Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule

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GHOSTS OF THE HOLOCAUST: HOLOCAUST VICTIM FINE ARTS LITIGATION AND A STATUTORY APPLICATION OF THE DISCOVERY RULE†

INTRODUCTION

Imagine that you are the director of a prestigious public museum of art in a major American metropolitan area. Seven years ago, an elderly couple donated an extremely valuable piece by a well-known, early-twentieth century artist to the museum. Prior to the donation, the couple had owned the piece since the early 1950s and had been told by the seller that the artist himself owned the piece prior to the couple's purchase. Then, after several years of quiet enjoyment by the museum and the museum-going public, the elderly heirs of the alleged "rightful" owner serve the museum with a demand for the painting's return. The heirs claim that the piece was looted during the Second World War nearly 60 years ago when the owner fled Europe to evade certain death under Nazi occupation. What is a museum director to do? Public opinion is clearly on the side of the previous owners, yet the piece's title is not clear . . . and it has been nearly 60 years. If the heirs were to triumph in this case, where would it end?²

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¹ See Regina Hackett, SAM Sues Gallery in Dispute Over Matisse Work, SEATTLE POST-INTELLIGENCER, Aug. 26, 1998, at E1 (reporting essentially these facts regarding an heir's claim to an extremely valuable Matisse painting currently held by the Seattle Art Museum).

² See When it's too late to hand back the loot, EVENING STANDARD (London), Aug. 24, 1998, at 45, available in 1998 WL 18171204. As this article explains, museum curators are faced with a quandary when dealing with stolen art:

- Suppose a Renoir or Monet stolen by Nazi troops from [a] Jewish family in France presents itself for sale, but the vendor innocently paid £5 million for it in New York? Do you refuse it, even though the French Jews no longer have title in French law?
- Do you refuse, for example, Imperial Chinese art looted by British troops from the Summer Palace in Peking in 1860? Or Benin bronzes saved by the British from disaster in the 1870s? Or sculpture looted by who knows who from Cambodian temples in 1970? Or old masters removed by Napoleon's army in Italy and Russia quite
While the fine art trade is one of the largest and most lucrative international industries, the present state of the law regarding stolen art is anything but clear. The problem raised by fine art trafficking, both legal and illegal, is exacerbated by both the volume of the trade itself and the inconsistency and confusion with which courts, already unfamiliar with the subject of fine art title law, have approached the problem. In addition, the years 1994 and 1997 saw the publication of two books that further disrupted the market for European Masters and pre-1940 modern art. These two best-selling books re-told the story of Nazi fine art looting and revealed extensive archival research which put the provenance of more than 20,000 pieces of art, many held by prominent American, Canadian, British, and French museums and most purchased in good faith, up for debate. While to date no claim has gone to trial, the mere potential for claims disrupts the art market by putting the titles of thousands of pieces of often extremely valuable art at risk (thereby making them worthless on the open market). This uncertainty of title therefore threatens to force these treasures underground (thereby effectively losing these pieces for world enjoyment a second time). By forcing these pieces out of public consumption—and surely limiting their private consumption—this risk

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3 See Emily C. Ehl, Comment, The Settlement of Greece v. Ward: Who Loses, 78 B.U. L. Rev. 661, 672 (1998) (arguing that there is little consensus among the few states that have addressed the issue of stolen art and no clear indications that other states would adopt any existing rule over one of their own design).


5 The term “European Masters” is used to refer generally to European art dating from the Renaissance to about 1850 (Proto-Renaissance, High Renaissance, Mannerist, Baroque, Rococo, Realist and Neoclassicist periods, including miscellaneous sub genres). See Horst de la Croix et al., Gardner’s Art Through the Ages pt. IV (9th ed. 1991).

6 Because of the peculiar racial, cultural and aesthetic interests of Hitler and the Nazi high command, European art dating from 1500 to about 1830 and European art resulting from modern movements such as Impressionism, Expressionism, Dadaism, Cubism, and Futurism (1860s to 1930s) are particularly at risk of contemporary title disputes between good faith purchasers and victims of the Nazi war machine.

7 Provenance is defined as:
[A] chronological history of a work of art traced to the creator by tracking the chain of transfer of ownership and possession, location, publication, reproduction, and display . . . . Provenance can impart information about, inter alia, authenticity and ownership but no uniform guidelines exist to determine it, to document it, or to disclose it.


8 Other experts have estimated that the number is actually closer to 100,000. See, e.g., John Harlow, Museums Fight to Keep Hitler Art Treasures, Sunday Times (London), Aug. 30, 1998, at 3G.
undercuts much of both the public and private utility of the pieces themselves. This uncertainty is further magnified when an art possessor’s only hope of finally quieting the title of a piece lies in an ad hoc ruling by a court unfamiliar with the subject or a coercive settlement with a sympathy-engendering original owner. The legal problem presented is therefore twofold. First, most courts—actually, most states—have yet to address this issue and therefore have no clear rule to impose. Second, whatever rule is actually imposed is likely to be done on an ad hoc basis, during the drama of a trial which will likely be necessary to create (or defend) a marketable title. This Note will address both of these issues in turn.

While the present state of law regarding stolen and resold art is unclear, it is not without several distinct doctrines. The general rule is that a thief cannot transfer legal or marketable title. While this maxim normally holds true, it does have several notable exceptions.

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9 See infra Part IV.C-D (arguing that some statute of limitations is necessary in order to internalize the cost of ownership); see generally William M. Landes & Richard A. Posner, The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles, in ECONOMICS OF THE ARTS: SELECTED ESSAYS 177 (Victor A. Ginsburgh and Pierre-Michel Menger eds. 1996) (discussing the intermingling of art’s peculiar public and private utility).

10 While other states have heard World War II art cases, these cases were heard in federal court and all eventually settled without adjudication; only New York has had some experience with the issues presented by these cases and stolen art in general. See, e.g., DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987) (applying New York law) (finding in favor of the original owner of a Monet that had been looted by American G.I.s who had been stationed in her sister’s castle), rev’d, 836 F.2d 103 (2d Cir. 1987) (reversing after finding that the statute of limitations had run under New York law); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981) (applying New York law, finding for the plaintiff and against the American collector who had purchased pieces from an American soldier shortly after the War), aff’d, 678 F.2d 1150 (2d Cir. 1982); In re Application to Quash Grand Jury Subpoena Ducas Tecum Served on the Museum of Modern Art, 677 N.Y.S.2d 872 (N.Y. Sup. Ct. 1998) (granting defendant’s motion to dismiss the Grand Jury subpoena of several pieces by Egon Schiele which were claimed by their original owners following their exhibition at the Museum of Modern Art), rev’d, 688 N.Y.S.2d 3 (N.Y. App. Div. 1999) (reversing on grounds that a subpoena duces tecum does not constitute “seizure” under the Fourth Amendment); Menzel v. List, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966) (finding in favor of a Jewish couple who abandoned a painting when they fled Brussels just prior to the Nazi occupation), modified, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967) (modifying amount awarded to plaintiffs), rev’d on other grounds, 246 N.E.2d 742 (N.Y. 1969). Other courts have heard similar, although in many ways quite different, cases, but they have been quite rare. See, e.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (applying Indiana law) (affirming the trial court’s decision to return stolen mosaics, currently in the possession of a good faith purchaser, to Cyprus). For an overview of cases involving art stolen during the Second World War, see generally Constance Lowenthal, An Annotated Checklist of Cases and Disputes Involving Art Wrongfully Taken During the Nazi Era and its Aftermath, SC40 A.L.I.-A.B.A. 11 (1998) (listing various art theft cases in the United States).

11 See Linda F. Pinkerton, Due Diligence in Fine Art Transactions, 22 CASE W. RES. J. INT’L L. 1, 1-2. (1990). As this commentator explains: Although common law and statutes in the United States provide that a thief cannot convey good title and therefore not even a good faith purchaser for value can obtain good title to an object purchased from a thief, the statute of limitations cutting off
These exceptions, discussed at length below, consist of the Act of State Doctrine, Adverse Possession, the Demand-And-Refusal Rule, and the Discovery Rule. When applying these various exceptions to the present issue, it is essential that the underlying goal or purpose of the exceptions be gleaned. Any subsequent application of one of these exceptions to the rule of title must meet or exceed the policy purpose for the rule itself. Furthermore, because the asset at issue here is "art," with all of its special cultural, physical, aesthetic, and financial values, the title rule and any applicable exception to it must take cognizance of these special values.

The chief goal of this Note is twofold. First, this Note intends to show that because of the highly emotional nature of the issue, conscious effort must be taken to proceed slowly and rationally. This Note endeavors to show that existing art law has useful rules and, while the present issue is undoubtedly unique, the application of these doctrines merits discussion. While the Nazis were obviously quite more than mere art thieves, many useful comparisons to "traditional" stolen art title disputes can, and in order to avoid knee-jerk problem solving, must be made. As a result of the special issues raised by Holocaust victim art claims, domestic legislation, isolated from the drama of the courtroom, must be enacted to balance the unique needs of the two innocent parties to Second World War stolen art claims: Holocaust victims and good faith purchasers. Second, this Note suggests that in light of the uniqueness of the assets in question and the relevant historical context, an application of the Discovery Rule is most appropriate to resolve the issues of contested title.

This Note is divided into four sections and addresses the issue of art looted from private collectors during the World War II era. Stem claims and the doctrines of laches and adverse possession have offered effective exceptions to the common law rule.

Id. (citations omitted).

See infra Part II.C.

See infra Part III.A.

See infra Part III.B.1.

See infra Part III.B.2.


See Menzel v. List, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966) (holding that the abandonment of artistic property by the original owners "was no more voluntary than the relinquishment of property during a holdup," and that even under Nazi law, art cannot be classified as lawful booty) (citations omitted), modified, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967) (modifying amount awarded to plaintiffs), rev'd on other grounds, 246 N.E.2d 742 (N.Y. 1969).

See infra Part IV.A.

This limitation exists because art looted from state collections create special problems of international law and comity which are beyond the scope of this Note. See Julia A. McCord,
tion II of this Note briefly outlines the historical background applicable to many of the current ownership disputes. The significance of this historical background is that, until quite recently, it has passed with neither popular nor academic discussion. Section III of this Note outlines the development and substance of the existing common law affirmative defenses to a fine art title claim. Finally, Section IV of this Note outlines an argument for a statutory application of the Discovery Rule to title claims by Holocaust victims and other victims of Nazi dispossession.20

I. BACKGROUND: THE PROBLEM

Recently, several European nations and industries began to make reparations to the victims of the Holocaust for their part in collaborating with the Nazis. These attempts have garnered much media attention. Swiss banks, for example, recently offered $1.25 billion to the victims of Nazi persecution in order to settle the class action suit against the Swiss banking and insurance industry for their complicity in the Nazi war effort.21 The issue of dispossessed art from World War II, however, is not so easily resolved. Unlike fungible items such as gold or money, each piece of art is unique. Thus, the disputes over stolen art raises more complicated problems.22 Additionally, the sheer number of pieces stolen during the war, the extent of their subsequent distribution, and the length of time that has since passed all serve to exacerbate the problem.23


20 Nothing in this Note is intended to undercut the tragic historical, social, and cultural significance of the Holocaust.


22 See Daniel J. Bender, An Alternative Approach to Settling Disputes Over Stolen Art, N.Y. L.J., Aug. 12, 1998, at 1 (advocating an alternative dispute resolution mechanism for these types of stolen art claims).

23 At the time of the writing of this Note, over 65 years have passed since Hitler's rise to power in 1933.
A. The Legacy of the Second World War

The pillaging of art treasures during war was neither a Nazi invention nor was it peculiar to the Twentieth Century. Pillaging and looting art treasures predates the Roman Empire and the practice can be found in the records of the Assyrian Empire circa 700 BC. The gathering of the spoils of war can even be found in the Old Testament. While it is clear from history that the Nazis did not invent war-time art looting, the pillaging that occurred during the Second World War was novel in the extent of “its scale, its ruthlessness, its planning, and even its recording.” More priceless works of art were seized between 1933 and 1945 than during all of the Napoleonic Wars and the entire Thirty Years War. It is estimated that more than 100,000 pieces of art were looted from Jews and other “dissidents” from both Western and Eastern Europe and in excess of 20,000 pieces are estimated to still be unaccounted for. While the primary difference between the Second World War and prior wars was the scale of the effort, there are other peculiarities worth noting. The most obvious innovation of the Second World War looting was that, “for the first time in history, the armies of most of the belligerents had highly trained art specialists in their ranks, whose duty it was to secure and preserve movable works of art, and whose professionalism, no matter what their ideology, saved most of the treasures of Europe for us.”

Thousands of pieces of art were displaced by the war. Several thousand pieces were taken from prominent Jewish collectors and dealers. “Ordinary people, too, lost their art treasures, left behind in their homes when they fled to freedom or were sent to death

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24 See Jeanette Greenfield, The Spoils of War, in SPOILS OF WAR, supra note 16, at 34 (tracing the history of war-time looting from the earliest recorded history through the Roman Empire, Viking Age, Crusades, Napoleonic Wars, and Colonization of Africa, the Americas and Asia to the present day).

25 See Numbers 31:9, 31:25-27, 31:52-53 (New American Standard) (“And the sons of Israel captured the women of Midian and their little ones; and all their cattle and all their flocks and all their goods, they plundered . . . . Then the Lord spoke to Moses, saying, ‘You and Eleazar the priest and the heads of the fathers’ households of the congregation, take a count of the booty that was captured, both of man and of animal; and divide the booty between the warriors who went out to battle and all the congregation . . . .’ And all the gold of the offering which they offered up to the Lord, from the captains of thousands and the captains of hundreds, was 16,750 shekels. The men of war had taken booty, every man for himself.”) (emphasis omitted).

26 Greenfield, supra note 24, at 38.

27 See FELICIANO, supra note 4, at 23 (noting that 20,000 pieces of “Jewish-owned” art was taken from France during World War II).

28 See James Auer, Dealing with the legacy of Nazi art thefts, MILWAUKEE J. & SEN- TINE, Sept. 23, 1998, at 2E.

camps."^{30} Some pieces were "donated" to prominent museums with the understanding that they would be returned when the war ended.^{31} Some pieces were sold or exchanged in order to finance the cost of living or escape, and some were just moved here and there, forgotten, and later found. While each case was a unique and individual event of personal loss,^{32} many of the present cases do fall into a relatively generalizable fact-pattern. As a result, a useful rule for dealing with these cases can, and should, be made.^{33}

The art was looted from European Jews, Freemasons and other "undesirables" in order that a great museum might be established in Hitler's hometown of Linz.^{34} Also, much of the German high command sought out and collected works of art for their own personal collections.^{35} The museum was to be stocked primarily with those artists whom Hitler found most culturally valuable. Such painters as Vermeer, Pieter Bruegel the Elder, Rembrandt, Hals, Fragonard, Van Eyck, and Dürer^{36} were particularly targeted because, pursuant to the Nazi aesthetic ideology, they represented "pure" Northern European art of the highest order.^{37} Hitler was especially obsessed with undoing the looting that occurred during the Napoleonic Wars of a century

^{31} See FELICIANO, supra note 4, at 45, 48-49 (explaining how several pieces of the Rothschild Collection evaded Nazi confiscation by storage in the Louvre).
^{32} See Nicholas, supra note 16, at 47. This commentator observes that:
Before we can search for lost objects, we must know what they are and determine the exact circumstances of their displacement. We must discover if they were confiscated by governments, stolen by individuals, sold willingly or under duress, barred for food, or simply hidden, forgotten, and randomly moved from place to place. Only when these problems have been solved can the process of restitution and compensation be undertaken, and then only on a case-by-case basis, in which, inevitably, present-day political considerations and the emotional legacy of World War II will be major factors.

^{33} The scenario, which in no way is meant to subtract anything from the suffering of huge sections of the population of both Western and Eastern Europe, often breaks down in the following way: a piece of now very valuable art was looted by one of the belligerents from either a "dissident" (Jewish, Gypsy or Slavic), or other art owner—or a prior looter—between the years of 1933 and 1945. Over the course of the 54 years following the war, the piece was not returned to its original owner and, for very legitimate reasons, its whereabouts were never ascertained (either due to political opposition resulting from the Cold War and Communist control of Eastern Europe, logistical barriers resulting from the disinterest of many of the formerly occupied countries, or simply because of the massive quantity of art at issue). Today, because of the reversal of these conditions, the pieces are being discovered in the possession of people who had no idea of the piece's history and who have paid a large sum of money to acquire or insure the work.

^{34} See FELICIANO, supra note 4, at 15-16.
^{35} See id. at 31 (noting that besides Hitler himself, Hermann Goering was perhaps the biggest "friend of the arts" in Nazi Germany).
^{36} See Appendix A.
^{37} See id. at 27. This "high" art is contrasted to the "low" or "degenerate" contemporary art of the pre-World War II era. See id.
earlier but sought to capture for Linz the "best" European art from the
1500s to the 1930s. 38 Hitler sought to repatriate works of "German
heritage" and, as a result, "[i]t stands as the cultural and aesthetic
aspect of Hitler's project of conquest, next to its political, racial, eco-

39 nomic, and military components." 39 To further this end, an exhaus-
tive list of "Germanic" art was compiled. It was intended that when a
peace treaty was signed with a conquered country—most notably
France, Belgium and Holland—the pieces could be demanded for
reparations. 40 The treaties, however, never came to fruition, and as a
result, the looting, while alarmingly extensive, was often aimless and
piecemeal.

Some pieces of "German heritage" could not be plundered, often
because they were in the United States, the United Kingdom, Soviet
Union or another not-yet-annexed Western European nation, and
therefore had to be purchased. The currency by which these pur-
chases were financed often came from the sale or exchange of seized
"degenerate" art. 41 Hitler had already attacked Futurism, Dadaism
and Cubism in his Mein Kampf and, after his rise to power, continued
to purge the German people from the influence of this "spiritual mad-
ness." 42 Despite its opposition to "degenerate" art, the Nazi high
command quickly realized the value of such "Judeo-Bolshevist"
modern artists as Pissaro, Kandinsky, Marc, Chagall, Klee, Matisse,
Dix, Ensor, Picasso, and Van Gogh. Starting in 1937, the Nazis auc-
tioned these pieces at several famous "Degenerate Art" shows that
were attended by numerous American, British and Belgian collectors
who had what the Nazi's needed most: hard currency. 43 Joseph Pulit-
zzer, for example, while on his honeymoon in 1939, acquired Ma-
tisse's Bathers with a Turtle at one such auction. 44 The proceeds
were then reinvested in more "acceptable" art. 45

38 See id. at 25.
39 Id. at 30; see also infra text accompanying note 72.
40 See id. at ch. 2 (outlining the rationale and massive scope of the "Kümmel Report").
41 See id. at 122-23 (noting that the Parisian art market actually experienced a huge up-
swing during the Nazi occupation and citing one contemporary observer who noted that a huge
cross-section of the population purchased this art simply because there was nothing else on
which to spend one's money).
42 See id. at 20-21 (quoting Hitler's Mein Kampf, wherein Hitler argued that it is the
"duty of the State, and of its leaders, to prevent a people from falling under the influence of
spiritual madness").
43 See Brigid Grauman, Chagall and the Nazis, WALL ST. J. EUR., Oct. 2-3, 1998, avail-
able in 1998 WL 12733038.
44 See Nicholas, supra note 29, at 40.
45 See id. at 39. Ironically, these art shows proved to be a poor investment in that one of
the pieces sold at auction was Van Gogh's Portrait of Dr. Gachet, which has since been re-sold
to a Japanese collector in 1990 for $82.5 million. See id. However, the German art investment
strategy was premised on both German victory and the aesthetic tastes of the Führer.
HoLOCAUST VICTIM FINE ARTS LITIGATION

The end of the war did not end the displacement of Europe's art treasures; the purchased were intermixed with the looted and, in the confusion surrounding the German collapse, much of the systematic nature of the German looting was undone. As the Allies proceeded through the formerly-occupied Europe and then Germany itself, huge caches of art treasures were discovered in mines, hidden vaults, monasteries, office buildings, homes, and even medieval castles.\(^{46}\) An organized Allied effort to recover the looted art was begun two days after the liberation of Paris.\(^{47}\) While attempts were made to salvage, catalogue, and repatriate the treasures, the retrieval efforts were largely in disarray and some Allied looting occurred.\(^{48}\) Each of the major Allied powers set up recovery commissions and meetings were held to determine what art was to be repatriated and what was to be kept as war reparations; as Germany was carved up into four zones, however, each of the controlling Allies went their own way.\(^{49}\)

The British and the Americans set up the M.F.A. & A. (Monuments, Fine Arts & Architecture), and attempted to set up collection points in order to return the works to their original owners.\(^{50}\) Soviet policy, however, was quite different. The Soviet Union, who had, without question, suffered the worst damage of all the Allies, believed that "reparation in kind should replace what the German army had taken or destroyed. [As a result, in] Germany and the eastern European countries occupied by the Soviet army, few of the things owned or plundered by the Nazis were returned to their owners."\(^{51}\) When Hitler had invaded Eastern Europe and Russia, he was "[c]onvinced that the art of Slavic peoples did not represent anything of value . . . [and as a result], deliberately and skillfully devastated [their] land."\(^{52}\) The Soviet army thus took German-held art as compensation for Slavic losses—regardless of the works' true owners.\(^{53}\) The French

\(^{46}\) See generally THOMAS CARR HOWE, JR., SALT MINES AND CASTLES: THE DISCOVERY AND RESTITUTION OF LOOTED EUROPEAN ART (1946) (chronicling the experiences of Monuments, Fine Arts, and Archives officers in Germany).

\(^{47}\) See FELICIANO, supra note 4, at 165.

\(^{48}\) See DeWeerth v. Baldinger, 836 F.2d 103, 105 (2d Cir. 1987) (finding that the Monet in question was noticed missing as soon as U.S. soldiers left the castle where the painting was being kept); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1155 (2d Cir. 1982) (finding that priceless Dürer paintings, purchased by defendant for $450 from a U.S. service-man who appeared at his door in 1946, had been stolen from a German castle in 1945).

\(^{49}\) See NICHOLAS, supra note 4, at 382-84 (describing the lack of cooperation among Allied powers).

\(^{50}\) See FELICIANO, supra note 4, at 173 (noting that the group was also concerned with protection, recuperation, and restitution).

\(^{51}\) Id. at 173-74.

\(^{52}\) Nikolai Nikandrov, The Transfer of the Contents of German Repositories into the Custody of the USSR, in SPOILS OF WAR, supra note 16, at 117, 120.

\(^{53}\) See Steven Costello, Must Russia Return the Artwork Stolen From Germany During World War II?, 4 ILSA J. INT'L & COMP. L. 141, 142 (1997) (estimating that in excess of 2.5
also seized German-held art in their own country. Thousands of these repatriated works (in excess of 15,000) were taken to the Musees Nationaux Recuperation, where their original ownership was, for the most part, never investigated. Instead, these pieces were either held “in trust” by the Louvre and other French museums or auctioned off. These pieces are now in countless museums and private collections around the world, and many have been sold numerous times in both Europe and the New World.

B. Holocaust Victims Art Cases: Past, Present, and Potential

Today, the international art trade is an unbelievably large and complex international industry and is second in scale and profitability only to the trafficking of illegal drugs. What makes the trade in art particularly problematic is both the uniqueness of the objects traded and the ease with which they are exported and hidden. In excess of 20,000 pieces of artwork looted during the Second World War remain unaccounted for and are continuously redistributed by this trade. These transactions have occurred in countless jurisdictions and legal systems, both “code” and “common law,” all over the world. Some of its buyers know of their purchases’ checkered past, but other buyers, due in part to both the misrepresentations of dealers and the often million artworks and over 10 million books were taken by the Soviets from Germany immediately following the war, but acknowledging that 1.5 million items were returned to East Germany in 1955); Margaret M. Mastroberardino, Comment, The Last Prisoners of World War II, 9 PACE INT’L L. REV. 315, 324-26 (1997) (discussing the dispute between Germany and Russia arising from the “Hidden Treasures Revealed” exhibit at the Hermitage Museum in St. Petersburg, Russia, in which seventy-four paintings by prominent Impressionist and Post-Impressionist painters, which were thought to have been lost during the Second World War, were displayed in the spring of 1995).

54 See FELCIANO, supra note 4, at 215-20 (describing curators’ evasive answers when questioned about inventories and ownership investigations).
55 See Victoria Combe, Monet Taken by Nazis is Barred from Exhibition, DAILY TELEGRAPH (London), Dec. 31, 1998, at 15 (noting that a Monet worth £6,000,000, which is now the subject of a claim by the heirs of a Holocaust victim, has been stored in the Musee des Beaux-Arts in Caen since the end of the Second World War).
57 See McCord, supra note 19, at 989. As this author explains, the illegitimate trade of stolen art flourishes under the art market’s current practices:
The illicit trade in art and antiquities flourishes, in part, due to the very nature of the art market. International trade in art is the norm, and for this reason, cultural patrimony can easily be taken out of its country of origin and sold to collectors and museums all over the world. Because the art trade encompasses legitimate as well as illegitimate international dealings, the problem of deterring the flow of clandestine objects is difficult to solve.
Id. (citations omitted).
58 See Auer, supra note 28, at 2E.
murky nature of provenance, are wholly unaware. Today, these pieces can be found in public museums and private collections around the world and do not come to light until they happen to catch the eye of a victim or an heir.\footnote{See Mastroberardino, supra note 53, at 318 (noting that much of this work is held in the former Soviet Union and that the Hermitage, a major Russian art museum, has a collection of just fewer than a million pieces which have, until recently, been inaccessible to the West).}

Recent political and technological developments have brought to light many World War II records not available before and, as a result, numerous claims for the return of art have surfaced in the last several years—often after being featured in one of the two books mentioned above.\footnote{See Nicholas, supra note 16, at 47 ("With the end of the Cold War and the opening up of Eastern Europe, it has become apparent that large numbers of works of art previously thought to be lost are, in fact, stored in repositories in countries of the former Soviet Union. Conversely, reestablishment of communications with these nations has enabled Western officials to identify displaced objects that appear in their own jurisdictions."); Denburg, supra note 21, at 234 ("Thousands of Jews throughout the former Soviet bloc were not compensated because their Communist governments did not allow them to file claims with the West German Government.") (citations omitted).} These claims, and the increasing risk of others like them, have upset the art world.\footnote{See Philippe de Montebello, Letter, Nazi Stolen Art, N.Y. TIMES, Dec. 24, 1998, at A18 (arguing that "only in the past few years, since the fall of the Iron Curtain and the opening of long-concealed files, has the means existed to sort out this tragic chapter of world history. Only now can we anticipate the development of data bases that would link claimants to missing works.").} This upset is due not so much to the claims themselves, but instead because of the great length of time that has passed since the works were stolen.\footnote{See Lee Rosenbaum, Nazi Loot Claims: Art With a History, WALL ST. J., Jan. 14, 1999, at A18 ("It is no simple matter to determine whether a particular work was stolen more than 50 years ago and never handed back. And identifying today’s legitimate claimants can be tricky, when so many of the original possessors have succumbed to genocide or old age.").} In late 1997, two paintings by Egon Schiele, which were part of a traveling exhibition at the New York Museum of Modern Art and owned by the nation of Austria, were claimed by heirs of Holocaust victims.\footnote{See Judith H. Dobrzynski, Modern is Urged to Play Solomon in Paintings Dispute, N.Y. TIMES, Jan. 1, 1998, at E1.} Later reports suggested that other Schieles, held in American museums such as the Museum of Modern Art in New York, the Art Institute of Chicago, and even the Allen Memorial Museum at Oberlin College in Ohio, may also have dubious titles.\footnote{See Judith H. Dobrzynski, More Paintings By Schiele Face Ownership Questions, N.Y. TIMES, Jan. 15, 1998, at B4.} Holocaust victims have pressed similar claims against a Degas pastel, _Landscape with Smokestacks_, owned by a Chicago collector and on display at the Art Institute of Chicago;\footnote{See Kevin M. Williams, Degas Settlement Lands in Uncharted Territory, CHI. SUN-TIMES, Aug. 16, 1998, at 43. The parties to the Degas lawsuit began settlement negotiations in mid-August 1998. See _id_. The August settlement, however, has since stalled. See Rosenbaum, supra note 62, at A18 (announcing victims’ plan to split the value of the painting with the current owner and seller).} a
Wtewael painting held by the Panamanian company, Cobert Finance; a Monet held by the Metropolitan Museum of Art; a Léger at the Minneapolis Institute of Arts, and Matisse's Odalisque held by the Seattle Museum of Art. In Canada, the Musée des Beaux-Arts de Montréal has been defending its claim to a 16th century painting by the Florentine artist Giorgio Vasari against a claim made by an art museum in Budapest since 1964. Museum administrators and art lovers have criticized the claims, arguing that they will have a chilling effect on the international exhibition of art. Unfortunately, they may be right. Recently, two paintings by Pierre Bonnard were pulled from a retrospective of the artist specifically because of the debate raised by the Schiele exhibit. It is likely that collections of European Masters and modern artists, because of their respective aesthetic and fiscal value to the Nazis, will be most effected. Furthermore, as more heirs come forward, these claims will continue to surface, and continue to disrupt the art market, private collectors, and museums.

C. International Statutory Attempts to Address the Problem

For the most part, international treaties have done little to resolve the present problem. Indeed, the existence of an international convention on point did little to stop the wholesale plunder of Europe during the Second World War. These treaties, however, have had two interesting and important effects: they have (1) signaled an international consensus for intolerance of this type of war-time behavior, and

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67 See Rosenbaum, supra note 61, at A18; see also Appendix B.
68 See id.; see also Appendix C.
69 See Judith H. Dobrzynski, Seattle Museum is Sued for a Looted Matisse, N.Y. TIMES, Aug. 4, 1998, at E3; Regina Hackett, Seattle Museum Sued over Artwork; Dealer’s Heirs Claim Matisse Painting was Looted by Nazis, SEATTLE POST-INTELLIGENCER, Aug. 1, 1998, at A1; Tunku Varadarajan, Gallery is Sued Over ‘Looted’ Art, TIMES (London) Aug. 5, 1998, at 11. The Seattle Art Museum case is significant in that, for the first time, a museum is being sued directly for an asset seized by the Nazis. See Appendix D.
72 See Michael Dobbs, Stolen Beauty, WASH. POST, Mar. 21, 1999, (Magazine), at 12 (noting that a library in Lvov, Ukraine now demands the return of a looted 499 year-old Dürer print (Appendix A), currently held by the National Gallery of Art, that had been displayed in Hitler’s own field headquarters on the Russian Front); Artner, supra note 71, at C6 (noting that threats of lawsuits over two Schiele canvases and one by Matisse “immediately raised fears of collectors refusing to loan major paintings to large international exhibitions or . . . queues of claimants dramatically reducing the nation’s European masterpieces”).
(2) made the defense of the Act of State Doctrine\textsuperscript{76} inapplicable to World War II-era looting.\textsuperscript{77} Several treaties have been enacted since the 1945 armistice, most notably the Hague Convention of 1954\textsuperscript{78} and UNESCO Convention of 1970,\textsuperscript{79} but have not been the basis for Holocaust victims’ fine arts claims.\textsuperscript{80} While these treaties do not have a statute of limitations in their terms, there seems to be a growing international consensus that some repose of title is necessary. An illustration of this sentiment is seen in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects which provides that “[a]ny claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.”\textsuperscript{81} While this suggests an interest in the eventual quieting of title, it must be remembered that the convention was enacted with the understanding that a claimant might still have a claim to the object under the terms of the 1954 Hague Convention.

D. Art Industry Attempts to Address the Problem

Claims of this type present a real threat to museums, auction houses and private collectors who have spent significant amounts of money on good faith purchases of what is later discovered to be “du-
bious" art. As a result, it is no surprise that museums have begun to scour their collections for art of questionable title. In a remarkable world-wide effort, several extra-governmental organizations have been established in order to address the situation, and the Art Loss Register, an extensive database of stolen works of art financed by several prominent auction houses, has announced an initiative to identify as yet unidentified pieces. Several organizations all over the world are in the process of compiling lists and on-line databases, and even offer legal advice on the making of an art claim. The so-called "Jewish Masterlist," which currently has 3000 entries, is expected to eventually contain 250,000 items. These databases, which will undoubtedly include pieces of significant financial value, will render the entries effectively unmarketable. Despite the present cooperation, however, it is unlikely that an industry-wide settlement will develop as it has in the European banking and insurance industries. This is due, in perhaps the largest part, to the sheer number of parties involved in this dispute, and it is likely that the "free-rider problem" would effectively quash any such attempt at a large class settlement.

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82 It should be noted that without a reasonable investigation into the title of a piece, a purchase cannot be considered to have been made "in good faith." See Landes & Posner, supra note 9, at 190. Landes and Posner define a good faith purchaser as:

[O]ne who, having made the optimal investment in obtaining information about the title of the work prior to purchase, believes that there is a very high probability that the seller can transfer good title to him. That is, not only is his belief that the seller can transfer good title to him sincere; it is also reasonable because the cost of additional investigation would exceed the savings from rejecting the work should its title prove defective discounted by the very low probability that the additional investigation would reveal that the seller's title was indeed defective.

Id.


84 See United States Holocaust Museum (visited Dec. 26, 1998) <http://www.ushmm.org/assets/ushmm4.htm> (summarizing several nations' efforts to address the issue of Holocaust victims' art and other asset claims).

85 See Holocaust Claims Processing Office (visited Oct. 17, 1998) <http://www.claims.state.ny.us/> (outlining the process for recovery and offering the help of the New York Banking Department as an advocate for citizen claims).

86 See Godfrey Barker, Why These Masterpieces may now be Worthless, EVENING STANDARD (London), Sept. 30, 1998, at 28.

87 See id. (stating that "[e]very work that goes onto the ALR's Jewish Masterlist is set to come off the market—above ground, anyway—unless its former owners issue a reprieve. Unreprieved, it will lose most of its value. That may mean justice for the past but its opposite for the present").

88 See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 49-50 (4th ed. 1998). These commentators explain that:

The freerider reasons that no contribution to a group payment is necessary because the contributions of others will amount to enough to induce X to change, so that the
Furthermore, good faith purchasers, who often have no action against a seller due to the passage of time, will be forced to either forfeit these pieces or simply keep them from public display. Be this as it may, it is unclear if large museums will comply with the principles advanced by the Association of Art Museum directors.

In December of 1998, forty-four countries met in Washington D.C. to address the problem. The result of this conference was an agreement on non-binding guidelines to search for and return these assets. The result of all this attention, however, may not be the re-

... The costs of overcoming freeriding can be high; if many people are involved, they can be prohibitive.

Id. Further, "a problem similar to freeriding—and one that, like freeriding, occasions high transaction costs—arises when payments must be made to a group in order to carry out a transaction, and where, unless each member of the group accepts payment, the transaction fails entirely," Id. at 50 n.26.

The Uniform Commercial Code, for example, provides that:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made.


Note that "warranty" here includes "warranty of title." See U.C.C. § 2-312 (1)(a) (1990) ("[T]here is in a contract for sale a warranty by the seller that . . . the title conveyed shall be good.").

See Stephanie Cash, Two Museums Return Stolen Artifacts, ART IN AM., April 1999, at 27 (contrasting the return policies of the Getty Museum and the Metropolitan Museum of Art); Rosenbaum, supra note 62, at A18 (noting that the recent Monet exhibition at the Boston Museum of Fine Arts contained a 1904 Water Lilies claimed by the heirs of Saul Rosenberg in clear violation of the AAMD's strong policy of not borrowing and displaying such works).


The conference adopted the following principles:

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.
turn of any looted art. These sweeping acts are just as likely to chill international exhibition and push the international trade of these pieces either underground or to countries that do not acknowledge the agreement. Furthermore, while it is too soon to tell, there is no reason to assume that museum compliance will be any better under these guidelines than under any of the previous non-binding “principles.”

To be sure, the test cases that have arisen to date are quite strong. The publicity given to these pieces, especially pieces of high fiscal value, will inevitably lead to abuse, and nuisance suits will abound. They will prey upon popular opinion, and justice will not be served. This is especially true when the provenances of all of the art that passed through Europe in the late 1930 and early 1940s are muddied by the confusion of the era. How is a court to tell the difference between the title of a piece sold legally in 1939 and one stolen in 1940 when there are no records for either, and all of the parties have since died?

II. THE AFFIRMATIVE DEFENSES AND THEIR EFFICACY

One difficulty with the study of stolen art stems from the fact that so much of the stolen art is transported across state and national boundaries and, as a result, presents difficult questions of interna-
tional and domestic choice of law. Because of the scope of the issue, this Note must be limited to an analysis of the common law doctrines. Unfortunately, it will be necessary to simply state that in civil law countries—countries perhaps not ironically, where much of this art originates or is purchased—a thief may effectively transfer title to a good faith purchaser of the goods. Conversely, in the United States, the United Kingdom, Canada and other common law countries, a thief cannot convey good title regardless of the good faith of the purchaser. The rule, however, is not without its affirmative defenses and statutes of limitations.

A. Introduction to the Doctrine of Worthier Title and its Exceptions

The common law formulation of the doctrine of worthier title is that a thief cannot convey good title when he resells something that he has stolen. The result is the same, regardless of how many times the item in question has been resold. As a result, in an action against even a good faith purchaser (who may have himself purchased from a good faith purchaser), the original owner will win. According to the U.C.C., "[a] purchaser of goods acquires all title which his transferor had or had power to transfer . . . ." The results of the rule's application have often been severe, and as a result, courts have sought to soften the harshest results. To accomplish this, courts have applied both statutes of limitations for actions of replevin and the doctrine of adverse possession to claims for chattels for over a century. The doctrine of adverse possession is an equitable one that works simi-

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95 See, e.g., Charash v. Oberlin College 14 F.3d 291 (6th Cir. 1994) (holding that the Ohio statute of limitations rule, rather than that of New York, applied to this action concerning the alleged conversion of fine art); 2 FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS § 11.1.7 (1986) (citing Winkworth v. Christie, Manson & Woods, Ltd., 1 Ch. 497 (1979), for the proposition that Great Britain's choice of law rule, for example, requires an application of the law of the place where the transaction occurred).
97 See id. at 19-20 (summarizing several of the legal defenses to a title claim and noting the dismally small likelihood of their success).
98 These actions frequently sound in replevin, a cause of action that has been used for years as a vehicle for quieting title. See, e.g., Seebold v. Eustermann, 13 N.W.2d 739, 745 (Minn. 1944) ("Replevin is a means of trying title to property . . . . It is an appropriate form of action in which to determine which of two contending parties is the owner.").
100 See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 11.7 (Student ed. 1984) ("Adverse possession is a strange and wonderful system, whereby the occupation of another’s land gains the occupier title—but only if the occupation is indeed wrongful.").
101 See Steven A. Bibas, Note, The Case Against Statutes of Limitations for Stolen Art, 103 YALE L.J. 2437, 2442 (1994) (outlining a brief history of the doctrine of adverse possession as applied to the law of chattel).
larly to, and often in conjunction with, a statute of limitations. In order for a possessor to gain title by adverse possession, the possession must be (1) exclusive, (2) open and notorious, (3) under a claim of right, and (4) continuous for the required statutory period.\textsuperscript{102} The rationale underlying the doctrine of adverse possession has been that the rule

has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.\textsuperscript{103}

While courts have been willing to recognize "legal" title in the possessor, they are often unwilling to recognize "marketable" title.\textsuperscript{104} Therefore, an adverse possessor may exclusively possess property acquired this way but often must await formal adjudication in order to sell the property.\textsuperscript{105} In addition to this great limitation, the affirmative defense has several other shortcomings worth noting.

The primary shortcoming of the doctrine of adverse possession is that it was developed in a far different time to address different concerns. It was initially meant to apply to real property and later, when applied to the law of chattel, was primarily used as a defense to a claim for the return of lost or stolen livestock.\textsuperscript{106} Applying the rule of adverse possession to livestock made sense in the insular, agrarian communities of a century ago. The "[a]nimals grazed on open land and were visible to the public."\textsuperscript{107} Further, "[c]ommunities were much smaller and word of mouth much more potent."\textsuperscript{108} When the law shifted in favor of good faith purchasers, it did so because, in effect, courts sought to reward the possessors for "feeding and caring for the animal" and punish the owner for laziness.\textsuperscript{109} Over time, courts began to apply the doctrine to other less conspicuous items,

\textsuperscript{102} See Cunninghan, supra note 100, at § 11.7.
\textsuperscript{103} Henry W. Ballantine, Title By Adverse Possession, 32 Harv. L. Rev. 135 (1918) (citations omitted).
\textsuperscript{104} See Cunninghan, supra note 100, § 11.7 n.1 (noting the difference between "legal" and "marketable" title in the law of real property).
\textsuperscript{105} See id. ("The only certain way to make the title marketable is to establish a paper record by a favorable court decision.").
\textsuperscript{106} See Bibas, supra note 101, at 2442.
\textsuperscript{107} Id. at 2443.
\textsuperscript{108} Id.
\textsuperscript{109} Id. (explaining how, as society moved away from agrarianism, the rationale of the rule became less persuasive).
and in doing so, the rationale disappeared. Slowly, the law shifted back to a stance more protective of owners. Today, when it comes to small mobile objects such as art, several “jurisdictions have replaced adverse possession law with various balancing-test doctrines,” and for many “traditional” stolen or misplaced art claims, this doctrinal shift is proper.

B. Judicial Modifications of Adverse Possession of Fine Art

The modifications to the rule of adverse possession for fine art can generally be broken down into two categories: the Discovery Rule and the Demand-and-Refusal Rule. Both rules are premised on a judicial cognizance of the need to treat art differently. The courts that have addressed the issue have found it necessary to deviate from both a rule that favors original owners exclusively and a strict application of the doctrine of the adverse possession of chattels which is often used in conjunction with a legislated statute of limitations. Both modifications are attempts to recognize the mobility, concealability, and financial value of art and balance the interests of both the original owner and the subsequent good faith purchaser. While the issue of stolen art and its recovery is significantly widespread, very few jurisdictions have even dealt with the issue. With the busy adjudicative future prompted by the rise of World War II claims, it seems as if the remaining jurisdictions will be forced to adopt one of these rules, or one of their own design. The purpose of this Note is to argue that jurisdictions which have yet to face this issue (World War II art claims for art looted from private parties) should treat them as a more “traditional” stolen-art case and apply some sort of statute of limitations. The Note also advocates the Discovery Rule as a proper balance between the rights of victims and subsequent good faith purchasers.

1. The Demand-and-Refusal Rule (and its Modifications)

The Demand-and-Refusal Rule has its origins in the seminal case of Menzel v. List. The plaintiffs in Menzel abandoned their Chagall

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110 Id. at 2442; see also O’Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980) (applying the Discovery Rule in determining whether the original owner had waited too long to bring her action for the return of three paintings she claimed were stolen in the 1940s). The Discovery Rule is discussed infra at Part III.B.

111 See supra text accompanying note 10.

The piece was eventually purchased by the Perls Gallery and sold to the Lists in 1955. The piece's provenance for the intervening years was unclear. In 1962 Mrs. Menzel located the piece in the possession of List and demanded its return. When List refused to return the piece, the plaintiff filed a complaint in a New York State court. The Menzel court held that the statute of limitations tolled until the original owner learned of the work's whereabouts and demanded its return. The limitations period began to run as soon as the subsequent possessor refused the demand. As a result of this holding, the court ruled that the defendants had either to return the piece or pay Mrs. Menzel $22,500 (its present value).

Thirteen years later, the United States Court of Appeals for the Second Circuit applied the New York demand and refusal rule to the adverse possession of fine art in Kunstsammlungen Zu Weimar v. Elicofon. The defendant in Elicofon had purchased two extremely valuable 15th Century Duerer paintings from an U.S. serviceman in 1946. He then displayed these paintings in his home—it is unclear if Mr. Elicofon knew of the real value of the artwork—and held them without interruption until 1966. The paintings had been looted during the American occupation of the castle Schloss-Schwarzburg in Thuringia immediately following the war. The defendant discovered the true value of the pieces in 1966 and the discovery was published in the New York Times. Immediately thereafter, the nations of East and West Germany and the Grand Duchess of Saxony-Weimar individually demanded their return. The demands were refused and a suit, which was to last eleven years, was initiated.

The Elicofon court adopted the Menzel rule and held that the statute of limitations was tolled until a demand and subsequent refusal occurred. The court ruled against the good faith purchaser, holding that while a statute of limitations does exist for the cause of action for the painting's return, it does not begin to run until the owner actually

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113 "Gouache" is defined as "a watercolor paint which, when dry, becomes opaque. It is commonly used on its own or in combination with transparent watercolor" Laurie Schneider Adams, A History of Western Art 352 (1994).
114 See Menzel, 267 N.Y.S.2d at 807.
115 See id.
116 See id.
117 See id. at 808-09.
118 See id. at 809.
119 See id. at 808.
120 678 F.2d 1150 (2d Cir. 1982).
121 See id. at 1155.
122 See id. at 1155-56; see also supra text accompanying note 48.
123 See Elicofon, 678 F.2d at 1156.
124 See id. at 1160-64.
finds the piece, demands its return, and the possessor refuses the demand.125 Despite a contrary application of New York law in a federal court in the late 1980s, the State of New York continues to apply this rule today.126

2. The Discovery Rule

The Discovery Rule, as applied to claims for stolen art, was established by the equally seminal case of *O'Keeffe v. Snyder.*127 In *O'Keeffe*, the plaintiff, the painter Georgia O'Keeffe, alleged that she had been robbed of two paintings in 1946.128 She did not report the theft to the New York Police Department, and soon was distracted by the death of her husband, Alfred Stieglitz. O'Keeffe finally reported the theft in 1972 and discovered the painting’s whereabouts in 1975.129 When her demand for the works’ return was refused, she instituted an action for replevin. The defendant alleged that he had purchased the pieces in 1975 from a Mr. Frank, who had owned the pieces since 1965 and exhibited them at a small art show in New Jersey in 1968.130 The defendant had been given the pieces by his father and alleged that he had remembered seeing the pieces in his father’s home as early as 1941.131

Faced with this quandary, the New Jersey Supreme Court opted not to apply the New York rule articulated in *Menzel v. List.*132 Instead, the court adopted the Discovery Rule, an equitable balancing test.133 “The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by

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125 See id. at 1166 (affirming the district court’s determination that Kunstsammlungen zu Weimar (East Germany) was entitled to possession of the painting).
128 See id. at 865-66.
129 See id.
130 See id. at 866.
131 See id.
132 See supra text accompanying notes 112-19.
133 The Discovery Rule was first developed for use in medical malpractice and tort law where an injury might not be noticeable until long after the statute of limitations had run. See John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statues of Limitations,* 27 UCLA L. Rev. 1122, 1152 (1980). For application of the Discovery Rule, see, e.g., Malapanis v. Shirazi, 487 N.E.2d 533, 536-37 (Mass. App. Ct. 1986) (holding in this medical malpractice action that “Massachusetts does not require discovery of each of the elements of the cause of action . . . before the limitations clock in [Massachusetts’ limitations statute] starts ticking”); Williams v. Borden, Inc., 637 F.2d 731, 734-35 (10th Cir. 1980) (applying Oklahoma law and holding that in this products liability case “[t]he statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition”).
exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." The rule is meant to be applied on a case-by-case basis and to balance the relative interests of the competing parties. The rule "shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property." The court then went on to contrast traditional adverse possession with this new doctrine. "Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Under the discovery rule, the burden is on the owner (the one seeking the benefit of the rule) to establish facts that would justify deferring the beginning of the period of limitations." As a result, the court remanded the suit to the trial court for a determination of whether O'Keefe had acted reasonably enough under the circumstances to enable her to recover the piece and if the statute of limitations had run out.

3. The Due Diligence Rule

The Due Diligence Rule is effectively the same as the preceding Discovery Rule in that it requires the rightful owner to search diligently (and the purchaser to investigate diligently) in order to toll the statute of limitations. The rule tends to protect theft victims at the expense of good faith purchasers while at the same time rewarding the purchaser who publicly displays the purchased work.

In DeWeerth v. Baldinger, the United States Court of Appeals for the Second Circuit reversed the verdict of the trial court which had

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134 O'Keefe, 416 A.2d at 869 (citations omitted) (emphasis added).
135 See In re Marriage of Wanic, 445 N.E.2d 1272, 1274 (Ill. App. Ct. 1983) ("In determining whether to apply the discovery rule to a particular cause of action, the supreme court has employed a test which balances the increase in the difficulties of proof with the passage of time against the hardship to the plaintiff who is unaware of his cause of action."); Raymond v. Eli Lilly & Co., 371 A.2d 170, 174 (N.H. 1977) ("The discovery rule is based upon equitable considerations; in determining whether and how the rule should be applied we must identify, evaluate and weigh the interests of the opposing parties.").
136 O'Keefe, 416 A.2d at 872.
137 Id. at 873 (citations omitted) (emphasis added).
138 See id. at 876-77 (permitting also the rule of tacking of periods of possession so long as there is privity between the possessing parties). Rather than face a retrial, the parties settled. O'Keefe took one piece, Snyder took another, and Sotheby's auctioned off the third piece to cover the parties' legal expenses. See DUKEMINIER & KRIER, supra note 88, at 161.
139 Without a reasonable investigation of title, a purchase cannot be considered to have been done in "good faith."
140 See Bibas, supra note 101, at 2448 (arguing that despite the abundance of labels, the doctrines of laches, due diligence and discovery are functional equivalents).
found that an original owner’s claim for a Monet that had been looted during the Second World War was not barred by the statute of limitations. The appellate court found that the plaintiff, while searching diligently from 1943 to 1957, had not done anything from 1957 until a nephew discovered the painting in 1981. The court in DeWeerth applied what was essentially the Discovery Rule, because the judges found that the plaintiff had unreasonably delayed her demand.

A New York state court responded to this application of its law in the opinion of Solomon R. Guggenheim Foundation v. Lubbell. The Guggenheim court rejected the Second Circuit’s reasoning and returned to a strict Demand-and-Refusal Rule. They did so, however, in such a way as to leave the door open to the possibility of an application of the equitable balancing of the Discovery Rule. Furthermore, before Guggenheim reached final adjudication, the United States Court of Appeals for the Seventh Circuit applied the Due Diligence Rule in a decision that returned a piece to the original owner.

As a result, while New York has opposed an application the Due Diligence Rule, the holding may live on in the Federal system and does control within the common law of the state of New Jersey. The continued application of the balancing test (by whatever name) is not a sign of poor or misguided adjudication, but a judicial recognition of the special nature of art claims.

142 See id. at 104.
143 See id. at 105 (stating that the piece was discovered in published volume of Monet’s works that was in a library near the plaintiff’s home, where she had simply failed to look).
144 See id. at 109 (stating that the policies of quieting stale claims and fairness to the defendant “would be frustrated if plaintiffs were free to delay actions for the return of stolen property until the property’s location fortuitously came to their attention.”) (citations omitted).
146 See id. at 431 (finding that the museum’s attempts to locate the piece were less than aggressive and stating that “[d]espite our conclusion that the imposition of a reasonable diligence requirement on the museum would be inappropriate for purposes of the Statute of Limitations, our holding today should not be seen as either sanctioning the museum’s conduct or suggesting that the museum’s conduct is no longer an issue in this case”).
147 See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).
III. THE DISCOVERY RULE: A MODEST PROPOSAL

"Le passé est, par définition, un donné que rien ne modifiera plus." 148

The Seattle Art Museum (the "S.A.M.") was sued for the return of Matisse’s Odalisque in late July 1998.149 Prentice Bloedel had purchased the piece, which has been valued at approximately $2 million, from the Knoedler Gallery in New York in 1954.150 The gallery had told Mr. Bloedel that the painting had been held by the artist until 1938, and that the provenance was free and clear in 1954.151 The piece was in the possession of the Bloedels from 1954 to 1991 when it was donated to the S.A.M..152 The piece had been exhibited at the S.A.M. and at the Washington Gallery of Modern Art in Washington, D.C. in 1966 and 1967.153 Prentice Bloedel died in 1996.154

In October 1997, the S.A.M. received a letter from the heirs of Paul Rosenberg, a prominent Parisian art dealer before the fall of Paris in 1941.155 The heirs learned of the painting’s whereabouts after it had been featured in the 1997 book, The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art by Hector Feliciano.156 The museum looked into the matter, but in July of 1998, told the family that they would have to sue for the painting’s return. The family did so, and the museum in turn sued the Knoedel Gallery for breach of the warranty of title, fraud, and negligent misrepresentation.157

As an illustration of the problem analyzed in this Note, the S.A.M. case is ideal. The "theft" occurred 56 years before the demand for the painting’s return. The "original owner" was a private collector (as opposed to a state museum), and there is at least some question as to whether the piece was sold in 1939 or looted in 1941.158 The purchase was made in good faith—33 years prior—and both the

148 MARC BLOCH, APOLOGIE POUR L’HISTOIRE, OU MÉTIER D’HISTORIEN 58 (7th Ed. 1974) ("The past is, by definition, a datum which nothing in the future will change.") (translated from the original French by Peter Putnam).
149 See Hackett, supra note 69, at A1.
150 See id. at A1.
151 See Hackett, supra note 1, at E1.
152 See id.
153 See id.
155 See id.
156 See FELICIANO, supra text accompanying note 4.
157 See Hackett, supra note 1, at E1.
158 See Updike, supra note 154, at F1 (stating that the provenance of the piece between 1939 and 1954 is quite "murky").
"owner" and the "purchaser/transferor" have since died. The defendant is a public art museum that has publicly exhibited the piece for six years and the previous possessor had displayed the piece in two very large museums. What is a museum director to do? The result of the case may write the script for similar suits across the country, thereby increasing the risks (and costs) of frivolous and nuisance lawsuits. Cases like the Seattle Matisse tend to arise in remarkably similar scenarios, and as a result, call for both treatment as a stolen-art claim and, for reasons of the passage of a great length of time, a specific application of the Discovery Rule. This rule should, however, for reasons that will be outlined below, be applied statutorily.

A. Nazis as "Thieves" and Why the Two Innocents of Holocaust Victim Art Litigation are Better Served by Legislative, Rather than Judicial, Rule Making

This Note must, as a preliminary matter, establish two things. First, for the purposes of this Note, the art looting which took place—by all parties to the Second World War to varying degrees—must be seen as much more than mere thievery. The Nazi looting of art from Jewish and other disfavored citizens of Germany and the nations annexed or conquered by Germany was, unlike robbery, an organized state action. The "official" nature of the looting had two effects. First, it gave the activity an air of legitimacy that is not present in theft. Second, it lessened the likelihood of any, let alone successful, resistance to the wrongful taking. However, useful comparisons to more "traditional" art theft can, and must, be made, for the same goals that courts dealing with other title claims are seeking to maximize must also be maximized here. The same rules of art theft adjudication

159 Some parties, including the claimants of the Chicago Degas, have opted to settle and give the disputed piece to a public museum, thereby permitting both the owner and good faith purchaser to take a huge tax deduction pursuant to I.R.C. §170(a)(1). For a discussion of the Degas settlement, see Rosenbaum, supra text accompanying note 62, but note that the negotiations have broken down over the issue of fair valuation. Such win-win arrangements, however, may not be possible if one of the parties is a museum and the other party an heir who is unlikely to be able to make full use of the tax deduction. See generally Ehl, supra note 3 (outlining the problems that this sort of tax deduction settlement agreement may cause).

160 See, e.g., Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029 (W.D. Wash. 1999) (deciding action against museum brought by daughter and daughter-in-law of art dealer who had owned Matisse painting that was looted during the Second World War); Summary of Seattle Art Museum's Position Related to the Controversy over Matisse's Odalisque, (Sept. 1, 1998) (noting the Catch-22 in which the S.A.M. now finds itself) (on file with author and available upon request from Linda Williams, S.A.M. Public Relations, LindaW@SeattleArtMuseum.org).

161 While it is true that the Discovery Rule has traditionally been applied on a case-by-case basis, see supra Part II.B, the issue of Holocaust-survivor fine art claims are of a nature that is better addressed by the sort of policy weighing, unaffected by the drama of the courtroom, in which legislatures are designed to engage.

162 See supra Part II.A.
can be utilized effectively in this context to achieve substantial justice for the contestants. While there is no question that the Nazis and their collaborators did engage in inhumane behavior and some appropriately were punished at Nuremberg, there is equally no reason to think that innocent, good faith purchasers, nearly sixty years later, are proper parties to now punish. As a result, the law should, and has in the past, made useful comparisons between World War II art looting and more “traditional” robbery and theft, and should thereby be open to an application of one of the doctrines of adverse possession.

Second, any rule-making should begin in the legislature, where a delicate balance between the competing interests of both the bona fide purchasers, who are for the first time learning that the title of their purchase is unclear, and the unfortunate victims of World War II over sixty years ago, can be achieved. Some commentators have argued that the political process can be over-represented by concentrated interests and, as a result, “malfunction.” In the present controversy, however, both parties (Holocaust victims and art owners), while relatively “concentrated,” are extremely savvy, well organized, and well represented in the political process. In fact, it is likely that the equality of access to the political process will result in either cancellation or a balanced appreciation of both positions. Furthermore, while it is unquestionable that traditional stolen art cases are so unique as to often require individual judicial determination, here, all of the dispossession occurred under one “event” over a singular ten-year period.

The situation here, because of the high emotion wrapped up in the controversy, demands a rule-making procedure that is, in many ways, ignorant of the facts of any specific case. The federal judiciary and the Supreme Court of the United States have, on numerous occasions, voiced their recognition of the functional limitations of the judiciary. The courts often justify the existence of per se rules—of

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165 See, e.g., U.S. v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953) (antitrust case) (“Judges in prescribing remedies have known their own limitations. They do not ex officio have economic or political training. Their prophecies as to the economic future are not guided by unusually subtle judgment. They are not so representative as other branches of the government . . . . Hearings in court do not usually give the remote judge as sound a feeling for the realities of a situation as other procedures do.”), aff’d, 347 U.S. 521 (1954) (per curiam).
which statutes of limitations are a type—on the rationale of judicial economy.\textsuperscript{166}

\textbf{B. Applying the Discovery Rule to Art Claims Arising From the Second World War}

A rule that would require either a strict statute of limitations or no statute of limitations at all is inappropriate in the present controversy. A strict statute of limitations ignores the mobility and ease of concealment of stolen art, while no statute of limitations allows a would-be plaintiff to sit on her rights, thereby causing prejudice to a defendant.\textsuperscript{167} A middle ground must be reached.\textsuperscript{168} Courts who are or will be faced with the issue of World War II art claims have and should continue to apply the balancing tests of the Discovery and Due Diligence Rules. The Discovery Rule balances the plaintiff's right to have her remedy preserved and the defendant's right to repose and quiet title. Only through such equitable balancing will the special characteristics of the object and the interests of all the parties be taken into account. This is especially true when the defendant is a public museum and has publicly displayed the piece in question for years (and to a lesser degree to private collectors who frequently loan their pieces for exhibition). To be sure, when appropriate, the parties should make every effort to settle in a mutually beneficial way, but there are times when settlement is inappropriate.\textsuperscript{169}

The Discovery Rule can and should be statutorily applied in such a way as to encourage parties to act consistently with the rationale of the rule (i.e. plaintiffs must search and defendants must purchase in good faith and make their possession known). Also, unless every holder of this now dubious art is willing to initiate a quiet title action, some state action will be necessary in order to create "marketable" title. State statutory recognition of a possessor's title, provided certain indicia of due diligence have been met, serves to quiet title across the jurisdiction. As such, a model Discovery Rule-type statute of limitations for title claims resulting specifically from the Second World War might look like the following:

\begin{itemize}
\item \textsuperscript{166} See, e.g., U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (holding that despite the reasonableness of the "fixed" price, the conspiracy was \textit{per se} illegal because an individual determination of the reasonableness of the price would be too judicially costly).
\item \textsuperscript{167} A putative plaintiff might, for example, wait to file until he or she was in more favorable tax situation before filing an action for the return of very valuable property.
\item \textsuperscript{168} See Petrovich, \textit{supra} note 133, at 1149 (noting that the Discovery Rule doctrine is a flexible alternative to strict statutes of limitations).
\item \textsuperscript{169} See \textit{supra} note 159.
\end{itemize}
ALL CLAIMS FOR THE RETURN OF ART WRONGFULLY DISPLACED AS A RESULT OF THE SECOND WORLD WAR AND THE THREE YEARS IMMEDIATELY FOLLOWING (1938–1948) SHALL BE MADE WITHIN FIVE YEARS OF THE ENACTMENT OF THIS STATUTE IF THE ALLEGED POSSESSOR MEETS THE REQUIREMENTS LAID OUT IN (1) AND (2) BELOW.\textsuperscript{170}

(1) The transaction by which the possessor acquired the item in issue was done in good faith evidenced by the possessor by engaging in at least one of the following at the time of acquisition:

(a) Checking with a stolen artwork registry,\textsuperscript{171} if in existence at the time of acquisition;

(b) Checking with a relevant law enforcement agency;\textsuperscript{172} or

(c) Investigating title within the art industry itself.

The incurring of investigation costs in excess of the value of the piece at the time of acquisition is not necessary in order to defend a claim.

(2) Within six months of the enactment of this statute, the possessor has:

(a) Displayed the piece publicly in a museum with attendance in excess of 20,000

\textsuperscript{170} Clearly, it would be improper to permit the statute of limitations to run against an individual or government who was barred from having their claim heard in a U.S. court. See, e.g., Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1164 (2d Cir. 1982) (holding that the statute of limitations did not run against East Germany until it was officially recognized by the United States and thereby permitted to be heard in U.S. courts). This type of tolling would also be properly applied to individuals who were, because of an oppressive regime, not permitted to have access to a Western tribunal.

\textsuperscript{171} "Stolen Artwork Registry" refers generally to standardized lists of lost or stolen objects such as the Art Loss Registry (ALR) maintained by Christie's and Sotheby's auction houses, and other such registries which may come into existence and such standardization (e.g. the so-called "Jewish Masterlist"). See Bibas, supra note 101, at 2462 ("[A] theft registry requires only that theft victims report art thefts. The advent of computer networks and high-quality digitized color images has made possible the recent creation of an international theft registry . . . . The database stores descriptions and photographs of thousands of stolen items in a central computer. For a small fee, buyers can search the registry.") (citations omitted).

\textsuperscript{172} "Relevant Law Enforcement Agency" refers to the law enforcement agency responsible for the jurisdiction wherein the work is traded, and has been traded (e.g. if the piece has been traded abroad, but purchased domestically, inquiry to the FBI and an international agency such as Interpol may be necessary).
PEOPLE PER YEAR FOR A PERIOD IN EXCESS OF 180 DAYS PER YEAR;\textsuperscript{173}

(b) \textit{Published the work, and the possession thereof, in a piece of academic or art industry literature with a reasonably wide circulation;}\textsuperscript{174} OR

(c) \textit{Listed the piece, and the possession thereof, on an art registry, if in existence.}

\textit{If such claims are not made within the above period they are hereby barred and both legal and marketable title are vested in the present possessor.}

The five-year statute of limitations serves to quiet title in museums and private collectors that display work publicly, provided that they purchased the work in good faith. Such a limitations period tends to favor those who were actually victims of the War, rather than their heirs several years later. Section (1) of the proposed statute sets out several objective standards for a determination of a “good faith purchase.” It requires that the purchaser inquire into the title of the piece to a reasonable extent (e.g. it would be unreasonable to require inquiry into a work’s history that would be more costly than the piece itself). It does not permit the type of “willful blindness” that has tended to be the norm in the fine art trade, but does so in a way that recognizes that these pieces were often acquired in an age when much less investigation was feasible.\textsuperscript{175} Furthermore, as these types of records become more accessible, these costs will decrease and more inquiry will be statutorily required. If a piece was not purchased in good faith, the original owner, whether victim or heir, will not be protected by the statute. Section (2) lays out objective tests for what is required to meet the “open and notorious” requirements of the Discovery Rule. It requires that the possessor act “reasonably” to put the

\textsuperscript{173} A sort of “tacking” of exhibitions would be appropriate if the exhibition was traveling.

\textsuperscript{174} “Reasonably Wide Circulation” means that the publication in which the work appears has at least 20,000 copies and an international distribution.

\textsuperscript{175} Cf. Bibas, supra note 101, at Part III (taking an owner-oriented approach rather than the buyer-oriented approach taken in this Note). The author argues that:

To reduce litigation costs, courts should eschew Guggenheim’s vague balancing and should announce what steps by an owner automatically defeat a laches defense. If an owner took no significant steps to report a theft (such as notifying the police or a \textit{catalogue raisonne}) and this silence prejudiced the buyer, laches should bar recovery. Where a buyer has taken pains to investigate and found nothing because of an owner’s laziness, the owner should pay for her sloth.

\textit{Id. at 2467-68.}
would-be claimant on notice. Again, if the piece is squirreled away following even a good faith purchase, the statute will act as no protection. Such a rule recognizes that altruism is often not enough to keep pieces in public consumption. This rule, therefore, counteracts a collector's impulse to remove a work from exhibition when a piece's history is cloudy.176

Even if courts are left to adjudicate the issue on an ad hoc basis, the Discovery Rule, as described above, is appropriate. In addition to this equitable principle, courts must also aggressively use the tool of summary judgment so as to weed out weak and groundless claims, realizing that many of these defendants are public facilities of limited means. When the Discovery Rule is properly applied, it will cut in favor of museums and private collectors who exhibit their work publicly while at the same time permitting original owners, provided that they have acted with "due diligence," to have their day in court. If enacted, the statute will quiet title to those parties who have behaved "honestly" and perhaps finally start to heal one of the still-open wounds of the Second World War.

C. Meeting Expectations, Quieting Title, and Limiting Nuisance Suits: Economic Justifications for the Discovery Rule

Uncertainty is expensive, and this is especially true in the area of art ownership, where it is often an unbargained-for expense. In situations such as the ownership of extremely valuable art treasures, parties must have clear behavioral standards in order to both predict the result of past actions and to plan for the future. Uncertainty and the doctrine of repose is essentially the rationale for applying a statute of limitations to claims for personal property, something that states are far from reluctant to do.177 As more and more of these cases come to public attention, the cost of art ownership is likely to have a huge increase. While normally the externalities of ownership should be internalized into the true cost of ownership, in the present case, these costs are being asserted 30 or 40 years after the purchase and are, as a

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176 See CUNNINGHAM, supra note 72, at 11 (discussing two collectors who removed art pieces at an exhibition because of recent disputes of ownership).

177 See, e.g., CAL. CIV. PROC. CODE § 338(c) (West 1998) (providing for a three-year statute of limitations for the recovery of chattels, but in the case of the theft of any article of "historical, interpretive, scientific, or artistic significance [the statutory period] is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party"); 735 ILL. COMP. STAT. ANN. 5/13-205 (West 1998) (providing for a five-year statute of limitations for the recovery of possession of personal property); N.Y. C.P.L.R. § 214 (McKinney 1998) (providing for a three-year statute of limitations for "an action to recover a chattel"); OHIo REV. CODE ANN. § 2305.09 (Anderson 1998) (providing for a four-year statute of limitations "[f]or the recovery of personal property, or for taking or detaining it").
result, totally unbargained-for and often borne by those that can least afford it.

The publicity of high profile cases, such as the Seattle case, will encourage plaintiffs with tangential and weak cases to sue museums, realizing that public sentiment is likely to push the museum toward settlement. Some outside limit must be made, and it must be one that takes cognizance of the situation and the interests of both parties. Even commentators who argue in favor of recognizing the rights of original owner over those of subsequent good faith purchasers recognize the benefits of some statute of limitations:

Since long delays in suing increase the risk of legal error by making it difficult to unmask spurious claims, there is an argument for having some fixed deadline for suit. At some point, the incremental effect of a very long statute of limitations in discouraging theft by reducing the price of stolen art will be offset by the effect on legal error costs. Moreover, these error costs are borne ex ante by original owners as well as by bona fide purchasers, since most original owners were once bona fide purchasers and they don't want to be harassed by persons claiming to be previous owners. Hence, even original owners would favor the law's imposing some period of limitations on suits for the recovery of stolen or lost art.\(^\text{178}\)

Most importantly, however, if would-be defendants meet the suggested indicia of compliance, the social value of art (i.e. public edification) is necessarily maximized while at the same time removing any excuse for not discovering the piece. If that is true, the harm incurred by the victim, fifty-four years prior, will be outweighed by the social good sought to be maximized. However, if the social good is not maximized (e.g. none or few of the statute's requirements are met) the victim's harm clearly outweighs the social utility. As a result, the bad faith purchaser or hoarder may still possess dubious art, but in doing so must internalize the cost of a potential title claim. The piece will therefore accurately reflect its true cost and any later claim will be a bargained-for risk. By only protecting those who comply with the exhibition requirements of the statute, the rule maximizes the goals of

\[^{178}\text{Landes & Posner, supra note 9, at 203 (emphasis and citations omitted). In addition, the judicial application of the Discovery Rule in various tort actions was often explicitly premised on a finding that its application would not unduly prejudice the defendant. See, e.g., In re Marriage of Wanie, 445 N.E.2d 1272, 1275 (Ill. App. Ct. 1983) (finding that the Illinois Supreme Court had ruled that a case may not proceed if the "hardship to plaintiff was outweighed by the increase in the difficulties of proof"); Raymond v. Eli Lilly & Co., 371 A.2d 170, 174 (N.H. 1977) (opting not to proceed with an application of the Discovery Rule until the court was satisfied that "the defendant's interests have not changed or been prejudiced in any way by the delay in this case").}\]
all art law (i.e. recognizing and protecting the title of good faith purchasers while recognizing the need for repose). 179

D. The Discovery Rule Encourages Both "Searching" and "Exhibiting"

In order for an owner to have her work returned, the Discovery Rule requires that she use reasonable efforts to locate the piece in order to toll the statute of limitations. 180 The effect of this requirement is obvious: the owner, if the value of the piece exceeds the cost of finding it, will search for the piece. The Discovery Rule also has the interesting effect of requiring that the possession be "notorious" (i.e. the possession should give the diligent searcher some idea of its location and the identity of the possessor). This rule regime encourages good faith purchasers to publicly display their pieces, while it is likely that a rule of no repose would drive pieces "underground" in order to avoid unprotected detection. Purchasers will have a real incentive, other than the ones inherent in art ownership,181 to display the piece publicly. O'Keeffe herself argued that public display should be sufficient to start the Statute of Limitations running.182 Museums, which by definition display the pieces in their possession and publish lists of

179 See KOMESAR, supra note 164, at 24 (discussing the remedy awarded in Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970), and arguing that the rule forced the defendant to internalize the costs of its production and gave the correct incentives to "search for modes of avoidance").

180 See O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980) (remanding the case to the trial court and stating that:
[i]n determining whether O'Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O'Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

Id.

181 See Landes & Posner, supra note 9, at 181 (citations omitted). Landes and Posner assert that:
[Art is] a prestige good that enables the collector to signal to others that he is a person of both wealth and good taste. The collector gets utility not only from admiring the work hanging in his living room but also from believing that other people envy or admire him because he owns it. To obtain this additional utility, people who buy art don't want to keep it hidden away. They brag about owning it, show it to friends, lend it to museums and galleries for exhibitions . . . . Most collectors go out of their way to get their paintings included in shows and books. They do this partly to confirm and enhance the value of the works but also to obtain utility from having one's name ("lent by" or "in the collection of") publicly associated with the work . . . . Art's signaling value makes it more likely that the rightful owner will eventually find his long-lost work.

Id.

182 See O'Keeffe, 416 A.2d at 871.
their collections, will be encouraged to continue to display them because the more they do, the less likely an owner can argue that she reasonably searched yet did not find. The benefit enjoyed by public museums and exhibiting collectors will also accrue to the public as more pieces, especially never before seen works, are publicly exhibited.183

This rule regime also has the effect of recognizing title in an original owner who has, for reasons outside her control, been unable to locate a lost work. The uncontrollable excuses are, for most would-be plaintiffs, the information freeze of the Communist regimes of Eastern Europe and the apathetic attitude of much of the West. These protections only exist, however, if the claimant searches, and, with the continued thaw of the Cold War, technological revolution, and increased public and political interest, the cost and difficulty of that search grows less prohibitive on a daily basis.184

E. Limitations of Action for Breach of Warranty of Title

Another reason for adopting an owner-friendly rule is that often the purchaser cannot seek compensation from the seller of the stolen piece.185 Often the cause of action for breach of the warranty of title is barred by a statute of limitations that begins to run as soon as the item is sold. Additionally, the situation of warranty of title is obscured by the vague differences in warranty that result from whether the painting was purchased from the artist,186 a gallery,187 or an auction.188 These differences are made all the more difficult to deal with by the peculiarities of property law that are unique to any given country or state. Some of these particularities can be seen simply by comparing the legal systems of the Continent, where much of this art was purchased, and the common-law systems of the United Kingdom and its former empire, where much of this art is now held.189

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183 See Landes & Posner, supra note 9, at 183-84 (noting that “[t]he more secure that property rights in works of art [sic], the more likely those works are to circulate, conferring value on art lovers, scholars, and artists.”).
184 See supra Part II.D.
185 See, e.g., U.C.C. § 2-725 (1990) (providing for a four-year limitations period for an action for breach of the warranty of title).
186 The artist, as creator, has clear title to the object as compared to situations such as “en-trustment,” whereby the owner intends to pass possession but not title. See Patty Gerstenblith, Picture Imperfect: Attempted Regulation of the Art Market, 29 Wm. & MARY L. REV. 501, 546-51 (1988).
187 Sale at a gallery has traditionally been seen as a statement that the piece’s title is free and clear and held without reservation by the gallery. See id. at 554.
188 An auction house only purports to sell as much title as the true seller actually has. See id. at 553-55.
189 As one commentator explains:
thermore, the art buyer/seller arrangement is often one of unbalanced expertise that puts the buyer at the mercy of the legal maneuverings of the seller. The merchant (who may escape liability simply by the passage of time) is often in a far better position to determine the provenance of the item or perhaps even seek title insurance. As a result, unless the law is willing to protect the good faith purchaser with the use of a balancing test such as the Discovery Rule, any other protection for the purchaser may be, in practice, illusory. To counteract this, parties will have to resort to the law of contract to resolve these questions—a practice disfavored by the U.C.C.—and the result is likely to be increased transaction costs. While it may be proper to assume that good faith purchasers would be able to recapture their loss under “normal” art theft circumstances, clearly many of the present disputes are “abnormal” simply by the passage of a great length of time.

F. No Protection for Bad Faith Purchasers

Contrary to criticism, an application of the Discovery Rule, as outlined above, will not open the floodgates to the future laundering of stolen art. To begin with, this application is meant to apply only to claims resulting from the Second World War. Other broader schemes have been discussed adequately elsewhere. Furthermore, the protection that the proposed Discovery Rule model statute brings to good faith purchasers is likely to be severely limited in the near future, and with good reason. As the number of stolen art registries increases, and title searches get less costly, purchasers of formerly stolen prop-

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The civil law permits a thief to transfer title to a good faith purchaser of goods, although the passage of time is also a relevant factor in the requirements for acquisition of title. In the United States, on the other hand, according to both the common law of sales and the Uniform Commercial Code, a transferor can only convey as good a title as he or she has. . . . Even after several transfers through good faith purchasers, good title can still not be attained. Gerstenblith, supra note 96, at 19-20 (citations omitted).

190 See Gerstenblith, supra note 186, at 562 (discussing the merchant’s superior position for authenticating the art).

191 See Bibas, supra note 101, at 2467 (discussing some of the loss spreading mechanisms held by art merchants).

192 See U.C.C. § 2-725 (1) (1990) (“By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.”) (emphasis added).

193 See generally Gerstenblith, supra note 186, at 556-61 (arguing for theories of both tort and agency liability in the buyer/seller relationship).

194 See generally Bibas, supra note 101, at 2437 (arguing that statutes of limitations actually encourage art theft).

195 See, e.g., Bibas, supra note 101, at 2437 (arguing that protecting owners by abolishing limitations periods for many types of personal property “would be both economically and morally just”); Gerstenblith, supra note 186, at 505-32 (discussing how art practices result in liability to both the purchaser and owner of art works); McCord, supra note 19, at 997-1008 (proposing a stricter standard for museums and auction houses in order to help end illegal art trade).
erty will not be able to effectively argue that their purchases were, in fact, made in good faith. This rule, because of its bias in favor of purchasers, will not lead to a huge increase in stolen art because technology will cause a successful defense of "good faith" harder to make.

However, the lowering of search costs also cuts the other way in that, as technology spreads information to searching owners, the excuses for not finding a work that is notoriously displayed grow less persuasive. While this prediction may ring true for purchases of stolen art in the near future, the fact of the matter is that most of these works were acquired during a period when inquiry, even at its most diligent, was much more limited. Any present judicial or legislative solution must take cognizance of this fact and the Discovery Rule, when applied as suggested above, best settles the title of art displaced by the confusion of the Second World War when it was acquired in good faith.

G. Inadequacy of the Demand-and-Refusal Rule

While the Demand-and-Refusal Rule and the Discovery Rule are in many ways similar, only a balancing test such as the Discovery Rule adequately takes into account the special problems associated with claims that are in excess of fifty years old. "The pure demand-and-refusal requirement eviscerates limitation periods by allowing owners to postpone making a demand indefinitely . . . . And far from serving its original goal of protecting a BFP from lawsuits, it makes him perpetually vulnerable to suit." The Discovery/Due Diligence Rule, unlike the Demand-and-Refusal Rule, necessarily takes time into consideration. Both rules:

serve to delay the accrual of the original owner's cause of action until the owner discovers the identity of the possessor of the stolen goods. Nevertheless, two critical differences distinguish these rules. First, the discovery rule requires an original owner to continually exercise due diligence in searching for a missing item. Second, the discovery rule

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196 See supra Part IV.B (specifically Section (1) of the model statute and its accompanying discussion).
197 See Bibas, supra note 101, at 2461 (discussing how an increase in both data bases and theft registries would make buyers of art more diligent when investigating the art work's history).
198 Theoretically, under the Demand-and-Refusal Rule, a claim by a would-be plaintiff is just as fresh 50 years later as it would be the day it was stolen.
199 Bibas, supra note 101, at 2445-46.
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This Note, however, endeavors to explain that because of the great length of time and common vagaries of each claim, such a rule is necessary to balance the interests of the owner, the good faith purchaser, and the public. If the Demand-and-Refusal Rule was to be adopted, title would never be quieted and the problems, inefficiencies, and injustices outlined above would continue indefinitely.

III. CONCLUSION

While the common law rule for the good faith purchase of personal property clearly holds that a thief cannot convey good title, courts have for years imposed any one of several doctrines as to the tolling of the statute of limitations period. Today, because of recent political and technological events, former owners of some culturally significant and extremely valuable fine arts are coming forward to make claims to subsequent good faith purchasers their work's return. Because of the great length of time and huge potential for inequitable treatment of these possessors, states should codify the Discovery Rule in a way similar to the proposal outlined in this Note. The rule serves to encourage public display of the works while giving victims adequate notice of their potential claims. If not adopted, courts that hear these cases must adopt the Discovery Rule as applied in O'Keeffe v. Snyder and the subsequent cases outlined above. If courts and legislatures in the United States and abroad adopt instead a rule of no repose, these pieces of significant historical, cultural, fiscal and aesthetic value will be lost a second time.

STEPHAN J. SCHLEGELMILCH

200 Ehl, supra note 3, at 672.
201 However, the proposed rule would tend to limit the claims of heirs, rather than survivors themselves, in that these claims would have to be filed within the proposed five-year period.
202 See supra Part IV.C. Many commentators and courts forget that art, unlike many other items of personal property, has a very real public value that must be weighed in whatever balancing test applied. See generally Jason R. Goldstein, Note, Deaccession: Not Such a Dirty Word, 15 CARDOZO ARTS & ENT. L.J. 213 (1997); Landes & Posner, supra note 9 (discussing the unique characteristics of art including the reasons that people choose to acquire it).

This Note is dedicated to my wife, April Schlegelmilch, without whom I would be lost. Thanks also to Professor Andrew Morriss who patiently taught me the fine art of legal scholarship; any errors in style or content remain mine alone. Finally, thanks to the Allen Memorial Art Museum, Seattle Art Museum, National Gallery of Art, Minneapolis Institute of Arts, and the Metropolitan Museum of Art for their help in writing this piece.
Male Nude with a Lion (verso)
Dürer, Albrecht (10 9/16 x 5 9/16), c. 1500
National Gallery of Art, Washington, D.C.
Woodner Family Collection (1991.182.11.16D)
used with permission
The Garden of Monet's House at Argenteuil
Monet, Claude (81 x 60 cm.)
The Metropolitan Museum of Art, New York
*used with permission*
Smoke Over the Roofs (Les Fumes Sur Les Toits)
Leger, Fernand
The Minneapolis Institute of Arts
Bequest of Putnam Dana McMillan (61.36.12)
used with permission
APPENDIX D

Odalisque
Matisse, Henri, 1928
Seattle Art Museum
(photo by Paul Macapia)
used with permission