dealer; it subsequently develops that the work was stolen from its original owner, who years after the theft claims the property from the museum. In other situations, a work of art is stolen *from* a museum, which ultimately locates the work and claims it from the possessor who may have purchased the work from a reputable dealer. Museums in possession of stolen art will probably think it preferable to fashion rules that place some obligation on owners to act with diligence in seeking to locate works they claim were stolen from them. On the other hand, museums that are the victims of theft will probably think it preferable to have rules that minimize the obligation of owners to locate their stolen property.[376]

To the extent that both original owners and good-faith purchasers make sympathetic claims, the interest of the art world is doubly undermined, because the current chaos supports neither of the claimants.

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375. *Id.* at 513.

376. Hoelzer v. City of Stamford, 933 F.2d 1131, 1139 (2d Cir. 1991) (Newman, J., concurring).

Of course, a primary concern of the art world, and particularly the artists and galleries within it, is the vitality of the art market. That market depends upon a measure, in fact a high dose, of security surrounding galleries' and purchasers' acquisitions.[377] Chaos undermines security and thereby undermines the market for art.

Finally, the art world as a whole is committed to the celebration and appreciation of art. Private owners of art are encouraged to loan portions of their collections to museums and galleries for public viewing, and they have largely been willing to do so. The shared collections of museums and private owners have allowed exhibits that foster public appreciation of whole schools of art, as well as the full range of talent and style of individual artists. Such exhibits would rarely be possible without the willingness of public and private owners worldwide to loan portions of their collections. Although some exhibits, especially those in galleries, are designed to reach a local audience, others, like the Schiele retrospective,[378] seek to draw audiences worldwide. The intended transportability of those exhibits, and the nature of the exhibits themselves, are multijurisdictional by intent and design. As the multijurisdictional connections of a work of art increase, so does the chaos of conflicting right-defining rules. To the extent that a private or public owner desires to avoid that chaos, the art "stays put" to the detriment of its wider appreciation.

The encouragement that the chaos lends to keeping art out of the wider public domain undermines another crucial interest of the art world—the overarching goal of identifying and recovering stolen art early enough to prevent or at least moderate financial, legal, and psychic loss to a good-faith purchaser.[379] Particularly in the case of a private collector, a decision to avoid the chaos simply by not loaning privately owned works eliminates an opportunity for the original owner to find the art by exercising due vigilance to discover the location of art stolen from him.[380] The chaos may, therefore, "end up short-changing not only the public but also the families seeking to recover lost works."[381]

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377. *See supra* notes 372-75 and accompanying text.

378. *See infra* notes 382-91 and accompanying text.

379. *See supra* note 25 and accompanying text.

380. Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AMERICA, Nov. 1998, at 37 (addressing the Schiele seizures specifically).

381. *Id.*

B. The Consequences Portrayed

No event better illustrates the chaotic result of multijurisdictional connections in art theft cases than the seizures, first by the state of New York and later by the United States, of two paintings in a collection sent by an Austrian state-owned museum to New York for exhibition. In the autumn of 1997, the Leopold Foundation of Vienna, Austria, sent more than 150 paintings by the late Austrian expressionist Egon Schiele[382] to New York City. They were to be displayed in the Museum of Modern Art (MoMA) as part of a Schiele retrospective.[383] Although the loan was arranged through the Foundation, the paintings were owned by Austria, which had purchased a vast collection of expressionist works[384] from Rudolf Leopold[385] in 1994. The Schiele paintings hung at MoMA for six weeks. On January 4, 1998, a few days before the close of the exhibit, two families asked MoMA to retain two paintings so that their provenance could be established. The two paintings were "Portrait of Wally," which was alleged to have belonged to Lea Jaray Bondi, a Jewish Viennese art dealer who fled Austria in anticipation of the Anschluss, leaving her art collection behind,[386] and "Dead City III," which was alleged to have belonged to Fritz Grunbaum, a Jew who was arrested in Vienna and died in the Dachau concentration camp.[387] The families claimed to be heirs of Bondi and Grunbaum. At the time of the request, each

382. Egon Schiele lived only twenty-eight years but created more than 3,000 works on paper and approximately 300 paintings. Although now considered the premier Austrian expressionist, during his life he received little recognition and even less compensation. In 1918, on the brink of commercial success, Schiele and his beloved wife, Edith, pregnant with their first child, contracted Spanish influenza and died within three days of each other. *See* Mark Harden, *Egon Schiele (1890-1918)*, *at* http://www.artchive.com/ftp_site.htm (last visited Jan. 11, 2001) (providing a short biography of the artist and a sampling of his work) (on file with the *Duke Law Journal*).

383. Judith H. Dobrzynski, *Appeals Court Tells Museum to Hold Austrian Paintings*, N.Y. TIMES, Mar. 17, 1999, at B3.

384. *In re* Museum of Modern Art, 688 N.Y.S.2d 3, 5 (App. Div.), *rev'd sub nom. In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897, 900 (N.Y. 1999).

385. Rudolph Leopold, a Viennese ophthalmologist, amassed a collection of more than 5,000 works of art, including about 250 by Schiele. For an excellent description of, and reaction to, the process by which Dr. Leopold acquired his collection, see Judith H. Dobrzynski, *The Zealous Collector—A Special Report; A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1.

386. Budick, *supra* note 16.

387. *Id.*

painting had a value of approximately $2 million.[388] Officials at MoMA refused the heirs' request, citing their contractual obligations to return the paintings to the Leopold Foundation.[389] On January 7, literally hours before the paintings were to be returned to Europe for exhibition in Barcelona, Spain, Manhattan District Attorney Robert Morganthau served MoMA with a subpoena duces tecum[390] barring transfer of the two paintings pending a criminal investigation into the theft alleged by the Jaray Bondi and Grunbaum heirs.[391]

The reaction of MoMA, the Leopold Foundation, Austria, the art world, and major museums was immediate. In its statement, MoMA noted the significance of the seizure: "At stake is the vital ability of people all over the world to share the art treasures that illuminate all of our lives."[392] Leopold Foundation officials noted that there was "no comparable instance in history" and suggested that the seizure "could rise up to a very big scandal."[393] Austria immediately

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388. *Austrian Art Ordered Held in NYC: Court Wants Inquiry into Whether Paintings Are Nazi Plunder*, BOSTON GLOBE, Mar. 17, 1999, at A5 [hereinafter *Austrian Art Ordered Held in NYC*]. There is a certain sweet irony to the fact that Schiele has come to be regarded as "the outstanding artist of turn-of-the-century Vienna" given that he was "despised by the Nazis and his works [were] confiscated as 'degenerate art.'" Ian Traynor, *Seizure of Paintings Sparks Fear over Loans: Art Dispute Widens*, GUARDIAN, Jan. 10, 1998, at 17.

389. Budick, *supra* note 16.

390. A subpoena duces tecum is "a subpoena requiring the witness to bring with him and produce specified physical evidence." N.Y. CRIM. PROC. LAW § 610.10(3) (McKinney 1995).

391. People v. Museum of Modern Art, 688 N.Y.S.2d 3, 5 (App. Div.), *rev'd sub nom. In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897, 900 (N.Y. 1999). The court briefly described the basis of the investigation:

> Based upon information obtained from heirs of the original owners, the New York County District Attorney alleges that one of the paintings, "Portrait of Wally" by the Austrian expressionist Egon Schiele, was owned by the late Lea Jaray Bondi and was stolen from her by a Nazi agent or collaborator shortly before she fled Austria during World War II. After the war ended, the painting was found among the collections of the Austrian National Gallery. Although Mrs. Bondi asked a noted Schiele expert, Dr. Rudolph Leopold, for help in retrieving her painting, he instead obtained the painting for his private collection. The second painting, "Dead City III," also by Schiele, was owned by Fritz Grunbaum in 1938 but was stolen just before his arrest and death in Dachau. After the war, Dr. Leopold added this painting to his private collection. In 1994, Dr. Leopold sold his collection to the government funded Leopold Foundation of Vienna for $175,000,000.

Id. at 4-5.

392. Richard Pyle, *MoMA to Relinquish Art Allegedly Stolen by Nazis*, JERUSALEM POST, Jan. 12, 1998, at 6.

393. *Id.* Interestingly, the Leopold Foundation was aware of the heirs' claims and yet did not seek the protection available in advance under the Federal Immunity from Seizure Act, 22 U.S.C. § 2459 (2000).

protested the seizure to the United States.[394] The Austrian Culture Minister called the seizure a "heavy blow to the international exchange of art."[395] Newspaper articles published at the time characterized the seizure as "causing jitters of monumental dimensions in the museum world"[396] and described the international art world as "reeling."[397] The Director of the Metropolitan Museum of Art suggested that "[m]useums and the public could be severely damaged as a consequence."[398] Part of the concern of New York museums was a competitive rather than a universal one. As the same Metropolitan official put it, "[a]ny number of institutions and individuals will not lend to institutions in New York . . . and all the good shows will go to Washington, Boston and Philadelphia."[399]

In other quarters, the seizure was heralded. One of the claimants observed, "we can resolve what's been a half century of great loss."[400] A United Nations Science and Cultural Organization (UNESCO) official claimed, "A civil contract between two parties [MoMA and the Foundation] cannot overtake a complaint of theft. People in the art world might be worried. But there is a crisis of conscience coming. A number of collectors are going to find things in their collections which are dubious."[401]

MoMA moved immediately to quash the subpoena. The lower court granted the motion, citing section 12.03 of New York's Arts and Cultural Affairs Law.[402] On appeal, the intermediate appellate court

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394. Jane Perlez, *Austria Protests Art Seizure*, INT'L HERALD TRIB., Jan. 10, 1998, at 7. The situation was described at the time as "what could become the touchiest diplomatic spat between Vienna and Washington since the peace of 1945." Simon Beck, *The Art of a Diplomatic Row*, S. CHINA MORNING POST, Jan. 11, 1998, at 11.

395. Robert Hughes, *Hold Those Paintings!: The Manhattan D.A. Seizes Alleged Nazi Loot*, TIME, Jan. 1998, at 70.

396. Judith H. Dobrzynski, *Ideas & Trends: Show and Tell; How Did You Get That Art in the War, Daddy?*, N.Y. TIMES, Jan. 25, 1998, at D4.

397. Traynor, *supra* note 388.

398. Judith H. Dobrzynski, *Already, Schiele Case Is Reining in Art World*, N.Y. TIMES, Jan. 10, 1998, at B7.

399. *Id.* Subsequent events suggest this particular fear is unfounded. First, the New York Court of Appeals held the seizure unlawful under New York law. *See infra* notes 404-06 and accompanying text. Second, the United States government stepped in and seized the Schieles under federal law, which it presumably would have done in any state. *See infra* notes 408-11 and accompanying text.

400. Pyle, *supra* note 392.

401. Traynor, *supra* note 388.

402. N.Y. ARTS & CULT. AFF. § 12.03 (McKinney Supp. 1999):

> No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is en route

reversed, holding that section 12.03 does not apply to subpoenas duces tecum issued as part of a criminal investigation.[403]

The New York Court of Appeals—in a 6-1 opinion—reversed the Appellate Division. The court saw itself called upon first to decide whether section 12.03 applied only to civil proceedings. If not, the court would decide whether the subpoena issued to MoMA effectuated a statutorily prohibited seizure of the paintings.[404] Despite the fact that section 12.03 listed certain types of civil actions, the court noted that the section employed unconditional language directing "'*no* process' . . . '*or any* kind of seizure . . . .'"[405] The effect of the subpoena directed at the Schieles was to "interfere significantly with the Leopold Foundation's possessory interests in the paintings by compelling their indefinite detention in New York, and thus effectuat[es] a seizure."[406]

MoMA proclaimed the court of appeals decision "a victory for all of the people and museums of our state because it means that New

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> to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

403. *In re* Museum of Modern Art, 688 N.Y.S.2d 3, 8 (App. Div.), *rev'd sub nom. In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897, 900 (N.Y. 1999). MoMA immediately characterized the Appellate Division's holding as "deeply troubling and disappointing" and indicated it would appeal. *Austrian Art Ordered Held in NYC*, *supra* note 388.

404. *In re* Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art, 719 N.E.2d 897, 900 (N.Y. 1999). One of the interesting facts about the circumstances after the Schieles were seized is that in the twenty months between the seizure and the New York Court of Appeals decision, the district attorney's office had not produced an indictment against anyone in connection with the case. Judith H. Dobrzynski, *Strategy in Schiele Art Case Questioned*, N.Y. TIMES, Oct. 12, 1999, at E3. This fact was commented upon by the court of appeals and has led to legal criticism of Mr. Morganthau's strategy:

> [L]awyers who handle art claims said they never understood where the subpoena would lead or whom the District Attorney planned to indict. The Nazi who seized the painting from Mrs. Bondi is long dead, as are the officials at the Austrian National Gallery who took it and traded it to Rudolf Leopold, now of the Leopold Foundation. Dr. Leopold, now in his seventies, lives in Vienna, and if the case were tried under Austrian law as expected, the statute of limitations would absolve him.

Id. Some lawyers have gone so far as to question the motive of Mr. Morganthau "asking if the politics of championing a popular cause and Mr. Morganthau's well-known rivalry with the United States' Attorney's office in Manhattan . . . led him to leap into a case." *Id.*

405. *Museum of Modern Art*, 719 N.E.2d at 900 (quoting N.Y. ARTS & CULT. AFF. § 12.03 (McKinney Supp. 1999)).

406. *Id.* at 904.

York will continue to be the cultural center of the world."[407] MoMA's victory, and the exuberance of those who urged and celebrated it, was short-lived. At 9 p.m. on the day the court of appeals announced its decision, a seizure warrant from the United States Attorney for the Southern District of New York arrived at the museum for "Portrait of Wally."[408] As might be expected, MoMA expressed deep disappointment that the U.S. Attorney's office "has decided to ignore the important policy . . . so vigorously enforced on yesterday's New York Court of Appeals decision."[409] Just as predictably, Mr. Morganthau heralded the action, stating "we applaud any effort that will bring us closer to determining the true ownership of the painting, and believe any step which prevents New York from becoming a safe haven for stolen art is a positive one."[410]

In a bizarre final twist, the Bondi and Grunbaum heirs apparently had no legitimate claim to the seized Schieles:

> Although we had assumed from the start the good faith of the people claiming the pictures, it now appears likely that neither family had a *bona fide* claim. In the case of one of these two claims, the painting was claimed by a former reporter for *The New York Times*. As it turned out, her claim was based upon her being the widow of a son of the pre-war owner's cousin, who in turn was not an heir to the painting. The other claim is even more convoluted. The man who asserted his family's rights in the painting wrote to us about his vivid recollections of seeing the picture in his aunt's house in Vienna before the war. But, according to the pre-war owner's grandson, the claimant never saw the painting, never set foot in the house in Vi-

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407. Judith H. Dobrzynski, *Modern Wins Ruling on Art Seizure*, N.Y. TIMES, Sept. 22, 1999, at E1. Robert Morganthau labeled it "a sad day." *Id.*

408. Oddly, the federal government did not issue a warrant for "Dead City III." That painting has been returned to Austria. Bruce Balestier, *Return of Painting Blocked by U.S. Attorney*, N.Y.L.J., Sept. 23, 1999, at 1.

409. *Id*.

410. *Id.* The federal government was not the only actor that responded to the court of appeals' opinion:

> Not to be outdone in promptly responding to the Court of Appeals' decision, [New York] Assembly Speaker Sheldon Silver later that week introduced legislation to allow State intercession when artwork on loan in New York is suspected of being stolen property. [New York] Governor George Pataki immediately announced his support for the bill.

Roy L. Reardon & Mary Elizabeth McGarry, *Artwork Allegedly Stolen by the Nazis*, N.Y.L.J., Oct. 14, 1999, at 3.

> enna, and is not, as a matter of fact, an heir—a fact the claimant recently conceded in a British newspaper interview.[411]

In the meantime, the Museum of Modern Art has found itself the target of seizure by a foreign court in a case that has been described as a "mirror image" of the Schiele seizures.[412] "Bauhaus Staircase" is a 1932 painting by Oskar Schlemmer and is considered "an icon of the Modern's collection."[413] The museum loaned the work for exhibit around the world. A German court ordered that the painting be held in Berlin for investigation of its provenance based on a claim to ownership by Schlemmer family members.[414] Before the order could be served, the painting was shipped back to the museum, where it remains today. A German court will hear the matter.

C. Reflections on the Chaos

Those familiar with the vagaries of choice-of-law results in multijurisdictional art theft cases might suggest that the displacements of private expectations and policy objectives described earlier in this part characterize many, if not most, conflicts scenarios. In virtually every scenario[415] save this one, however, the source of the governing

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411. *Holocaust Assets: Hearings Before the House Comm. on Banking and Fin. Servs.*, 106th Cong. 177 (Feb. 10, 2000) (testimony of Glenn D. Lowry, Director of the Museum of Modern Art, New York).

412. Judith H. Dobrzynski, *Modern Is Focus of a New Dispute over a Painting*, N.Y. TIMES, Feb. 10, 2000, at E3.

413. *Id.*

414. Oskar Schlemmer, who had been labeled a "degenerate artist" by the Nazis, sold the painting to a curator at MoMA in 1933 but allegedly was never paid or was not paid adequately. Dobrzynski, *supra* note 412, at E3.

415. Perhaps the most analogous multijurisdictional chaos to that which exists in original owner/good-faith purchaser contests in art theft cases is the conflict in interests that arises when security interests in different states are created in the same moveable chattel. Here, a secured creditor perfects its interest in the state where the chattel is located. The debtor in possession of the chattel takes the chattel to another state without knowledge of the original secured creditor. There, the debtor pledges the chattel as security to the second lender, who is without knowledge of the existence of the prior interest. This second creditor perfects its claim under the law and filing system of the second state. Just as we have seen in the art theft context, "[i]t is a difficult question to determine which of two or more innocent parties bears the risk in such a situation when the debtor absconds or fails." EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 968 (3d ed. 2000).

In addressing the issue of successive interests secured in multiple states, the U.C.C. until recently committed itself to a situs rule, although not always to the benefit of the first secured creditor. The code focused on the secured chattel and required the first secured creditor to maintain a close watch on the situs of the chattel in order to protect the priority of that creditor's security interest over a later good-faith secured creditor in a second state. Creditor #1 was

law is foreseeable if not predictable, at least within the United States. The constitutional standard defining when a state may apply its own substantive law[416] will shield a party from application of an unexpected rule. Choice-of-law models themselves often require significant contacts between the parties or transaction and the state or na-

granted a four-month window in which to file in the chattel's new location. If the first creditor did, it had priority over creditor #2, even if creditor #2 filed before creditor #1 in the second state. U.C.C. § 9-103(1)(d) (1972). If creditor #1 did not discover the location of the chattel and act to preserve its security in the new situs state within this window, creditor #1 lost its priority to creditor #2.

The 1998 version of Article 9 completely changes the focus in multijurisdictional security priority conflicts, and it does so in a way that highlights the commonalities and differences between those conflicts and the conflicts between owners and good-faith purchasers of stolen art. Instead of focusing on the situs of the chattel, the relevant 1998 Code sections focus on and give legal significance to the local law and security system of the state of the debtor's location. Thus, it is in the place of the debtor's location, not the chattel's situs, where security interests are to be filed. U.C.C. § 9-301 (1998). As long as the debtor "stays put," creditor #2 would be directed, as was creditor #1, to the local law of debtor's location and local filings there. Thus, in our scenario, creditor #2 would have notice of creditor #1's perfected interest. The multijurisdictional problem under the 1998 version arises not when the chattel moves, but when the debtor moves or changes location. If the debtor changes location between its dealings with creditor #1 and creditor #2, creditor #2 would file in the new location and, unless informed, would have no knowledge of the prior interest. On the other hand, creditor #1, likely to be self-interested in the whereabouts of the debtor, ought to be aware at some point of debtor's departure from his prior location. In recognition of these two perspectives, section 9-316 allows the first perfected interest to remain perfected, as against the subsequent buyer or creditor, for four months after the debtor changes location.

Why this brief foray into the complexities of multijurisdictional filing conflicts in an Article about owner-purchaser conflicts in art theft cases? Because each poses the problem of relative innocents, one of whose interests must be subordinated to the other. The shift in focus between the 1972 and 1998 versions of Article 9 illustrates the drafters' appreciation of the difficulty posed for the first secured creditor, akin to the owner in the art theft context, whose legal rights are affected by the movement of collateral which is out of its possession. The 1998 version eases the first creditor's task considerably by requiring that creditor only to track the debtor's location or business status. Precisely because the debtor is known to creditor #1, the latter has a link to the protection of its legal interests.

Unfortunately, the art theft context denies the opportunity to define a conflicts rule that would protect the interest of the original owner in the same way that the U.C.C. drafters have sought to balance the rights of successive creditors. It is the "link" to the debtor, rather than to the location of the chattel, that allows the first creditor the opportunity to protect its rights through the exercise of appropriate diligence. The owner of stolen property nearly always lacks that link because the theft creates not only a gap in the chain necessary to track the chattel's location, but also a gap in identifying any subsequent possessor who could guide the way to either the art itself or its current possessor and ultimately to the possible source of governing law. SCOLES ET AL., *supra*, at 970-76.

416. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1980), established that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary not fundamentally unfair." *Id.* at 312-13.

tion whose law is chosen. Thus, the models buffer parties from unanticipated or unforeseeable choices.[417] In individual cases, courts often take pains to explain the lack of unfairness or unpredictability in a given choice-of-law result.[418] Additionally, to the extent that the forum is likely to apply its own law, as would be true with respect to those rules deemed to be procedural,[419] constitutional limitations on exercises of personal jurisdiction will prevent the defendant from having to defend in a forum that could not reasonably have been anticipated.[420]

So why do these buffers against unpredictable fora and sources of governing law fail to protect party interests and public policies in the context of original owner/good-faith purchaser contests? Personal jurisdiction will exist on the traditional ground of domicile[421] in the typical owner/purchaser case in which the owner ventures to the purchaser's home state or nation to bring the suit for replevin of the art.[422] In other scenarios where the claimed art is not located at the purchaser's domicile, for example because it is on loan for exhibit[423] or consigned for sale,[424] the forum-situs is not constrained in the exercise of jurisdiction because the defendant has voluntarily placed his property there, and the cause of action is directly related to that prop-

417. This is true of the Restatement (Second) "most significant relationship" test, *see supra* note 336 and accompanying text, and various manifestations of government interest choice-of-law analysis. *See* Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 128 (1993) (observing that even those states not purporting to engage in government interest analysis do so in another guise).

418. *E.g.*, Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 282-84 (N.Y. 1993) (offering a thoughtful explanation of why New York's choice of a Missouri rule, which allowed a New York company to be exposed to liability under circumstances in which New York would shield the same company, was not unfair or unpredictable).

419. *See supra* notes 275-81 and accompanying text.

420. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

421. *See generally Milliken*, 311 U.S. at 457 (upholding jurisdiction over an absent domiciliary).

422. *See supra* note 420 and accompanying text.

423. Such was the case with the Schiele seizures. *See supra* notes 382-411 and accompanying text.

424. Such was the case in *Greek-Orthodox Patriarchate v. Christie's, Inc.*, No. 98 Civ. 7664(KMW), 1999 U.S. Dist. LEXIS 13257, at *8 (S.D.N.Y. Aug. 18, 1999). *See supra* notes 224-47, 318-24 and accompanying text.

erty.[425] Second, the constitutional constraints on a state's choice of its own law do not extend to a state's application of its procedural rules, including its statute of limitations.[426] Thus, to the extent that the conflict-of-law issue in the owner/purchaser dispute is treated as one involving statutes of limitations,[427] the constitutional buffer against the application of unforeseeable laws is not implicated. Further, as we have seen,[428] until an owner and a purchaser are aware of each other's identity, both must anticipate the possibility of nearly any legal rule being applied.

Third, the typical original owner versus good-faith purchaser litigation occurs in the purchaser's domicile, which is also the situs of the disputed artwork. Both contacts, that of defendant's domicile and situs of the res, will suggest a strong interest of the forum in applying its own law. This will be especially true in those fora committed to a discovery rule.[429] A forum that is the domicile of the owner[430] or the situs of the res[431] will also be significantly connected to the dispute. It is, therefore, not surprising that the law most often chosen in the cases described above is forum law.[432] Where forum law is routinely chosen, forum shopping by the plaintiff predictably follows.

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425. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the United States Supreme Court held that the "minimum contacts" standard of *International Shoe* governed the constitutionality of in rem as well as in personam jurisdiction. The effect of this holding was to make the presence of the defendant's property within the state jurisdictionally relevant but not determinative. *Id.* at 207-209. As the *Shaffer* Court itself noted, "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction." *Id.* at 207.

426. Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) (holding that a forum state may apply its own statute of limitations in any case, even one in which the state would be constitutionally barred from applying its own substantive laws).

427. *See supra* notes 269-94.

428. *See supra* Part III.A.1.

429. Because a discovery rule favors the good-faith purchaser, in contrast to a "demand and refusal" rule, and the purchaser is domiciled in the discovery-rule state, that state will presumably be favorably inclined to apply its rule.

430. The corollary to the point made *infra* note 429 is applicable here. A forum that is the owner's domicile and has an owner-favoring rule, such as the "demand and refusal" rule, will be strongly motivated to apply its own rule.

431. The United States Supreme Court has noted in a variety of contexts that a state that is the situs of the res has an interest in such issues as the property's marketability. *E.g.*, Shaffer v. Heitner, 433 U.S. 186, 208 (1977) (noting this interest in the personal jurisdiction context).

432. *E.g.*, Charash v. Oberlin Coll., 14 F.3d 291, 296-99 (6th Cir. 1994) (determining that Ohio would apply Ohio law); Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 286 (7th Cir. 1990) (determining that Indiana would apply Indiana law); DeWeerth v. Baldinger, 836 F.2d 103, 106 (2d Cir. 1987) (determining that New York would apply New York law). *But see* Greek-Orthodox Patriarchate of Jerusalem v. Christie's,

IV. BRINGING ORDER OUT OF CHAOS

Order can be brought to the palette in stolen art cases, and broad public and private policies can be served, only by the adoption of a universal right-defining rule. Rendering the choice of law completely predictable will accomplish little in enhancing private expectations or policy goals in the stolen art context. The key feature of the varying approaches to the choice-of-law issue—other than their variance—is that they are neutral, both as between the immediate title or immediate wrongfulness and deferred title or wrongfulness and as between the discovery rule and the "demand and refusal" rule. None of the choice-of-law methods point to or even favor a particular result as between the original owner and good-faith purchaser or the policies supporting the claims of each. Similar outcome neutrality will follow if all states and nations agree on a universal mechanism to choose the source of the applicable law. This will be true whatever that source may be, whether a source linked to the owner (owner's domicile at time of suit or time of theft, or the place of theft), a source linked to the purchaser (place of purchase or purchaser's domicile), or a source linked to the artwork's situs at any given transactional point. Such a universal mechanism, wherein the same law-choosing mechanism is applied whatever the forum for suit, would certainly make the choice-of-law outcome predictable at the point at which the original owner discovered the good-faith purchaser, demanded possession, and was refused. The knowledge of a fixed body and source of law defining the rights of the parties might thus encourage the disputants to settle. A universal choice of law would diminish forum shopping by plaintiffs[433] to the extent that such shopping was driven by variant choices made by alternative fora. Because any chosen forum would decide the case by application of the same rule, plaintiff would not be advantaged, nor defendant disadvantaged, by suit in one available jurisdiction rather than another.

What of the situation for owners and purchasers prior to the owner's discovery of the identity of the purchaser or current possessor? Here, a universal model provides a lopsided advantage to one of the parties and one set of sovereign policies and disadvantages the others. This outcome can be illustrated by examining what practical

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Inc., No. 98 Civ. 7664, 1999 U.S. Dist. LEXIS 13257, at *12-18 (S.D.N.Y. Aug. 18, 1999) (concluding that New York would apply French law).

433. *See supra* note 432 and accompanying text.

effects would flow to the parties, the art world, and concerned states if fixed choice-of-law rules were universally adopted.

A. Owner-Linked Rules

Owner-linked rules are choice-of-law rules tied to either the place of theft or the domicile of the owner. Such rules might focus on domicile at the time of theft, at the time of good-faith purchase, or at the time of suit. A universal owner-linked rule might take the following form: *The validity and effect of a transfer of rights in stolen property to a good-faith purchaser shall be determined by the local law of the original owner's domicile at the time of the theft.* If an owner-linked choice-of-law rule were universally adopted, the original owner would immediately know the "rules of the game," although not necessarily the outcome. Only if the owner's domicile embraced the "demand and refusal" rule would the owner gain quietude as to the protection of his interests. Any other rule (an immediate transfer of title if sale is made to a good-faith purchaser, title acquired by such a purchaser only upon adverse possession through prescription, or wrongfulness deferred while the owner exercises due diligence) would leave the ultimate outcome in limbo, but the rule would at least inform the owner about any immediate obligation he may have.

The good-faith purchaser, by definition not knowing of the existence of an original owner outside his chain of title, can gain no quietude or repose absent a definable or identifiable source of law governing his rights. Here, the source of law would be definable but from the purchaser's perspective unidentifiable until the good-faith purchaser knew the identity of the owner and the owner's domicile at the time of the theft.

B. Purchaser-Linked Rules

"Purchaser-linked" rules are choice-of-law rules that choose the purchaser's domicile or place of purchase as the source of substantive rules with respect to original owner/good-faith purchaser rights. As with owner-linked rules, purchaser-linked rules equalize the parties in terms of litigation strategies by denying the plaintiff a forum-shopping incentive. Unlike owner-linked rules, though, purchaser-linked rules offer a slight advantage to the good-faith purchaser. This is true whether the focus is on his purchase or on a predecessor's purchase, because the good-faith purchaser would either know or be able to determine the source of law defining his right, title, or interest, at a

point potentially far earlier than the original owner. Until the true owner discovered the identity of the good-faith purchaser, the owner could not begin to fathom the source of rules defining the nature of his obligation.[434]

Although recognition of a universal choice-of-law rule would not significantly advance the private expectations and public policies underlying the various right-defining rules, universal adoption of a right-defining rule itself would significantly achieve those goals. This would be particularly so if the chosen rule lay somewhere in the middle of the range of available rules. The potential problems that may arise under a universally adopted rule from either extreme demonstrate the need for a rule from the middle. At one end of the right-defining range lies the rule that most favors the good-faith purchaser by immediately vesting title in him upon his purchase. Although such a rule would bring certainty if universally adopted, it risks rendering the original owner helpless unless the theft is immediately discovered and universally publicized. Perhaps because of the weight of this burden on a faultless owner, the rule of immediate acquisition of title to stolen art[435] has few adherents[436] and does not suggest itself as worthy of universal recognition. At the other end of the spectrum, the "demand and refusal" rule suffers similar failings. Universal adoption of the "demand and refusal" rule would bring certainty, but from the perspective of the good-faith purchaser, the only certainty would be uncertainty. Repose would not and could not accompany most good-faith purchases[437] no matter how long the period of possession following the purchase. This rule has only one adherent,[438] albeit a significant one, and, therefore, demonstrably lacks universal appeal.

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434. The *Winkworth* court, which applied Italian law vesting title to art stolen in England but sold to a good-faith purchaser in Italy before being returned to England, noted that the owner "neither knew of nor consented to the removal of the goods from England or anything which made such removal more probable." Winkworth v. Christie, Manson & Woods, Ltd. [1980] 1 Ch. 496, 503. *Winkworth* is discussed *supra* notes 299-302 and accompanying text. In fact, from the owner's perspective, "there was never any voluntary act on his part which connected or was even likely to connect the goods to any foreign system of law." *Id.* at 509.

435. Recall, however, that immediate acquisition of title by a good-faith purchaser is the vastly more favored rule where the original owner voluntarily parted with possession. *See supra* notes 62-89 and accompanying text.

436. *See supra* notes 60-61 and accompanying text.

437. The extent of the burden placed on the purchaser to qualify as having purchased in good faith is discussed *supra* at notes 76-89 and accompanying text.

438. *See supra* note 204.

To command universal appeal, a right-defining rule applicable to original owners and good-faith purchasers of stolen art must reflect the conflicting interests of both the claimants and the myriad policy interests detailed in Part III.[439] In this author's opinion, only the discovery rule can claim to serve such diverse masters. It can lay this claim precisely because it places similar obligations on both the owner and the purchaser. Under any of the right-defining rules, the purchaser must meet the burden of establishing his good faith. Thus he must not have known, nor have had reason to know, of the owner's superior claim. The purchaser is required to exercise diligence in this regard, a diligence that may demand reasonable inquiry regarding the chain of title to the work.[440] A purchaser who fails to exercise such diligence will be held to constructive knowledge of suggested defects and will risk the withdrawal of good-faith status upon which his claim to title is based. The diligence required of the purchaser presumably makes the sale of stolen art on the open market more difficult and the discovery of defects more likely.

The discovery rule of accrual demands diligence of the true owner as well. That owner must pay sufficient attention to his property to be aware of the theft. Once aware of the theft, he must be reasonably diligent in searching for the property.[441] If the search is undertaken and continued, the cause of action will not accrue until it can be concluded that the search would disclose the whereabouts of the art. Herein lies the service of this rule to policy interests beyond the interests of the immediate parties. The effect of the discovery rule is to encourage, albeit indirectly, public acknowledgment of possession by the good-faith purchaser. Because the owner's due diligence must be capable of bearing fruit, wholly private possession by the purchaser disfavors his long term interests by continuing the vitality of the true owner's claim. Thus, the purchaser whose claimed ownership of the stolen art is reported in publications and acknowledged in public exhibits finds his interests better protected than the purchaser of stolen art that has been languishing in garbage bags behind a dresser before

439. *See supra* notes 365-432 and accompanying text.

440. As a practical matter, this burden can be a significant one in financial and temporal terms. As the director of the Museum of Modern Art put it, investigating and resolving provenance issues are matters of "enormous complexity" that require "meticulous and dispassionate research." *See supra* note 411.

441. *See supra* notes 128-31 and accompanying text.

private restoration by the purchaser.[442] Tempered publicity of possession by the purchaser, even if it results in a claim by an original owner, is likely to draw that claim by a diligent owner early enough that the purchaser will still have meaningful legal rights against the vendor from whom the work was purchased.[443] Of course, if the owner is not exercising appropriate diligence, time begins to run in favor of the purchaser. To come full circle, the owner's diligence and the purchaser's good-faith inquiry prior to purchase may prevent the sale, facilitate the return of the art to the original owner, and avoid the necessity of a choice between two relative innocents.

CONCLUSION

Law is always challenged when it must decide between two innocents in situations where each has a claim worthy of accommodation and a mutual accommodation is not possible. All that can be hoped in defining rules by which such decisions are to be made is that the rules are perceived as fair to the claimants, advance public policies, are certain, are applied predictably, and that, as a result, they can guide human conduct in a way that makes less likely the progression of events that leads the innocents to the conflict. Were stolen art cases to play themselves out wholly within the confines of a single state or nation, any of the right-defining rules described in this Article would serve these goals. Unfortunately, stolen art cases do not arrive at courthouse steps painted on such simple factual backgrounds. As the cases examined in this Article illustrate, modern stolen art cases encompass great distances in time and space. Their backgrounds are sometimes subtle, sometimes darkly disturbing, and they do not admit of easy evaluation or resolution under the most ordered of legal palettes. The chaotic palette of current divergent right-defining rules and choice-of-law methods has not produced what any observer would call a pretty picture. It has instead produced a picture that defeats the ideals of all who cherish art—artists, owners, purchasers, galleries, museums, and

442. *Compare* DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987) (noting that the artwork was pictured and discussed in several publications and faulting the original owner for failing to "undertake[] even the most minimal investigation"), *with* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *29 (E.D. Pa. Feb. 23, 1995) (explaining that "where a court finds that an [original] owner has diligently searched for a painting but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run" (internal quotation marks and citation omitted)).

443. *See supra* note 25.

the public. Universal commitment to one right-defining rule can bring order to this chaos.

I am arguing for the unique importance of what, in modern parlance, is called the "settlement"[444] or "coordination"[445] function of law in defining the relative rights of original owners and good-faith purchasers of stolen art. The settlement or coordination function of law "is to settle authoritatively what is to be done."[446] Justice Brandeis said it this way, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[447] My belief is that universal adoption of the discovery rule would "settle it right." In the face of the current chaos, however, the fact of reaching a universal, or nearly universal, choice is more important than the precise rule chosen. Here, the private and public interests at stake will only be served by a settled set of rules, and "although a better set is preferable to a worse one, even a worse one is, within bounds, preferable to none at all."[448]

444. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

445. Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 182-85 (1982).

446. Alexander & Schauer, *supra* note 444.

447. Commissioner v. Colo. Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

448. Alexander & Schauer, *supra* note 444.