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Volume 49 | Issue 1

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2017

# Property as Prophecy: Legal Realism and the Indeterminacy of Ownership

John Humbach

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## Recommended Citation

John Humbach, *Property as Prophecy: Legal Realism and the Indeterminacy of Ownership*, 49 Case W. Res. J. Int'l L. 211 (2017)  
Available at: <https://scholarlycommons.law.case.edu/jil/vol49/iss1/13>

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# Property as Prophecy: Legal Realism and the Indeterminacy of Ownership

## **Cover Page Footnote**

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# PROPERTY AS PROPHECY: LEGAL REALISM AND THE INDETERMINACY OF OWNERSHIP

*John A. Humbach\**

*Property law, like all law, is indeterminate. This means that ownership itself is indeterminate and every owner is vulnerable to challenges based on unexpected legal rules or newly created ones. Even the most seemingly secure rights can be defeated or compromised if a clever-enough lawyer is retained to mount a challenge. The casebooks used in first-year property courses are full of examples. In the case of particularly valuable property, such as works of art, the motivation to fashion arguments to support ownership challenges is obvious. Short and strictly interpreted statutes of limitations can mitigate the risks to ownership by cabining the timeframes from which title challengers can draw facts to support their claims.*

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## I. INTRODUCTION

Property is a fundamental and pervasive social practice. In everyday interactions, people recognize, respect, and reaffirm “ownership” in a myriad of different ways. There are many similarities between the law of property and the social practice. In both, for example, owners are viewed as having a variety of special advantages or benefits, including, most prominently, the right to have or possess the things they own; the right to exclude others from them; and, generally, the right to deal with them more or less as they please. The

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\* Professor of Law, Elisabeth Haub School of Law at Pace University.

law of property and the social practice are, however, different in important respects. Perhaps most important: when compared with the law, ownership in the social practice of property is not a particularly complex concept. In everyday social interactions, a person either owns something or does not. In the law of property, by contrast, the conception of ownership is far less simple.

Because the law of property and the social practice are different, it is possible for the two to give different answers on questions of who owns what. The law, of course, takes precedence, but only if someone invokes it. This does not mean, however, that the social practice of property necessarily follows the law on questions of ownership. What is more accurate to say is that, as long as the players in the social practice do not take steps to invoke the legal system to resolve disputes, the social practice of property generally ignores the intricacies and vagaries of the law. Meanwhile, ownership in the social practice of property is constantly affirmed and reaffirmed in the ways people deal with one another in ordinary social interactions. Legal ownership is, by comparison, rarely declared by the institutions of the legal system and almost never reaffirmed at law. Consequently, attributions of ownership under the social practice of property almost surely predominate over legal ownership in people's property consciousness. When the law does intervene in ownership disputes, however, the outcomes are as likely as not to go against the social practice. Even as a purely legal matter, such outcomes are largely unpredictable.

There are practical and theoretical reasons for this divergence and unpredictability. The practical reason is that lawyer time is expensive, and persons having legal expertise usually do not get professionally involved in (or, at least, they do not spend much time on) cases whose resolution is "clear cut" or "easy." Lawyers are only likely to get seriously involved in ownership disputes when they believe the issues, either of law or fact, are at least plausibly contestable, with sound reasons in support of outcomes going either way. That is to say, there must ordinarily be a fair degree of uncertainty as to how a legal dispute will come out before a client will want to spend money on the lawyer hours needed to seek a legal determination. This pre-requisite of uncertainty is in and of itself enough to make the outcomes of legal disputes notably unpredictable.

The theoretical reason for the divergence lies in the intrinsically indeterminate nature of the law itself. Although there is little debate about who owns what in the usual social practice of property (meaning most property rights *seem* more or less secure from serious challenge), one should not be lulled into thinking that most property rights are relatively secure at law. Nor should one assume that it only makes sense for people to take property disputes to court in those cases where the social practices provide no clear answer. Whether an ownership dispute is plausibly contestable, and therefore fit for a lawyer's attention, is never a purely objective matter; it is never a question whose answer

depends solely on applying a fixed set of legal rules to objectively relevant facts. Even if it seems clear that a person owns a particular item under the relevant social practices, or even under the law, a skillful lawyer can often persuade a court to take the property away from the person who has it and give it to somebody else. That is to say, a lawyer who is adept at discovering and advocating alternative bases for decisions, drawn from the vast array of conceptual resources that the law provides, can make a case plausibly contestable and therefore unpredictable.

## II. OWNERSHIP INDETERMINACY

Standard first-year property-law casebooks are filled with cases of putative owners who faced surprising challenges to their ownership, often resulting in partial or total losses of valuable property.<sup>1</sup> Even though these erstwhile owners had no reason to doubt their ownership under the social practice or law of property, it turned out that some unexpected legal technicality (which they probably didn't even understand) meant somebody else, completely unsuspected, was declared the actual owner. And even when these challenged owners managed to avoid losing their property entirely, the trip they had to take up the judicial ladder—perhaps all the way to their state's highest court—was hardly a painless or inexpensive adventure.

Oliver Wendell Holmes once wrote that the law is simply “[t]he prophecies of what the courts will do in fact, and nothing more pretentious” than that.<sup>2</sup> For Holmes, the common law was not an objectively ordered, “brooding omnipresence in the sky”<sup>3</sup>—not a body of rules existing “out there” like Plato's Forms for judges to discover, declare, and woodenly follow to resolve disputes. On the contrary, Holmes suggested that the only law that can be known, as opposed to predicted, is the law that was applied in the past, which can be seen by looking back at what judges have done in already-decided cases.<sup>4</sup>

This “Legal Realism” of Justice Holmes, as carried forward by the modern Critical Legal Studies movement, places great—some would say excessive—stress on the fact that law, by its very nature, is always in some degree indeterminate. Different lawyers can make different predictions about “what the courts will do in fact,”<sup>5</sup> but no one can say

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1. See, e.g., SUSAN FLETCHER FRENCH & GERALD KORNGOLD, *CASES AND TEXT ON PROPERTY* (6th ed. 2015); JOHN G. SPARKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* (2d ed. 2012).
  2. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).
  3. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.).
  4. Holmes, *supra* note 2.
  5. Holmes, *supra* note 2.

with certainty what the outcomes will be in future cases. As one scholar has explained, judges have “tremendous leeway”<sup>6</sup> to decide cases more or less as they see fit:

Depending upon how a judge would read the . . . precedents, she would extract different rules of law capable of generating conflicting outcomes in the case before her. . . . [T]he choice of which rules to apply in the first place is not dictated by the law and . . . competing rules will be available in almost any case which reaches the stage of litigation.<sup>7</sup>

As every modern lawyer knows and often takes for granted, these possibilities make the law, as well as the actual outcomes of specific cases, very susceptible to advocacy.

Observations about the law’s indeterminate nature apply equally to legally enforceable property rights, which cannot be predicted (except through educated guesses) by reference to legal rules. Even the most confident declaration that “O owns X” is only a prophecy of what a court will do, and such prophecies are always subject to challenge and possible refutation in litigation. No matter how confident the prophecy, a sufficiently skilled lawyer will always be able to invoke various competing rules whose force may undercut the current putative owner’s claim. For the court deciding the case, “the choice of which rules to apply . . . is not dictated by the law.”<sup>8</sup> And therein lies the fundamental indeterminacy of ownership.

But this is not all: a court not only has a choice of which rules to apply, but also the option of abolishing old rules and making up entirely new ones if a skillful lawyer can persuade it to do so.<sup>9</sup> A simple case showing this indeterminacy in action is *Nelson v. Parker*.<sup>10</sup> There, a widower deeded a house to his son, Daniel, but the deed clearly showed that the widower’s live-in companion, Irene, was intended to have the house for life through a life estate.<sup>11</sup> Daniel, preferring not to wait until Irene’s death to take the house, hired a lawyer to remove her.<sup>12</sup> The normal legal rule for cases like this is straightforward: when interpreting

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6. Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 209 (1986).

7. *Id.*

8. *Id.*

9. *See id.* (“[L]eeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided.”).

10. *Nelson v. Parker*, 687 N.E.2d 187 (Ind. 1997).

11. *Id.* at 188.

12. *Id.* at 187.

a deed, the grantor's clear intention controls.<sup>13</sup> Based on this rule, Irene's life estate should have prevailed. On appeal, however, Daniel's lawyer added indeterminacy to the case by digging up an obscure, old rule to the effect that a "reservation" in a "stranger" (someone not party to the deed) is void—meaning the deed's words meant to create Irene's life estate would have no legal effect.<sup>14</sup> Irene's lawyer then urged the court to abolish the old rule,<sup>15</sup> arguing that it no longer served its original purpose. In other words, Irene's lawyer suggested that the court should take a major chunk out of Daniel's property rights by eliminating an obscure legal wrinkle that Daniel's lawyer had unearthed and asserted.

The court ultimately ruled against Daniel and abolished the old rule. But the important point for present purposes is that the case illustrates how readily a pair of skilled advocates can provide a court with essentially complete discretion in making its decision. Even though no law compelled it to do so, the court chose to use its discretion to transfer valuable property rights from Daniel, who perhaps did not morally deserve them, to Irene, who perhaps did.<sup>16</sup>

*Nelson v. Parker* represents one of the many examples in standard property-law casebooks that illustrate (albeit perhaps unintentionally) the fundamental indeterminacy of property rights.<sup>17</sup> We may feel that the court made the right choice in *Nelson v. Parker*, and we may cheer that the court had a choice at all, but the possibility of such choices is exactly what makes property titles indeterminate and vulnerable to advocacy.<sup>18</sup> Modern American property law rests on a continuous succession of precedents that go back nearly 1000 years, and in a body of law going back that far, there is probably always some old rule, combination of rules, or vague principles or policies that a resourceful,

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13. *See id.* (“[T]he object of deed construction is to ascertain the intent of the parties.”); *see also* *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641, 643 (Ind. 1987) (“[T]he object of deed construction is to ascertain the intent of the parties.”).
  14. *Nelson*, 687 N.E.2d at 188 (“[A]t common law a grantor could reserve an interest only for the grantor, but not for a third person, or ‘stranger’ to the deed.”).
  15. The old rule was indeed still the law of the state, reinforced by the court in *Ogle v. Barker*, 68 N.E.2d 550, 553–54 (Ind. 1946). *See also Nelson*, 687 N.E.2d at 189.
  16. Whatever Irene's rights may have been under the law of property as it existed at the time of the deed, it is fair to say that she would surely have been regarded as the rightful owner of the deeded interest under the usual social practice of property. It is not part of the social practice of property that an owner's right to transfer property as he pleases can be torpedoed by obscure legalities excavated from another age.
  17. *See, e.g.*, SPARKLING & COLETTA, *supra* note 1.
  18. *See Altman*, *supra* note 6 (“[L]eeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided.”).

motivated lawyer can dig up and cobble together to make a colorable case. And, if even there is not, an imaginative and resourceful lawyer could almost always make at least a plausible argument for abolishing one of the existing rules or creating a new one. Even if the resulting line of argument is not a guaranteed winner, it can be sufficiently compelling to cast a cloud on title and pry loose a handsome settlement—a possibility that is limited only by the attacking lawyer’s imagination and resourcefulness. As I remind my students, nobody’s property is safe as long as there’s a sharp-eyed lawyer out there looking for a way to persuade a court to give it to someone else.

Of course, the picture presented here perhaps exaggerates the indeterminateness of property rights, just as legal-realism jurisprudence has exaggerated the indeterminateness of law itself. After all, most of the law, as a real-life influence on everyday human conduct, is not at all indeterminate, but rather reliable and predictable virtually all of the time. And indeed, the legal system’s reliance on largely voluntary legal compliance could not function if this were not the case.

Nevertheless, the law’s relative predictability in ordinary life is not of much relevance or comfort in the world of legal practitioners or others professionally engaged with the law. For in the cases that occupy the attention of lawyers, the law is, essentially by definition, “indeterminate,” otherwise there would be no actual or potential controversy requiring the lawyer’s time. Nobody pays lawyers to think about cases that seem clear beyond the possibility of cavil or doubt. The only cases that lawyers regularly deal with are ones that are, or reasonably may be, contested.<sup>19</sup> Similarly, even though legal property rights are generally well understood and seem quite “determinate” as a matter of social practice, the professional world inhabited by lawyers is a world of indeterminate laws and ever-available bases, legal and factual, to contest other people’s property rights.

### III. GETTING PROPERTY BY CREATING NEW RULES:

#### *DEWEERTH v. BALDINGER*

A striking example of how skillful lawyers can persuade courts to create new legal rules in order to divest and reassign property rights is the World War II art-theft case of *DeWeerth v. Baldinger*.<sup>20</sup> At issue

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19. To be sure, many lawyers spend a lot of time and receive substantial fees for thinking about matters that are not currently being contested. A principal purpose for engaging lawyers in these matters is to head off burdensome lawsuits in the future. One reason that the law usually appears to be determinate is simply that it may not seem worth anyone’s while to fashion arguments that challenge most of the conventionally predicted results.
20. *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev’d* 836 F.2d 103 (2d Cir. 1987), *on motion for reconsideration* 804 F. Supp. 539

was the ownership of a painting by Claude Monet, called *Champs de Blé à Vétheuil*.<sup>21</sup> In 1957, three decades before the case arose, Edith Baldinger purchased the painting and placed it in her home on Park Avenue in New York City.<sup>22</sup> As it turned out, however, the Monet had been stolen in 1945 from a home in Germany during the chaotic aftermath of World War II.<sup>23</sup> Eventually, a Geneva art dealer took the painting to New York and, through the Wildenstein & Co. gallery, sold it to Mrs. Baldinger.<sup>24</sup> When Mrs. Baldinger bought the painting, she was entirely unaware that it was stolen property.<sup>25</sup> The same was probably also true of Wildenstein and possibly the Geneva art dealer, although they surely knew that a large amount of stolen art was floating around Europe at the time.

In the early years following the 1945 theft, Mrs. DeWeerth made various inquiries and efforts to find her stolen painting, all to no avail.<sup>26</sup> It was not until 1981 that a chance discovery by her nephew revealed that Wildenstein had been involved in selling the painting in 1957.<sup>27</sup> Once a court compelled Wildenstein to divulge the stolen painting's whereabouts, Mrs. DeWeerth made a formal demand on Mrs. Baldinger to return it.<sup>28</sup> Mrs. Baldinger refused.<sup>29</sup>

In early 1983, nearly 40 years after the theft, Mrs. DeWeerth sued in federal court to recover the painting from Mrs. Baldinger.<sup>30</sup> The threshold question was whether German or New York law should apply.<sup>31</sup> Under German law, Mrs. DeWeerth's cause of action would

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(S.D.N.Y. 1992), *rev'd* 38 F.3d 1266 (2d Cir. 1994); *see also* JOHN A. HUMBACH, *WHOSE MONET? AN INTRODUCTION TO THE AMERICAN LEGAL SYSTEM* (2d ed. 2016) (discussing the case at greater length, as a vehicle for introducing and demonstrating the operation of the American common-law system).

21. *DeWeerth*, 658 F. Supp, at 690.

22. *Id.*

23. *Id.* at 692.

24. *Id.* at 691.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 691–92.

29. *Id.* at 692.

30. *Id.*

31. Federal courts sitting in a diversity-jurisdiction case are supposed to apply the law of the state in which the court is located. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The applicable choice-of-law rules and property law in *DeWeerth v. Baldinger* was, therefore, the law of New York. *DeWeerth*, 658 F. Supp, at 692 (*citing* *Klaxon Co. v. Stentor Ele. Mfg. Co.*, 313 U.S. 487 (1941)).

have expired many years before,<sup>32</sup> which would have meant an easy victory for Mrs. Baldinger.<sup>33</sup> Mrs. DeWeerth's lawyers obviously wanted to persuade the court to not use Germany's law, and it was here that they introduced the first major indeterminacy into the case, arguing that the court should apply New York law instead.<sup>34</sup> The choice-of-law question required the court to engage in, among other things, a subjective significant-relationship analysis,<sup>35</sup> which was, despite its major impact on property rights, not very determinate. But Mrs. DeWeerth's lawyers succeeded in getting Germany's unfavorable law out of the case, and the question then became: What is the applicable statute-of-limitations period for actions to recover chattels in New York? This question turned out to be not so easy to answer, producing plenty of ownership indeterminacy for the lawyers to feast on.

The legal situation was essentially this: the New York statute of limitations states flatly that an action to recover a chattel "must be commenced within three years," which sounds fatal for Mrs. DeWeerth's claim.<sup>36</sup> Long before, however, New York courts had been persuaded to add a new proviso to the statute's flatly stated rule. According to this judicial proviso, when a stolen chattel is held by a good-faith buyer, the three-year period does not even begin to run until the owner demands the chattel and the good-faith buyer refuses to return it.<sup>37</sup> This court-invented proviso not only guts the curative effects

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32. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 937 (Ger.), *translated in GERMAN CIVIL CODE: BGB*, [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) [<https://perma.cc/YS64-6YFJ>] (last visited Nov. 6, 2016) ("(1) A person who has a movable thing in his proprietary possession for ten years acquires the ownership (acquisition by prescription). (2) Acquisition by prescription is excluded if the acquirer on acquiring the proprietary possession is not in good faith or if he later discovers that he is not entitled to the ownership.").
  33. *Id.* According to German Civil Code § 937(1), good title had presumptively ripened in somebody in Germany before the painting was brought to New York, unless someone could prove the absence of 10 years' good-faith possession that would trigger the exclusion in subsection (2). Without such proof, Mrs. Baldinger received good title under German law at the time of her purchase in 1957, quite apart from any title that she could assert based on her own long period of good-faith possession.
  34. Brief of Plaintiff-Appellee Gerda Dorothea DeWeerth at IV(C), *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994) (Nos. 93-7144, 93-7146), 1993 WL 13029840.
  35. *DeWeerth*, 658 F.Supp. at 692.
  36. N.Y. CPLR § 214 (McKinney 2016).
  37. *Menzel v. List*, 253 N.Y.S.2d 43, 44 (App. Div. 1964), *aff'd on other grounds*, 246 N.E.2d 742, 745 (N.Y. 1969). The original theory was that, until the good faith purchaser had refused a demand for the chattel, there was no wrong to trigger the statute of limitations. *See Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

of the nominal three-year statute of limitations, but also has a dramatic value-shifting impact on property rights, to the detriment of innocent buyers like Mrs. Baldinger. Following the New York precedents, however, the District Court held that the three-year statute of limitations had not run and rendered a judgment for Mrs. DeWeerth.<sup>38</sup> The court ordered Mrs. Baldinger to return the painting that she had held in good faith for more than 25 years.<sup>39</sup>

On appeal, the Second Circuit reversed.<sup>40</sup> The court decided to let Mrs. Baldinger keep the painting because Mrs. DeWeerth had failed to use reasonable diligence to find it after it was stolen.<sup>41</sup> Notably, the Second Circuit treated Mrs. DeWeerth's insufficient diligence as the pivotal fact of the case, even though New York law, which the court was supposed to follow,<sup>42</sup> had no rule requiring owners to use reasonable diligence.<sup>43</sup> The Second Circuit conceded that New York had no such rule, but was convinced that the requirement was a good idea and that New York courts would embrace it once the opportunity arose. So, in deciding *DeWeerth v. Baldinger*, the Second Circuit created a new rule of property, requiring reasonable diligence, and then used that rule to deprive Mrs. DeWeerth of the property rights she had under the state law that it was supposed to apply. To put it bluntly, Mrs. Baldinger's lawyers persuaded the Second Circuit to invent a brand new legal rule, to add it to the property law of another jurisdiction, and then to use its newly-minted rule to take property away from Mrs. DeWeerth and give it to Mrs. Baldinger.

Creating new rules of law in the course of adjudication is, of course, not unheard of. On the contrary, it has long been considered at the very core of our common-law system, the source of the flexibility the common law needs to respond to new conditions.<sup>44</sup> When courts make new rules in the adjudication of ownership disputes, however, the result

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38. *DeWeerth*, 658 F.Supp. at 694.

39. *Id.* at 695.

40. *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987).

41. *Id.* at 112.

42. *Id.* at 109–12.

43. See *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426, 429–30 (N.Y. 1991) (acknowledging that New York has case law holding that a plaintiff in replevin must make a demand for the return of chattels within a reasonable time, but that no New York case had applied the reasonable-time requirement to owners who did not know the location of their property).

44. A key exception to this general acceptability is in the field of constitutional law, where new judge-made rules can be seen to have the effect of “amending” the Constitution—a matter of grave concern to advocates of originalism and strict construction. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 140 (4th ed. 2006).

can be to reassign property rights from one person to another, as in *DeWeerth v. Baldinger*.<sup>45</sup> Such ad hoc reassignments of property rights are an ever-present possibility (and litigation temptation) as long as skillful advocates trying to salvage “losing” cases are able to persuade courts to create new rules or drop old ones, just because it seems like a good idea based on reasons of better policy. It is an important factor that makes property rights fundamentally indeterminate—and ever vulnerable to the sharp-eyed lawyer who seeks to wrest them away.

The Second Circuit’s decision for Mrs. Baldinger was not, however, the end of the story. In 1991, the Court of Appeals of New York rejected the Second Circuit’s new rule of “New York” law, holding that a requirement of reasonable diligence did not further the state’s policy of protecting the owners of stolen property.<sup>46</sup> The court also added pointedly that “the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for the purposes of the Statute of Limitations.”<sup>47</sup>

This was not, however, a happy ending for Mrs. DeWeerth. After New York clarified its law on reasonable diligence, *DeWeerth v. Baldinger* made a second trip through the federal courts.<sup>48</sup> The District Court again held for Mrs. DeWeerth based on the 1991 state decision,<sup>49</sup> while the Second Circuit again held for Mrs. Baldinger.<sup>50</sup> Although the Second Circuit acknowledged that it had previously made the wrong call on New York law, it nevertheless stayed with its original decision for Mrs. Baldinger in the interest of “finality.”<sup>51</sup> Finality is, to be sure, an important principle, but it is not an inflexible one. In a case like this, the Second Circuit almost surely could have gone either way.<sup>52</sup> As if to provide a stark example of property law’s indeterminacy and vulnerability to advocacy, the Second Circuit chose to stick with its previous, though now demonstrably erroneous, outcome. Consequently, Mrs. DeWeerth was legally deprived of her property even after her

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45. *DeWeerth*, 38 F.3d at 1273.

46. *Lubell*, 569 N.E.2d at 430 (1991).

47. *Id.*

48. *DeWeerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y. 1992); *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994).

49. *DeWeerth*, 804 F.Supp at 554.

50. *DeWeerth*, 38 F.3d at 1276.

51. *Id.* at 1275.

52. Ironically, the Second Circuit later cited *DeWeerth v. Baldinger* in a case where it held that exceptions to finality should be “liberally construed when substantive justice will thus be served.” *LeBlanc v. Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001) (*citing* *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963)).

right—as confirmed by the indisputably highest authority possible—had become as determinate as a property right could be.<sup>53</sup>

#### IV. STATUTES OF LIMITATIONS REDUCE THE INDETERMINACY OF PROPERTY RIGHTS

Even though the Second Circuit got the New York law exactly wrong, for which Mrs. DeWeerth paid the price, the court may have had the better end of the matter for at least two policy reasons. First, in seeking to give force to the statute of limitations and cut off a theft victim's long-stale claim, the Second Circuit chose the policy that would most likely protect people's reasonable and legitimate property-right expectations. That is, the court chose a policy that was best adapted to align the law of property with the social practice of property. Second, and perhaps more important, by extending the statute of limitations' power to cure title uncertainties, the Second Circuit acted to limit the risks that flow from the indeterminacy of property rights. These two reasons will be considered in turn.

There is much to be said for the idea that courts should endeavor to decide property cases in accordance with the expectations that people have based on the social practice of property. This is not, of course, what courts generally purport to do. More typically, courts purport to follow the law faithfully, wherever it may lead. Still, if a court were inclined to decide ownership disputes in accordance with the social practice of property, it would generally have wide latitude to do it.<sup>54</sup> Exercising that latitude would probably mean first and foremost trying to avoid conferring unexpected windfalls on some while visiting rude and ruinous surprises on others. Such windfalls and surprises are, virtually by definition, at odds with the social practice of property.

Perhaps it was something akin to this kind of thinking that underlay the Second Circuit's stiff insistence on holding for Mrs. Baldinger even after New York's highest court made it unambiguously clear that Mrs. DeWeerth was the true owner of *Champs de Blé à*

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53. *DeWeerth*, 38 F.3d at 1276. It is assumed that the Second Circuit's decision could not constitutionally or jurisdictionally change the law of New York, but only misdeclare it. Mrs. DeWeerth was therefore the owner of the painting before the litigation began and continued to be the owner under the only body of law—state law—that could apply to determine the painting's ownership. There was no federal property law that could apply, so the Second Circuit's ruling could not change the legal fact that Mrs. DeWeerth continued to be the painting's owner even after the Second Circuit's original decision to the contrary—unless, of course, legal property rights do not really exist all but are only prophecies of what courts will do.

54. See Altman, *supra* note 6 (“[L]eeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided.”).

*Vétheuil*.<sup>55</sup> By the time Mrs. DeWeerth sued Mr. Baldinger, nearly 40 years after the painting was stolen, Mrs. DeWeerth had likely long since given up any real hope of ever getting it back. Notwithstanding her rekindled hopes after her nephew helped to uncover the painting's trail, Mrs. DeWeerth probably did not count very heavily on its return as she moved into her 90s. By contrast, after paying a respectable sum to acquire the Monet from a reputable art dealer, Mrs. Baldinger had prized and possessed it for decades without question of her right to do so, when suddenly she faced a coterie of strangers determined to pull it off her wall.<sup>56</sup> Almost certainly, a decision for the true owner in *DeWeerth v. Baldinger* would have been experienced as a pleasant but unexpected windfall for Mrs. DeWeerth and a distinctly rude surprise for Mrs. Baldinger.

To be sure, the very substantial loss originally inflicted on Mrs. DeWeerth cannot be denied. Anyone who has lost her valuable possessions to a thief has suffered a major injustice, but that does not mean it is justice to inflict exactly the same loss on innocent others. Transferring injustice from one to another may be satisfying to the latter, but it hardly can be called "justice." It merely replaces one injustice with another. More generally, Mrs. DeWeerth and Mrs. Baldinger represent two different interests that are shared by every property owner: (1) the interest in being able to regain possession in the event of theft or loss; and (2) the interest in being able to invest in property, in good faith, without fear of having it taken away due to unforeseen claims challenging the title. In any contest over stolen or lost property, these two interests will compete, but they are nevertheless interests that every property owner shares.

One function of statutes-of-limitations is to provide a rough balance between these two competing interests. Longer limitations periods tend to push the balance in favor of true owners; shorter periods tend to favor innocent buyers who invest in property in good faith and may be equally deserving of the law's concern. But no matter how short the nominal statutory period may be, exceptions to statutes of limitations, such as discovery rules<sup>57</sup> or New York's demand-and-refusal

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55. *DeWeerth*, 38 F.3d at 1269.

56. *Id.*

57. Discovery rules delay the running of the statute of limitations until the true owner has discovered the item or would have discovered the item by use of reasonable efforts. See *O'Keeffe v. Snyder*, 416 A.2d 862, 869 (N.J. 1980) ("The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.").

requirement,<sup>58</sup> tend to skew the balance in favor of erstwhile “true” owners at the expense of innocent purchasers.

When one of two innocent parties must suffer, the presumably preferable approach is to lay the loss on the one who will suffer less.<sup>59</sup> In this context, the least-sufferer would be the one whose expectations are likely weaker or non-existent. That person would normally be the one who has already lost possession and, due to lapse of time, has little or no realistic hope of getting it back. This person’s reasonable expectations of future possession would almost always be weaker than those of a person who has not only possession, but also every reason to believe that she has good title, especially if she paid a substantial price in good faith.<sup>60</sup>

Furthermore, assuming that the law generally favors investments in private property and seeks to encourage the acquisition and possession of things, such as works of art, it makes sense for the law to place a higher priority on providing security for innocent buyers and a lower priority on the erstwhile owner’s interest in regaining wrongfully taken or lost property. For one thing, every owner is an acquirer, and every acquirer has an interest in being protected from unknown, potential claims attacking the title conveyed by the transferor.<sup>61</sup> Although owners also want to be able to regain items that might later be lost or stolen, that interest is contingent and speculative, dependent on future events that can only be controlled to some extent, such as by theft-prevention measures. As such, the interest in regaining possession

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58. *Id.* at 868; see also Judith Wallace, *New York’s Distinctive Rule Regarding Recovery of Misappropriated Art After the Court of Appeals’ Decision in Mirvish v. Mott*, 3 SPENCER’S ART L. J. 17, 18 (2012) (describing New York’s demand-and-refusal requirement).

59. This would seem, at least, to be the utilitarian or consequentialist solution to the problem, and deontological analysis seems, to me at least, to be a dead end. Specifically, if taking somebody’s possession is a kind of moral wrong that can never be justified by “lesser-evil” consequentialist considerations, then the law should never intervene to take possession from one innocent person and give it to another. Another consequentialist approach is to place the loss on the one who could have avoided it at the lowest cost. Ordinarily, the lowest-cost avoider is the theft victim because it is usually easier to protect property from theft than to verify the transferor’s title to a chattel, especially absent a system of title registration.

60. The cognitive distortion known as the “endowment effect” provides another explanation. The effect describes people’s tendency to value a thing more highly when they already have it and face the possibility of losing it, as compared with the value they place on things they do not yet possess. See, e.g., *The Endowment Effect: It’s Mine, I Tell You*, ECONOMIST (Jun. 19, 2008), <http://www.economist.com/node/11579107> [<https://perma.cc/QJT4-K5XX>].

61. Gary D. Sessler & Kenneth S. Levine, *Art Buyer’s Due Diligence: Do You Own It Free and Clear?*, 1 SPENCER’S ART L. J. 8, 8 (2010).

seems entitled to a lower priority than owners' present and immediate interest in retaining the things that they already possess. After all, it seems far more probable that a person would be deterred from investing in property by the possibility of loss due to hidden vulnerabilities in a transferor's title than by the potential difficulty of recovering the property if thieves take it.<sup>62</sup> A general legal policy to encourage and support investment in property should take this difference into account.

Perhaps the most important reason for prioritizing owners' interest in receiving protection from title challenges, and therefore skewing the statute-of-limitations balance in favor of innocent purchasers, is that property rights are fundamentally indeterminate. Because the law places virtually no limit on either the "competing rules . . . available in almost any case"<sup>63</sup> for mounting a challenge to another's property rights, or on and the "choice of which rules to apply in the first place,"<sup>64</sup> property will likely remain vulnerable to ownership challenges as long as there are sharp-eyed lawyers looking for ways to get it. But the law can, at least, adopt and enforce strict and short statutes of limitations to cabin the timeframes from which title challengers can draw facts to support their "competing" claims. Shorter and stricter statutes of limitations will tend to favor parties whose claims to ownership are based on the simple, hard-to-contest facts of actual possession, which lie at the core of the social practice of property. Prioritizing owners' interests in protection against transferor title defects would particularly support investment in property categories, such as works of art, which can be valuable, portable, and notoriously shadowy in their chains of title. Longer limitations periods only encourage potential challengers to look for and latch onto ambiguities in the apparent facts of the past as bases for claims. To reduce the hazards of buying and selling art,<sup>65</sup> laws should likewise reduce the risks posed by sharp-eyed lawyers through shorter limitations periods.

## V. CONCLUSION

Like all law, property law is indeterminate, which means that ownership itself is indeterminate. Even the most seemingly secure ownership rights are mere prophecies, and these prophecies can fail if a

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62. To be sure, the law's commitment to restore stolen goods to their rightful owners can help to reduce theft by working as a potential deterrent. Given the criminal penalties that exist, however, as well as the relative rarity of successful restorations, it is doubtful whether strengthening owner's rights to regain possession provides a significant deterrent to theft.

63. Altman, *supra* note 6.

64. Altman, *supra* note 6.

65. Although the law on the subject is contested, at least one court has held that sellers can be subject to liabilities far exceeding the selling price under the implied warranty of title for sales of goods. *Menzel v. List*, 246 N.E.2d 742, 745–46 (N.Y. 1969).

clever lawyer mounts a challenge. Every owner is therefore vulnerable to some degree to challenges based on new or unexpected legal rules that tend to support a re-assignment of ownership from one person to another. Where valuable property is concerned, such as works of art, lawyers have obvious incentives to fashion arguments in support of reassignments of ownership to their clients.

Legal rules that lengthen the time to sue for lost or stolen property dilute the ability of statutes of limitation to cure title uncertainties, real or contrived. This dilution cannot be justified by the added protection that such lengthening provides for the erstwhile owner's interest in regaining lost possession. For most owners, the marginal protection afforded by an augmented right to regain possession is more than offset by the increased danger to owners' interest in retaining valuable property that has been purchased in good faith.