Fordham Law Review

Volume 64 | Issue 1 Article 3

1995

A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art

Ashton Hawkins

Richard A. Rothman

David B. Goldstein

A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art

Cover Page Footnote

 The authors gratefully acknowledge the invaluable assistance of Patricia D. Acha in the presentation of this article.

A TALE OF TWO INNOCENTS: CREATING AN EQUITABLE BALANCE BETWEEN THE RIGHTS OF FORMER OWNERS AND GOOD FAITH PURCHASERS OF STOLEN ART

ASHTON HAWKINS
RICHARD A. ROTHMAN
*DAVID B. GOLDSTEIN**

INTRODUCTION

ART theft has probably been with us for almost as long as there has been art, which is to say, virtually forever.[1] As the value of art transactions has expanded, now totalling billions of dollars annually, the theft of art and the trade in stolen art has kept pace.[2] Stolen art frequently returns to the stream of commerce, where it is often obtained by an innocent good faith purchaser for value[3] who is unaware of the theft many years ago. When the former owner[4] finally locates the art in the possession of this good faith purchaser and commences an action against this innocent purchaser for conversion or replevin,[5] the courts are faced with the unpleasant dilemma of allocat-

---

 The authors gratefully acknowledge the invaluable assistance of Patricia D. Acha in the preparation of this article.

1. James Daly, *Tracers of the Lost Art*, Forbes, Oct. 10, 1994, at 21; William Touhy, *Picture This: Art Thievery Is Thriving*, L.A. Times, Aug. 16, 1994, at H1, H4 ("Art thefts, of course, have occurred since the first art objects were made . . . .").

2. Daly, *supra* note 1, at 21. Art theft, with an estimated profit of $2 billion annually, is the third most profitable crime behind drug smuggling and illegal arms trading. Touhy, *supra* note 1, at H1; David Holmstrom, *Stolen-Art Market Is a Big Business at $2 Billion a Year*, The Christian Science Monitor, Aug. 11, 1994, at 1. Art theft from museums alone is estimated at between $1 and $2 billion annually. Mary Ann Marger, *Artful Dodgers Face the Feds*, St. Petersburg Times, Sept. 16, 1994, at 26.

3. For the purposes of this article, the term "purchaser" will refer to a good faith purchaser for value or an innocent donee, such as a museum, unless otherwise specified.

4. The term "owner" or "former owner" is used throughout this Article to denote an entity or person who is not in possession of a work of art, but is pursuing a claim for recovery of that art or for damages based on a claim of prior possession or superior title to the current holder of that art. The term is not meant to connote a legal or moral judgment as to that claimant's right to the art.

5. Generally speaking, an act of conversion "is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." 23 N.Y. Jur. 2d *Conversion* § 1 (1982) (citation omitted); *see id.* § 3; *see also* Sporn v. MCA Records, Inc., 448 N.E.2d 1324, 1326 (N.Y. 1983) (stating that an action for conversion constitutes a "denial of plaintiff's rights to the property

ing rights and burdens between these two innocent victims of the thief, who is typically either unknown or judgment-proof.[6]

At the heart of the stolen art problem—virtually dispositive in many cases—is the question of the appropriate statute of limitations, i.e., how long after the theft can the former owner sue the current holder of the art? This problem arises from a fundamental principle of law, combined with the unique attributes of art. Anglo-American law is well-settled that neither a thief nor a good faith purchaser from the thief, nor even subsequent good faith purchasers, can pass good title.[7] Indeed, the tort of conversion is unique in that it permits a plaintiff to recover property or money damages from a defendant who is by definition innocent of any wrongdoing or of inflicting harm on the plaintiff, regardless of the defendant's ability to recover against the actual wrongdoer. Despite this unusual situation, courts have, for statute of limitations purposes, treated innocent purchasers no less harshly—and often more harshly—than "guilty" tortfeasors.

The statute of limitations problem is heightened with respect to valuable works of art because, unlike most forms of personal property, art is frequently nonperishable (often lasting for centuries); easily transportable (the art trade, legitimate and otherwise, is notable for its internationalism) and hence, easily concealed; readily identified; nonfungible; and often of dramatically increasing value. Thus, it is not uncommon for claims to recover stolen art to be made decades after the theft, often against innocent purchasers.

Unfortunately, legal rules that allocate rights and burdens among the parties involved in stolen art—both the guilty and the innocent—remain mired in "horse-and-buggy law,"[8] relying on ancient doctrines ill-suited to respond to the modern stolen art problem. Judicial and

---

or possession of that property"); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 15, at 88, 93 (5th ed. 1984) [hereinafter Prosser & Keeton] (discussing methods by which a defendant may wrongfully acquire possession). Under New York law, a replevin action "may be brought to try the right to possession of a chattel." N.Y. Civ. Prac. L. & R. § 7101 (Consol. 1976). In other words, a replevin action is brought to determine which party has the superior interest in the chattel, not which party has undisputed legal title. David D. Siegel, New York Practice § 337 (2d ed. 1991). Historically, "[t]he origin and precise scope and nature of the action of replevin at common law are lost in antiquity and there has been doubt and controversy concerning them rendering it impossible to be didactic." 12 Carmody-Wait § 82:2 (2d ed. 1966).

6. *See* Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) ("The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss."), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

7. *See* Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 833 (S.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); Restatement (Second) of Torts § 229 & cmt. d (1965); U.C.C. § 2-403(1) ("A purchaser of goods acquires all title which his transferor had or had power to transfer . . . ."); Fowler V. Harper et al., The Law of Torts, § 2.15A, at 186-87 (2d ed. 1986).

8. Prosser & Keeton, *supra* note 5, § 15, at 102 n.39; *see also id.* at 88-90 (tracing historical development of tort of conversion); Harper, *supra* note 7, § 2.13, at 179

legislative attempts to address this issue either have focused on a small piece of the problem or have exacerbated the problem. This Article proposes a comprehensive legislative solution based on a computerized art theft registry and focused on the reality—all too often ignored by the courts—that the rights of two innocents are frequently at stake.

The 1991 decision of the New York Court of Appeals—the highest court in the art market capital of the world—in *Solomon R. Guggenheim Foundation v. Lubell*[9] exemplifies this judicial failure to balance the rights of the two innocents. In *Guggenheim*—an action to recover a stolen painting from a good faith purchaser—the court held that the statute of limitations does not begin to run until the former owner locates, demands, and is refused the return of its property, regardless of the former owner's failure to exercise diligence in locating the stolen work. As a result of this decision, New York effectively has no statute of limitations for the recovery of stolen property, and innocent purchasers are perpetually at risk of a claim of theft by a former owner.

Although the court in *Guggenheim* expressed a fear that a less "owner-friendly" rule would turn New York into a haven for stolen art,[10] its decision instead threatens to turn New York into a haven for questionable litigation of ancient claims,[11] and thereby may have a chilling effect on legitimate art transactions and art exhibitions in the state. Moreover, rather than helping to solve or to ameliorate the widespread and serious problems involving art theft, *Guggenheim*'s view of the law has exacerbated them, permitting former owners to avoid taking the steps that might lead to the recovery of stolen art, and thus preventing innocent purchasers of stolen art from becoming new victims of the thief.

(noting "the incrustations of ancient lore associated with the tort of conversion" (citations omitted)).

9. 569 N.E.2d 426 (1991).

10. *See id.* at 431; *see also* Sydney M. Drum, Comment, DeWeerth v. Baldinger: *Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. Rev. 909, 938-42 (1989) (discussing the discovery or due diligence rule and stating that it promotes illicit trade in stolen art); Alexander Stille, *Was This Statue Stolen?*, Nat'l L.J., Nov. 14, 1988, at 1 (discussing the increasing aggressiveness of foreign countries in protecting their "cultural property").

11. *See, e.g.*, Hoelzer v. City of Stamford, 933 F.2d 1131 (2d Cir. 1991) (regarding litigation commenced after the city made no effort to ascertain the whereabouts or existence of its property for 19 years); Golden Budha Corp. v. Canadian Land Co. of America, 931 F.2d 196 (2d Cir. 1991) (regarding litigation commenced 18 years after plaintiff learned that defendant had possession of the property); Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990) (concerning lawsuit commenced 13 years after plaintiff learned the whereabouts of the property); *see also* Charles D. Webb, Jr., Note, *Whose Art is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 Ky. L.J. 883, 892-94 (1990-91) (arguing that the discovery or due diligence rule will encourage filing of stale claims); Richard Perez-Peña, *The Art-Law Center of the Universe*, N.Y. Times, Oct. 22, 1993, at B7 (discussing the attractiveness of New York City as a venue for ancient claims of stolen art); *infra* part II.B (discussing cases decided after *Guggenheim*).

The fundamental flaw in *Guggenheim*, authored by then Chief Judge Sol Wachtler, is its failure to consider that it had two "innocents" before it—the innocent theft victim and the innocent purchaser. Instead, the court absolved the former owner, as a matter of law, of *any* duty of diligence under the applicable statute of limitations[12] to attempt to locate its missing art.[13] The court harshly treated the innocent purchaser as worse than the thief,[14] holding that the innocent purchaser could challenge the owner's delay only through the equitable defense of laches. Under a laches defense, the burden falls on the purchaser to show that the former owner unreasonably delayed in bringing suit *and* that the purchaser was unduly prejudiced by the unreasonable delay.[15] This fact-intensive inquiry can rarely be resolved without protracted litigation.[16] *Guggenheim* simply failed to give proper weight to the value of repose both to settled commercial relations and to the proper functioning of the legal system.

Under *Guggenheim*'s inflexible application of New York's unique demand and refusal rule, former owners will be able to prevail over innocent purchasers even after decades of inaction in attempting to locate the missing work. Moreover, although *Guggenheim* itself was a straightforward art theft case, New York is becoming a magnet for litigation of a variety of ancient claims as plaintiffs seek to extend its reasoning to matters having little or nothing to do with "stolen" art, including patrimony claims brought by foreign governments,[17] claims

12. Under New York law, the statute of limitations for conversion or replevin is three years. N.Y. Civ. Prac. L. & R. § 214(3) (McKinney 1990).

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

14. *See id.* at 429; *infra* note 53 and accompanying text.

15. *See Guggenheim*, 569 N.E.2d at 431. Prejudice, for purposes of laches, usually entails either a significant loss of evidence or a material change in the defendant's position as a result of plaintiff's delay. *See infra* part I.D.

16. *See infra* notes 110-11 and accompanying text.

17. Patrimony cases involve claims by foreign governments to obtain title to cultural property that allegedly was located within their borders and subject to a "cultural property" law purporting to vest ownership of all such property in the government. Although most such cases do not involve actual theft, foreign governments seek to characterize the property as stolen in order to exploit United States law to the effect that even a good faith purchaser cannot take title to "stolen" property. *See, e.g.*, Republic of Croatia v. Trustee of the Marquess of Northhampton, 610 N.Y.S.2d 263, 265 (App. Div. 1994) (concerning Croatia and Hungary's unsuccessful attempt to gain ownership of a treasure of unknown origins); Gary Taylor, *Peru Relics Prove Baffling to Prosecutors*, Nat'l L.J., Oct. 30, 1989, at 8 (discussing *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), a case concerning Peru's attempt to assert legal ownership of artifacts seized by U.S. Customs Service from American citizens).

Only patrimony claims based on ownership—as distinguished from a mere right to expropriate or prohibit export—currently are even cognizable in the United States courts, and there is sharp debate concerning the circumstances under which foreign cultural property laws should be enforced in the United States. *See generally* Paul M. Bator, *An Essay on the International Trade in Art*, 34 Stan. L. Rev. 275, 310-66 (1982) (evaluating existing and potential methods of regulating international art trade); John H. Merryman, *The Retention of Cultural Property*, 21 U.C. Davis L. Rev. 477, 479-82

for misplaced art,[18] and claims by heirs challenging the validity of the artists' original transactions.[19]

As a direct result of *Guggenheim*, there is a growing concern on the part of art dealers, collectors, and museums regarding art transactions and exhibitions of artworks in New York. *Guggenheim* confirms that the courts are institutionally ill-equipped to achieve a proper balance of the competing interests at stake. Unless a proper balance is restored between the rights and duties of innocent former owners and purchasers, New York's "worldwide reputation as a preeminent cultural center,"[20] including both the commerce and display of art, with its many museums, galleries, private collectors, auction houses, and resident artists, will be jeopardized.

The appropriate balancing of rights and duties among former owners, sellers, and purchasers would appear to require a legislative, rather than a judicial, solution.[21] Given that commerce in stolen art is not a local or even a national phenomenon, an international solution would, in theory, be most effective. Because of the difficulties of "legislating" on the international level,[22] however, this Article proposes a federal legislative solution to the art theft problem highlighted by *Guggenheim* based on a computerized international art loss registry using currently available technology. Alternatively, and recognizing the difficulty of getting the attention of Congress to legislate in an historical area of state power such as tort statutes of limitations,[23] this Article proposes that the State of New York adopt this proposal. The

(1988) (analyzing the objectives and policies of "foreign cultural property retention schemes"). *See also infra* note 227 (discussing proposed UNIDROIT treaty to enforce cultural property laws).

18. *See, e.g.*, Hoelzer v. City of Stamford, 933 F.2d 1131, 1134 (2d Cir. 1991) (concerning the city's claim against a restorer of Depression-era murals brought 19 years after student rescued them from the trash during a school renovation).

19. *See* Richard Perez-Peña, *Settlement Over Artwork By an Ex-Slave*, N.Y. Times, Oct. 7, 1993, at B11 (concerning a settlement agreement between descendents of an ex-slave, Bill Traylor, who was posthumously recognized as a great folk artist, and an artist and gallery); Richard Perez-Peña, *Link to an Illustrious Past, and a Possible Fortune*, N.Y. Times, Dec. 9, 1992, at B1, B2 (detailing suit by heirs of Bill Traylor against an artist and New York gallery for share of profits from Traylor's works); Judd Tully, *Bill Traylor Case Ends Amicably*, ARTnewsletter, Nov. 16, 1993, at 4 (discussing settlement reached between heirs of Bill Traylor and the gallery and artist).

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

21. Any such legislation should avoid a definitive resolution of the unknowable and metaphysical question, "What is Art?" Rather, this Article suggests that "art" is self-defined by the participants by virtue of availing themselves of the statutory procedures proposed herein for recovery of stolen "art," and by a minimum value for access to those procedures.

22. Proposed and enacted international laws for the recovery of limited classes of stolen art are discussed *infra* parts III.C.1, III.C.3.

23. Congress has enacted a statute of limitations under the Cultural Property Implementation Act ("CPIA"), 19 U.S.C. §§ 2601-2613, which applies to a very limited category of foreign art objects, and which provides recovery rights only to foreign governments. *See infra* part III.C.1.

proposal may serve as a model for other jurisdictions. At a minimum, and as a first step, the New York legislature should overrule *Guggenheim* and reallocate the rights and duties of the relevant parties with respect to the limitations period based on a standard discovery rule.[24]

It must be understood that no solution, legislative or otherwise, will be perfect. Under any legislation, some innocent party—whether the former owner or the purchaser—will be saddled unfairly with a loss. Unlike *Guggenheim*, however, which uniformly imposes the loss entirely on innocent purchasers while placing slight responsibility on former owners to avoid those losses, the legislative proposal outlined here allocates responsibilities and burdens on the parties that can most easily meet them and losses on the parties who are most able to avoid or to mitigate them.[25]

More specifically, this article proposes that the accrual of the statute of limitations for an art theft victim's claim for conversion or replevin would depend on whether the former owner or subsequent purchaser avails themself of the special procedures set forth in the proposed statute. Under these procedures, a former owner who "registered" expeditiously the stolen work with a confidential, user-financed international computerized stolen art registry[26] would be protected against a limitations claim by subsequent purchasers. Correspondingly, a purchaser who consulted the registry at the time of purchase would be protected by a three-year limitations period from the date of purchase.

Thus, a registered owner's time to commence suit would be tolled indefinitely against a subsequent purchaser,[27] so long as the owner exercised reasonable diligence in searching for the art, while the three-year statute would begin to run in favor of the purchaser at the time he checked the registry and found that the work in question had not been registered. The registry would notify the registered owner that an inquiry had been made by a prospective purchaser and confidential records would be kept of such inquiries. If neither party availed itself of the registry, the proposed statute would apply a discovery rule. Issues of retroactivity and lack of knowledge of the registries are also addressed.[28]

---

24. Under a discovery rule, the statute of limitations commences when the plaintiff discovers or reasonably should have discovered the facts essential to assert a cause of action. *See infra* part III.B.

25. This proposal is discussed in further detail, *infra* part V.

26. At the present time, the only such computerized registry is operated by the International Art & Antiques Loss Register, a private, for-profit British corporation, with offices in London and New York City. *See infra* notes 231-39 and accompanying text.

27. Such a purchaser could not, by definition, be a good faith purchaser because he either did not check the registry or ignored the results.

28. *See infra* part V.

Part I of this Article analyzes *Guggenheim* and shows that New York's demand and refusal rule, as applied in *Guggenheim*, unfairly over-protects non-diligent owners as against innocent purchasers. Part II reviews *Guggenheim*'s predecessors and its progeny, and demonstrates that *Guggenheim* has incorrectly reinterpreted the demand and refusal rule from a pro-purchaser to a pro-owner rule. Part III critiques some of the alternative limitations doctrines available in balancing personal property rights in stolen unique chattel such as art, and reviews various legislative proposals. Part IV discusses the technological availability of a computerized international stolen art reporting system that could help resolve the stolen art statute of limitations problem. Part V details and analyzes the proposed legislative solution to the stolen art statute of limitations problem and explains why, although the proposal is not a cure-all to all timeliness problems related to stolen art claims, it goes far in equitably balancing the rights and burdens between former owners and good faith purchasers.

I. THE *GUGGENHEIM* DECISION

A. *Background*

Solomon R. Guggenheim Foundation v. Lubell[29] involved an action for replevin, or, in the alternative, for conversion, brought by the Solomon R. Guggenheim Museum (the "Guggenheim" or the "Museum") in New York City against Rachel Lubell in 1987.[30] Sometime after April 1965, a Chagall gouache[31] was stolen from the Guggenheim.[32] The painting was purchased in May 1967 by Ms. Lubell and her since deceased husband from the prestigious Madison Avenue Robert Elkon Gallery for $17,000.[33] The Lubells were treated as innocent, good faith purchasers for value: they investigated the paint-

29. 569 N.E.2d 426 (N.Y. 1991).

30. *Id.* at 428.

31. The gouache, painted by Marc Chagall in 1912, is known as *Menageries* or *Le Marchand de Bestiaux* (The Cattle Dealer) and was painted in preparation for an oil painting entitled *Le Marchand de Bestiaux*. Solomon R. Guggenheim donated the gouache to the Museum in 1937. *Id.*

32. The Guggenheim's accession card for the gouache indicates it was seen in the Museum on April 2, 1965. The next (undated) entry notes that it was "missing." *Id.*; Deposition of Vivian E. Barnett, Curator of the Guggenheim, at 24, 30-31 (Nov. 5, 1987) [hereinafter Barnett Dep.] (on file with *Fordham Law Review*). Although the Guggenheim claimed that it only learned of the theft when it undertook a complete inventory of the Museum collection in 1969-70, *Guggenheim*, 569 N.E.2d at 428, there was evidence that it knew the work was missing before 1967. Barnett Dep., at 44-48. *See also* Richard Perez-Peña, *Guggenheim Presses Case on a Stolen Painting*, N.Y. Times, Dec. 27, 1993, at B1, B4 [hereinafter Perez-Peña, *Guggenheim Presses Case*] (commenting on the reasons why the painting may have been missing before 1967).

33. *Guggenheim*, 569 N.E.2d at 428.

ing's provenance, paid fair market value, and publicly displayed the painting.[34]

The Guggenheim took no steps to publicize the theft, nor did it inform any other museums, galleries, artistic organizations, or any law enforcement authorities of the theft.[35] Other than an apparent internal investigation, the Guggenheim did nothing to attempt to recover the painting.[36] The Museum "deaccessioned" the gouache in 1974, thereby expunging the work from the official inventory of the Museum.[37]

In August 1985, almost 20 years after its sale to the Lubells, the Guggenheim fortuitously learned of the painting's location.[38] In January 1986, the Museum formally demanded that Ms. Lubell return the gouache. She refused, and the Guggenheim commenced suit in September 1987 in the Supreme Court, New York County, seeking return of the Chagall gouache or, in the alternative, its then fair market value of $200,000.[39]

---

34. *Id.* The Elkon Gallery had purported provenance papers for the Lubells to inspect; the Lubells publicly exhibited the painting at the Elkon Gallery in 1967 and 1981, and they openly displayed it in their home for over 20 years. Their investigation of the provenance prior to purchase included contacting Chagall himself and Chagall expert Franz Meyer, Director, Kunstmuseum, Basel, Switzerland. *Id.* at 431; *see also* Perez-Peña, *Guggenheim Presses Case*, *supra* note 32, at B1, B4 (discussing events surrounding the purchase of the painting and the purchasers' investigation of its title).

35. *Guggenheim*, 569 N.E.2d at 428; Barnett Dep., *supra* note 32, at 52-58. The Guggenheim did not inform its insurance company until 1970, three years after the work was apparently discovered missing. *Id.* at 51-52, 60-61. Nor did the museum inform the artist, Marc Chagall, or the Chagall expert, Franz Meyer, although both were alive at the time. *Id.* at 54-57. Both Ms. Barnett, the curator, and Mr. Thomas Messer, the Museum director, admitted that the common procedure in cases of theft was to report it to the authorities. *Id.* at 75-76.

36. *See Guggenheim*, 569 N.E.2d at 428. The Museum claimed that its inaction was a "tactical decision based upon its belief that to publicize the theft would succeed only in driving the gouache further underground and greatly diminishing the possibility that it would ever be recovered." *Id.* Alternatively, the Museum may simply have been embarrassed that a Museum employee apparently walked off with the Chagall and several other works by artists such as Pablo Picasso and Fernand Léger. Perez-Peña, *Guggenheim Presses Case*, *supra* note 32, at B4; Barnett Dep., *supra* note 32, at 74-76.

37. *Guggenheim*, 569 N.E.2d at 428.

38. An art dealer had brought a transparency of the painting to Sotheby's for an auction estimate. A former Guggenheim employee working at Sotheby's recognized the painting and notified the Guggenheim. *Id.*

39. *Id.* Under New York law, the prevailing plaintiff is entitled to the fair market value of the art at the time of trial, not the time of the theft. *See* Menzel v. List, 246 N.E.2d 742, 744-45 (N.Y. 1969). Lubell then impleaded the estate of Robert Elkon, the owner of the Elkon Gallery, as a third party defendant, who interpleaded the Gertrude Stein Gallery. *See* Perez-Peña, *Guggenheim Presses Case*, *supra* note 32, at B4. New York law permits the good faith purchaser to implead the seller, including when the seller was also a good faith purchaser, for breach of implied warranty of good title. *See* Menzel v. List, 279 N.Y.S.2d 608, 609 (App. Div. 1967) (per curiam), *rev'd on other grounds*, 246 N.E.2d 742 (N.Y. 1969).

The trial court granted Ms. Lubell's motion for summary judgment based on a statute of limitations defense. The court, following *DeWeerth v. Baldinger*,[40] in which the Second Circuit interpreted New York law as imposing on art theft victims a duty of reasonable diligence to attempt to locate stolen property,[41] held that the Museum's failure to do anything for twenty years except search its own premises was unreasonable as a matter of law.[42]

The Appellate Division reversed, finding that, under New York's demand and refusal rule, the trial court (and the Second Circuit) erred in imposing a duty of reasonable diligence on the theft victim in the context of a statute of limitations defense.[43] The court found "it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, *no matter how long*."[44] Instead, the court held that the issue of the Museum's diligence should be considered only in the context of Lubell's equitable laches defense,[45] in which Lubell would have to show prejudice resulting from the Museum's unreasonable delay.[46] According to the Appellate Division, the three-year limitations period did not even *begin* to run until the missing property was located, demand for its return had been made by the Museum, and its return had been refused by Lubell.[47]

B. *The Court of Appeals Decision*

The New York State Court of Appeals affirmed the decision of the Appellate Division and adopted its reasoning on the statute of limitations issue. As enunciated by the court, "The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it."[48] The court explicitly rejected the holding in *DeWeerth*, stating that "the Second Circuit should not have imposed a duty of

40. 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

41. *DeWeerth*, 836 F.2d at 107-08.

42. *Guggenheim*, 569 N.E.2d at 428-29.

43. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 621-22 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

44. *Guggenheim*, 550 N.Y.S. at 622 (emphasis added). Whether facetiously or not, the court further remarked, "Indeed . . . delay alone could be viewed as having benefited [Lubell], in that it gave her that much more time to enjoy what she otherwise would not have had." *Id.* (citation omitted).

45. For a discussion of laches, see *infra* part I.D.

46. *Guggenheim*, 550 N.Y.S. at 621. Lubell asserted that "the purchase of the gouache constituted a prejudicial change of position," in that if the Guggenheim had acted diligently, it would have recovered the gouache before Lubell had an opportunity to purchase it. *Id.* at 622. The court assumed the validity of Lubell's prejudice argument, but focused on open factual issues regarding the reasonableness of the Museum's actions and Lubell's own diligence. *Id.* at 620-23.

47. *Id.* at 620.

48. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991) (citing Goodwin v. Wertheimer, 1 N.E. 404, 405 (1885); Cohen v. Keizer, Inc., 285

reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations."[49] According to the court, the only obligation New York law imposes on the "true owner [is that] having discovered the location of its lost property, [the owner] cannot unreasonably delay making demand upon the person in possession of that property."[50]

As the court recognized, the demand and refusal rule was judicially created to protect good faith purchasers, *not* non-diligent owners: "[u]ntil demand is made and refused, possession of the stolen property . . . is not considered wrongful."[51] In the absence of wrongdoing by the purchaser, no cause of action for replevin exists against a good faith purchaser until demand and refusal has occurred. The court then leapt to the conclusion that the limitations period cannot begin prior to refusal.[52] The court noted the anomaly between the demand and refusal rule and the rule that when the stolen property remains in the possession of the thief, the statute "runs from the time of the theft, even if the property owner was unaware of the theft at the time that it occurred."[53] The court, however, otherwise failed to address or to justify this anomaly.

Although the court rejected Lubell's limitations defense, it agreed with the Appellate Division that the Museum's lack of diligence could be considered "in the context of [Lubell's] laches defense. The conduct of *both* [parties] will be relevant . . . and . . . prejudice will also need to be shown."[54] Finally, the court agreed with the Appellate Division that the burden of proof on Lubell's affirmative defense that

---

N.Y.S. 488, 489 (App. Div. 1936)). In fact, neither of these cases involved statute of limitations issues.

49. *Guggenheim*, 569 N.E.2d at 429-30.

50. *Id.* at 430 (citation omitted).

51. *Id.* (citing Gillet v. Roberts, 57 N.Y. 28, 30-31 (1874); Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966)).

52. *Guggenheim*, 569 N.E.2d at 430 (stating that "the demand and refusal is a substantive and not a procedural element of the cause of action"); *see* Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 620 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

53. 569 N.E.2d at 429 (citing Sporn v. MCA Records, 448 N.E.2d 1324, 1326-27 (N.Y. 1983); Varga v. Credit-Suisse, 171 N.Y.S.2d 674, 676-77 (App. Div. 1958), *aff'd*, 155 N.E.2d 865 (N.Y. 1958)). The harshness of this result is ameliorated only in the limited class of cases in which the thief actively concealed the theft (as opposed to the identity of the thief or the location of the chattel), during which time of active concealment the statute is tolled. *See, e.g.*, General Stencils, Inc. v. Chiappa, 219 N.E.2d 169, 171 (N.Y. 1966) (holding that one who conceals theft is estopped from asserting statute of limitations defense). *See generally In re* Steyer, 521 N.E.2d 429, 430 (N.Y. 1988) (finding that a wrongdoer is estopped from asserting statute of limitations defense when he wrongfully concealed misconduct beyond the limitations period). *But see* Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1163 & nn.23-24 (2d Cir. 1982) (arguing that a thief is not treated more favorably than the good faith purchaser, and contending that a broad estoppel rationale underlies state court cases involving theft, which would prevent thief from asserting statute of limitations defense).

54. *Guggenheim*, 569 N.E.2d at 431; *Guggenheim*, 550 N.Y.S.2d at 622.

the painting was not stolen rested on Lubell, not the Guggenheim.[55] The court then remanded the case for trial, for consideration of, inter alia, Lubell's laches defense.[56]

C. *Critique of* Guggenheim

Guggenheim's statute of limitations rule for stolen property is not only unique to New York,[57] but it is not applied in any other area of the law in New York.[58] The Court of Appeals proffered several justifi-

55. 569 N.E.2d at 431. Lubell had argued that "[a]side from the Statute of Limitations" issue, the Museum had not presented proof that the painting was stolen. If the Museum had disposed of the painting by sale or otherwise, then Lubell, as a good faith purchaser, would have title superior to the Museum's. *Guggenheim*, 550 N.Y.S.2d at 623 ("[A]s both sides agree, if defendant is a good-faith purchaser and the gouache was not stolen, then [Lubell's] title is superior to [the Guggenheim's]."") (citing U.C.C. § 2-403(1) ("A person with voidable title has power to transfer a good title to a good faith purchaser for value.")). The possessor, however, need not establish that the painting was not stolen if the claimant cannot first establish his prior ownership. *See* Republic of Croatia v. Trustee of the Marquess of Northhampton, 610 N.Y.S.2d 263, 264-65 (App. Div. 1994).

56. The case ultimately settled on the eve of trial on December 28, 1993. Although the settlement terms are confidential, it has been reported that Lubell and the two defendant galleries allegedly agreed to pay the Guggenheim $212,000 in damages in exchange for Lubell retaining possession of and obtaining title to the painting. Andrew Decker, *Guggenheim and Collector Resolve Suit over Chagall Gouache*, ARTnewsletter, Jan. 25, 1994, at 4-6; Constance Lowenthal, *Art Crime Update*, Wall St. J., Feb. 18, 1994, at A10; Richard Perez-Peña, *An Art Museum and A Collector Reach a Quiet Compromise*, N.Y. Times, Jan. 2, 1994, § 4, at 2.

57. Although a few ancient cases in other jurisdictions required a demand before a former owner could *bring* a conversion claim against a good faith purchaser, *see* Burckhalter v. Mitchell, 3 S.E. 225, 226 (S.C. 1887); Parker v. Middlebrook, 24 Conn. 207, 210 (1855); Restatement (Second) of Torts § 229 cmt. h (1965); Prosser & Keeton, *supra* note 5, § 15, at 94 n.50; John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 U.C.L.A. L. Rev. 1122, 1135-36 (1980); *see also infra* note 67 (citing cases and commentary), the authors are aware of no other jurisdiction today that holds that the *limitations* period against a good faith purchaser of stolen property does not commence until demand and refusal. *See, e.g.*, Christensen Grain, Inc. v. Garden City Coop. Equity Exch., 391 P.2d 81, 85 (Kan. 1964) (stating that conversion claim "accrued when [defendant] innocently purchased the [stolen property] from the thief," thereby overruling demand and refusal rule of Daniel v. McLucas, 55 P. 680 (Kan. Ct. App. 1899)).

58. The New York Civil Practice Laws and Rules section 206(a) provides that, when a demand is required, a cause of action accrues when the *right* to make the demand is complete, *i.e.*, when the *wrong* is committed. N.Y. Civ. Prac. L. & R. § 206(a) (McKinney 1990) (prior to 1991 amendment); *id.* at Practice Commentaries to § 206:1; *see also* Federal Ins. Co. v. Fries, 355 N.Y.S.2d 741, 744 (Civ. Ct. 1974) (stating minority rule that conversion occurs upon refusal of demand). In certain specified cases, the right to make a demand is complete when the wrong is discovered, which has been interpreted to mean when a reasonable person discovered or should have discovered the wrong. N.Y. Civ. Prac. L. & R. Practice Commentaries to § 206:1 (McKinney 1990) (prior to 1991 amendment). The "discovery" rule applies to misappropriations by fiduciaries, *id.* § 206(a)(1), breach of bailment agreements, *id.* § 206(a)(2), and toxic exposures, *id.* § 214-c(2); *see, e.g.*, Jensen v. General Elec. Co., 623 N.E.2d 547, 551 (N.Y. 1993) (commencing statute of limitations in hazardous waste suit from time when injury was discovered, pursuant to § 214-c(2)).

cations for its unique application of the demand and refusal rule, each of which are open to serious challenge on grounds of logic, policy, and precedent. For example, the court noted that the demand and refusal rule "affords the most protection to the true owners of stolen property."[59] Although this statement is of course true, it begs the two central issues: whether unreasonably non-diligent former owners should be entitled to the greatest possible protection against diligent, innocent purchasers, and how best to allocate the rights and duties between the two innocent parties. The court never explained the policy behind, or rationale for, its rigid preference for the non-diligent former owner over the diligent purchaser, except for its conclusory and unsubstantiated statement that any lesser protection "would, we believe, encourage illicit trafficking in stolen art."[60]

In choosing a rule that affords the greatest possible protection to former owners, the court also ignored the effect and intent of *all* statutes of limitations—to extinguish otherwise valid rights by dint of the mere passage of time, regardless of the underlying merits of the claim. The fundamental purposes of statutes of limitations are to prevent stale claims, promote stability, and grant repose in commercial and other relations.[61] Unlike laches, statutes of limitations focus on the objective actions of the claimant, not on (often subjective) harm or prejudice to the defendant.[62]

---

59. *Guggenheim*, 569 N.E.2d at 430. By its choice of language—the prior holder of the art is the "true owner"—the court can be seen as having pre-judged the outcome. *See generally* Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 637 (1988) (discussing why the "confusing search for the 'owner' " in property disputes often prejudices the outcome).

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

61. The New York Court of Appeals has emphasized that the primary purpose of a limitations period is fairness to a defendant. Flanagan v. Mount Eden Gen. Hosp., 248 N.E.2d 871, 872 (N.Y. 1969). A defendant should "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the 'evidence has been lost, memories have faded, and witnesses have disappeared.' " *Id.* (quoting *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950) (quoting Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944))); *see* Duffy v. Horton Memorial Hosp., 488 N.E.2d 820, 822-23 (N.Y. 1985) ("There is also the need to protect the judicial system from the burden of adjudicating stale and groundless claims."); *see also* DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987) (recognizing the burden of stale claims), *cert. denied*, 486 U.S. 1056 (1988); O'Keeffe v. Snyder, 416 A.2d 862, 868 (N.J. 1980) ("The purpose of a statute of limitations is to 'stimulate to activity and punish negligence' and 'promote repose by giving security and stability to human affairs.' ") (quoting Wood v. Carpenter, 101 U.S. 135, 139 (1879)); 9 Wigmore on Evidence § 2538 (Chadbourn rev. 1981) (discussing the burden of proof in statute of limitation claims); Petrovich, *supra* note 57, at 1126-28 (discussing the three policies for the statute of limitations).

62. Burnett v. N.Y. Central R.R., 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants."); Drum, *supra* note 10, at 937 (discussing that limitations claims are for the protection of defendants); Petrovich, *supra* note 57, at 1127.

Indeed, in sharp contrast to its decision in *Guggenheim*, the Court of Appeals recently held that the statute of limitations in an accountant malpractice action "accrues upon the client's receipt of the accountant's work," not when the IRS assesses a deficiency.[63] The court explained its decision based on a traditional view of limitations law that is irreconcilable with its decision in *Guggenheim*:

> The policies underlying a Statute of Limitations—fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory—demand a precise accrual date that can be uniformly applied, not one subject to debate or negotiation.... [T]o base a limitations period on the potentiality of IRS action defies the essential premise of temporal finality embodied in Statutes of Limitation ... [and] "would mean turning our backs on certainty and predictability ...."[64]

The court in *Guggenheim* never explained why claims by non-diligent owners to recover stolen personal property from innocent purchasers should be exempted from the general application of statutes of limitations, thereby permitting an *indefinite* tolling of the limitations period until that uncertain and unpredictable time when a former owner fortuitously discovers the location of the property.

The court also noted the existence of three alternative limitations rules[65] but rejected them for inconsistent reasons that have little to do with the appropriateness of New York's unique demand and refusal rule. These other approaches consisted of running the three-year period against the good faith purchaser from the time: (1) of the theft, as is the case when the action is brought against the thief;[66] (2) the good faith purchaser obtains possession of the chattel (the majority rule);[67] or (3) the former owner discovered or through *reasonable* dili-

63. Ackerman v. Price Waterhouse, 644 N.E.2d 1009, 1012 (N.Y. 1994).

64. *Id.* at 1012-13 (quoting Ackerman v. Price Waterhouse, 604 N.Y.S.2d 721, 721 (App. Div. 1993)).

65. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991).

66. *Id.* at 429; C. Clifford Allen, III & Patricia J. Lamkin, Annotation, *When Statute of Limitations Begins to Run Against Action for Conversion of Property by Theft*, 79 A.L.R.3d 847, 851, 853-54 (1977).

67. Federal Ins. Co. v. Fries, 355 N.Y.S.2d 741, 744 (Civ. Ct. 1974); 51 Am. Jur. 2d *Limitation of Actions* § 125 (1970); Allen & Lamkin, *supra* note 66, at 851, 855-56; *see also* DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987) ("In virtually every state except New York, an action for conversion accrues when a good faith purchaser acquires stolen property."); O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) (discussing the running of the statute of limitations in the context of art theft); Prosser & Keeton, *supra* note 5, § 15, at 93-94 (stating that although New York and "two or three other states" require demand and refusal before conversion by a good faith purchaser is complete, "the great weight of authority regards the mere acquisition of the goods under such circumstances as in itself an assertion of an adverse claim, so detrimental to the dominion of the owner that it completes the tort"). *See generally* Restatement (Second) of Torts § 229 & cmt. h (1965) (stating the majority and minority rules). In some states, the accrual occurs at the the time of theft, *e.g.*, Jackson v. American Credit Bureau, Inc., 531 P.2d 932, 934-35 (Ariz. Ct. App. 1975); Becton Dickinson & Co. v. Reese, 668 P.2d 1254, 1257 (Utah 1983), whereas in other states,

gence should have discovered the location of the stolen art (the standard discovery rule), as the Second Circuit held in *DeWeerth*.[68]

For example, the New York Court of Appeals relied on unenacted legislation to conclude erroneously that New York had already considered and rejected a discovery rule.[69] In fact, the proposed legislation (the "Art Claim Bill"), which cleared both the State Assembly and Senate in 1986,[70] but which was vetoed by Governor Cuomo,[71] did not propose to replace the demand and refusal rule with a discovery rule. Rather, the Art Claim Bill, which applied only to certain not-for-profit institutions, provided that these institutions could trigger the three-year statute of limitations to recover stolen art by providing notice, in the form of display or publication, that they were in possession of the art.[72] The Art Claim Bill focused on the actions of the holder of the art, not on the actions of the claimant, as would a discovery rule.[73] It contained an *exception* to the potential harshness of the notice pro-

---

the accrual occurs at the time of purchase, *e.g.*, Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *25-26 (E.D. Pa. Feb. 23, 1995); Christensen Grain, Inc. v. Garden City Coop., Equity Exch., 391 P.2d 81, 83 (Kan. 1964); Palludin v. Bergin, 375 P.2d 544, 545 (Nev. 1962).

68. In addition to the Second Circuit, courts in Pennsylvania, Indiana, and New Jersey have explicitly adopted a standard discovery rule for stolen art work. *See* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *28 & n.5 (E.D. Pa. Feb. 23, 1995); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1388-91 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); O'Keeffe v. Snyder, 416 A.2d 862, 869-70 (N.J. 1980); *see also* Mucha v. King, 792 F.2d 602, 611-12 (7th Cir. 1986) (discussing applicability of Illinois discovery rule to conversion of bailed property). In 1982, California enacted by statute a discovery rule for stolen art claims, which was expanded in 1989 to include any "article of historical, interpretative, scientific or artistic significance." Cal. Civ. Proc. Code § 338(c) (West Supp. 1994). Although the California courts have not interpreted this particular rule, they generally impose a duty of reasonable diligence in conjunction with a discovery rule. *See, e.g.*, Jolly v. Eli Lilly & Co., 751 P.2d 923, 927 (Cal. 1988) (stating that "[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her"). Ohio and Oklahoma have adopted a discovery rule for recovery of stolen property claims generally. *See* Ohio Rev. Code Ann. § 2305.09 (Page 1991) (amended 1994); Firsdon v. Mid-American Nat'l Bank & Trust Co., No. 90-WD083, 1991 Ohio App. LEXIS 4808, at *1 (Ct. App. Oct. 11, 1991); *In re* 1973 John Deere 4030 Tractor, 816 P.2d 1126, 1132-33 (Okla. 1991).

69. *Guggenheim*, 569 N.E.2d at 430.

70. New York State Bill A. 11462-A, S. 3274-B, 209th Sess. (1986) [hereinafter Art Claim Bill] (on file with *Fordham Law Review*); *see infra* part III.C.2.

71. Veto Message No. 22, New York State Governor's 1986 Veto Messages, at 863 (Mario M. Cuomo) [hereinafter Veto Message] (on file with *Fordham Law Review*); *see also* Irvin Molotsky, *3 U.S. Agencies Urge Veto of Art-Claim Bill*, N.Y. Times, July 23, 1986, at C15 (discussing recommendations by federal agencies with respect to the Art Claim Bill).

72. Art Claim Bill, *supra* note 70, § 214-d(a).

73. The Governor's veto message similarly addressed the inadequacy of the notice, rather than the reasonableness of the former owner's conduct. The Governor was also swayed by the U.S. State Department's concern that the bill would have resulted in New York becoming "a haven for cultural property stolen abroad since such objects [would] be immune from recovery." Veto Message, *supra* note 71, at 863.

vision based on a discovery rule,[74] but was vetoed despite the ameliorative discovery exception, not because of it.[75] In short, New York's legislature and Governor have *not* considered, let alone rejected, adoption of a discovery rule to replace the demand and refusal rule.

The Court of Appeals then proceeded to turn the demand and refusal rule on its head by holding "that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence."[76] In fact, the New York courts originally crafted the demand and refusal rule to protect good faith purchasers, *not* former owners. The creation of the rule was wholly unrelated to statute of limitations concerns.[77] The purpose of the rule—at a time when merely being hauled into court might be viewed as damaging to one's reputation—was to avoid stigmatizing the innocent purchaser as a wrongdoer before he had an opportunity to make amends.[78] The courts reasoned that until a demand for the return of property had been made and refused, the good faith purchaser had done nothing wrong.[79] Thus, the courts created and used the rule to dismiss former owners' claims for return of property, where the owner had brought suit before the purchaser refused to return the property.[80]

Not until almost a century after its creation, in *Menzel v. List*[81]—a case involving stolen art—was the demand and refusal rule converted from a shield for innocent purchasers into a sword for former owners. *Guggenheim* adopted *Menzel*'s simplistic syllogism: if the innocent purchaser could not be sued until demand and refusal had been made, then the former owner could sue within three years of refusal, regardless of the passage of time from the taking of the property until the

74. Art Claim Bill, *supra* note 70, § 214-d(d).

75. Veto Message, *supra* note 71, at 863.

76. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991).

77. For further discussion of the origins and development of New York's demand and refusal rule, see *infra* part II.A; *see also* DeWeerth v. Baldinger, 836 F.2d 103, 108-09 (2d Cir. 1987) (discussing the purposes behind the demand and refusal rule as for the protection of innocent parties), *cert. denied*, 486 U.S. 1056 (1988); Gillet v. Roberts, 57 N.Y. 28, 33-34 (1874) (characterizing the demand and refusal rule as reasonable and just for the protection of the innocent purchaser).

78. N.Y. Civ. Prac. L. & R. § C206:1 (McKinney 1990) ("[T]o avoid stigmatizing an innocent purchaser as a tort feasor, he is not liable for conversion until the plaintiff makes a demand upon him that is ignored." (citing Berman v. Goldsmith, 529 N.Y.S.2d 115 (App. Div. 1988))).

79. *Gillet*, 57 N.Y. at 34; Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981) ("[B]ona fide purchaser's possession is initially lawful, and only becomes unlawful once he has refused, upon demand, to return the property to the true owner." (citations omitted)), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

80. *Gillet*, 57 N.Y. at 34.

81. 253 N.Y.S.2d 43, 44 (App. Div. 1964) (per curiam). This Article cites four different *Menzel* opinions. Procedurally, the above-cited opinion affirmed the denial of a pretrial motion to dismiss, while the latter three concerned post-trial proceedings. *See* Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967) (per curiam), *modification rev'd*, 246 N.E.2d 742 (N.Y. 1969).

demand. Nothing in the text of the statute of limitations[82] or in the policy or origins behind this originally pro-purchaser rule requires the tolling of the statute of limitations on the former *owner's* behalf until demand and refusal.[83] Indeed, the illogic of the *Guggenheim* result, which favors the thief and the bad faith purchaser over the innocent purchaser, was recognized over a century ago.[84] The court's harsh treatment of the innocent purchaser is exacerbated by the rule that damages are measured by the current value of the art (in this case, $200,000), rather than at the time of the theft or purchase ($17,000).[85]

Even if one were to accept the "logic" that a replevin cause of action does not accrue against an innocent purchaser until demand and refusal, nothing in the policy or logic of the rule compels the rejection of a duty of reasonable diligence on a former owner seeking to invoke the demand and refusal rule and the judicial nullification of the statute of limitations.[86] In short, nothing in the text, precedent, policy, or logic leads to the unprecedented and inflexible rule articulated in *Guggenheim.*

Without analysis or explanation, the court further asserted that "it would not be prudent to . . . impose the additional duty of diligence before the true owner *has reason to know* where its missing chattel is

---

82. *See* N.Y. Civ. Prac. L. & R. § 214 (McKinney 1990) ("The following action must be commenced within three years: . . . 3. an action to recover a chattel or damages for the taking or detaining of a chattel . . . ."). As noted, § 206(a) states that the limitations period accrues when the *right* to make demand occurs. *See supra* note 58.

83. The court in *Guggenheim* could just as easily have treated the absence of a demand as an affirmative defense, unrelated to the former owner's right to bring an action. *See, e.g.*, Atlas Ins. Co. v. Gibbs, 183 A. 690, 693 (Conn. 1936).

84. *See* Harpending v. Meyer, 55 Cal. 555, 561 (1880) (en banc). The court stated:

> [T]he operation of a rule which exempts a *bona fide* purchaser from being sued until after demand [is] made, is, in all the cases to which it has been applied, favorable to the *bona fide* purchaser, and it is claimed to have been devised for his protection. If applied to this case, its operation is exactly the reverse of that. To hold that the statute did not commence running in favor of these defendants from the time of the delivery of the goods to them, because at that time they were conscious of no wrong-doing, which, if they had been conscious of, would have set the statute in motion in their favor, involves an absurdity. . . . We are unwilling to give a conscious wrong-doer any advantage over a constructive wrong-doer.

Id.

85. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991); Menzel v. List, 246 N.E.2d 742, 744-45 (1969), *rev'g* 279 N.Y.S.2d 608 (App. Div. 1967), *modifying* 267 N.Y.S.2d 804 (Sup. Ct. 1966). This harshness may be ameliorated in some cases by the right to recover this amount from the seller, but the seller may be unavailable, judgment-proof, or itself a good faith purchaser. *See Menzel*, 267 N.Y.S.2d at 809. The statute of limitations in this type of third party action commences at the time of demand and refusal in the underlying action, on the rationale that quiet title is not disturbed until that time, and hence, the warranty of quiet title has not previously been broken. *See Menzel*, 279 N.Y.S.2d at 609; *supra* note 39.

86. *See, e.g.*, DeWeerth v. Baldinger, 836 F.2d 103, 108 (2d Cir. 1987) (expressing view that New York Court of Appeals would impose a duty of reasonable diligence in attempting to locate stolen property).

to be found."[87] Under the *Guggenheim* rule, however, whether the former owner *has reason* to know the location of the missing chattel is irrelevant; that formulation, of course, is the traditional discovery rule that was expressly rejected in *Guggenheim*. Indeed, the former owner is under no duty to exercise diligence even *after* it *has reason* to know the location of the stolen art. The requirement of diligence in making a demand arises *only* when the former owner *actually* knows where the chattel is located, regardless of any efforts, reasonable or otherwise, to locate it.[88] The court, however, never explains why it would "not be prudent" to impose a duty of reasonable diligence—as is typically required under a discovery rule—from the time the former owner learns of the theft, or at least from the point when a reasonable person would have discovered the location of the art.

The court then concluded its statute of limitations analysis by contrasting its rule with an unusual description of the discovery rule, stating that "[t]hree years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art."[89] The court never explained: (1) why the alternative to demand and refusal should be a limitations period that accrued from the time of the theft, rather than from the purchase, as in most jurisdictions;[90] (2) why a *bad faith* purchaser should be entitled to invoke a limitations rule designed to protect good faith purchasers;[91] and (3) why it is so unfair to terminate the rights of an unreasonably non-diligent owner at the expiration of a statutorily-defined limitations period as against an innocent purchaser.

The driving force behind *Guggenheim's* inflexible demand and refusal rule appears to be that any lesser protection for non-diligent owners would "encourage illicit trafficking in stolen art."[92] No evidence, however, exists for this proposition. New York is apparently the *only* state in which the limitations period commences *after* demand and refusal, yet there is no evidence that any less owner-friendly jurisdictions have become havens for stolen art, or that New York's

87. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991) (emphasis added).

88. *Id.* ("[T]he true owner, *having discovered* the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property." (emphasis added)).

89. *Id.* at 431.

90. *See supra* note 67.

91. *See, e.g.*, Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1391 (S.D. Ind. 1989) (concluding that discovery rule was inapplicable to a bad faith purchaser due to fraudulent concealment), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

92. 569 N.E.2d at 431; *id.* at 430 (quoting statement from Governor Cuomo's veto of the very different Art Claim Bill that "the bill, if it went into effect, would have caused New York to become 'a haven for cultural property stolen abroad . . . .' "); *see also supra* note 71 and accompanying text (discussing Cuomo's veto).

demand and refusal rule, first applied to protect former owners in 1964,[93] has discouraged trade in stolen art in New York.

Indeed, the belief that the demand and refusal rule would discourage art theft or cause purchasers to be more prudent is counter-intuitive. Under *Guggenheim*, a good faith purchaser is treated *worse* than a thief or a bad faith purchaser. Thus, there is a disincentive to make an expensive, time-consuming investigation into provenance, particularly given that such investigations are often inconclusive.[94] Moreover, because *Guggenheim* does not obligate the owner to report or to publicize the theft, the investigatory burdens that *Guggenheim* unfairly places solely on purchasers is less likely to reveal the former owner's identity. By contrast, a rule that rewards a good faith purchaser, as opposed to a bad faith purchaser, and that encourages former owners to come forward so that a provenance search would more likely lead to the theft victim, would more logically accomplish *Guggenheim*'s professed policy goals. The primary effects of *Guggenheim* in New York are likely to be an increase in burdensome litigation of stale claims that could not be brought in any other jurisdiction and a disincentive for legitimate art dealers, exhibitors, and collectors to be active in the New York art market.

D. *The Laches Defense*

As noted, *Guggenheim* does not foreclose an innocent purchaser from invoking a laches defense. Laches is a common law affirmative equitable defense that is typically used to mitigate the rigidity of a statute of limitations when defendants have been prejudiced by plaintiffs who "slumber[ed] on their rights."[95] Laches has traditionally been applied only when the plaintiff seeks equitable relief,[96] and when the plaintiff has brought a claim within the applicable statute of limita-

93. Menzel v. List, 253 N.Y.S. 43, 44 (App. Div. 1964) (per curiam).

94. For example, the Lubells' good faith investigation failed to reveal the Guggenheim's prior possession of the Chagall. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 619 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

95. Burnett v. New York Cent. R.R., 380 U.S. 424, 428-29 (1965); Webb, *supra* note 11, at 884 (citing Black's Law Dictionary 875 (6th ed. 1990)).

96. As an equitable defense, laches traditionally has not been available in an action at law, such as a conversion claim for damages. *See* Gonzalez v. Chaplin, 552 N.Y.S.2d 419, 420 (App. Div. 1990); Appleton v. National Park Bank of N.Y., 208 N.Y.S. 228, 233 (App. Div.), *aff'd*, 150 N.E. 555 (N.Y. 1925). The court in *Guggenheim* did not address whether laches could be raised as a defense to Lubell's conversion claim, or only to the replevin claim for return of the painting. Although replevin is generally a legal, not an equitable, cause of action, in cases of "unique chattel," New York courts employ a hybrid doctrine of "equitable replevin," allowing injunctive relief and equitable defenses, such as laches. *See* N.Y. Civ. Prac. L. & R. Practice Commentaries, § C206:1 (McKinney Supp. 1995). There does not appear to be any similar exception for a conversion claim for damages.

tions period.[97] Unlike a statute of limitations, laches is committed to the discretion of the court based on all the equities.[98]

The laches doctrine requires a defendant to prove *both* the plaintiff's unreasonable and inexcusable delay in commencing suit *and* prejudice to the defendant *resulting* from that delay,[99] i.e., reliance on the other party's inaction that results in a harmful change of circumstance to the defendant.[100] In assessing delay under the laches doctrine, "the focus is on the reasonableness of a plaintiff's delay rather than on its length."[101] Reasonableness of the plaintiff's delay focuses on such fact determinations as the measures that plaintiff actually took, the measures potentially available to the plaintiff, and the measures the plaintiff should have taken.[102] It is in the context of this "reasonableness" inquiry that courts consider the extent of the plaintiff's diligence.[103] Whereas the plaintiff's diligence (or lack thereof) ends the inquiry under the discovery rule, laches requires the court to go on to consider whether the plaintiff's lack of diligence prejudiced the defendant.

There are two general categories of cognizable prejudice to support a defense of laches: (1) loss of evidence that would support the defendant's position, such as lost documents, death of witnesses, or faded memories,[104] and (2) a material change in the defendant's position that would not have occurred but for the delay, including changes

97. *Cf.* 1 Jack B. Weinstein et al., New York Civil Practice ¶ 213.07 (1995) (stating that the doctrine of laches is used to bar equitable relief even when the claim is brought within the limitations period if unreasonable delay caused prejudice to defendant).

98. *See, e.g.*, Goodfarb v. Freedman, 431 N.Y.S.2d 573, 578 (App. Div. 1980) (stating that the equities include " 'all the facts and circumstances which help to show what is just and right between the parties' " (quoting Forstmann v. Jormy Holding Co., 154 N.E. 652, 655 (1926) (Pound, J.))).

99. DeWeerth v. Baldinger, 804 F. Supp. 539, 553 (S.D.N.Y. 1992), *rev'd on other grounds*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 115 S. Ct. 512 (1994); *In re* Barabash, 286 N.E.2d 268, 271 (N.Y. 1972) ("The essential element of this equitable defense is delay prejudicial to the opposing party."); Augustine v. Szwed, 432 N.Y.S.2d 962, 965 (App. Div. 1980); 75 N.Y. Jur. 2d *Limitations & Laches* § 337, at 544 (1988).

100. Weinstein, *supra* note 97, ¶ 213.07, at 2-332; *see* Sorrentino v. Mierzwa, 302 N.Y.S.2d 565, 569-70 (App. Div. 1969).

101. *DeWeerth*, 804 F. Supp. at 553.

102. *See generally DeWeerth*, 804 F. Supp. at 553 (acknowledging the "particularly fact sensitive nature of the laches inquiry"); Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 849-52 (E.D.N.Y. 1981) (noting that political and historical factors may mitigate plaintiff's delay), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 622 (App. Div. 1990) (questioning whether plaintiff's failure to search actively for painting was unreasonable), *aff'd*, 569 N.E.2d 426 (N.Y. 1991).

103. *Guggenheim*, 569 N.E.2d at 431; Varconi v. Unity Television Corp., 173 N.Y.S.2d 201, 206 (Sup. Ct. 1958).

104. When there has been such a delay as to cause loss of evidence or death of witnesses, the prejudice to the defendant is exactly the type of harm that the statute of limitations' policy of repose from stale claims seeks to avoid. Burnett v. New York Central R.R., 380 U.S. 424, 428 (1965). The difference is that the statute of limitations

in the law, a change of title, or other intervening equities or harm caused by the plaintiff's delay.[105] It has been suggested that a museum could claim laches as a result of suffering a "lost opportunity cost" if it refrained from acquiring similar works because it believed it already owned those in its possession.[106] Lubell argued that her purchase of the painting itself was a material prejudicial change in circumstance caused by the Guggenheim's unreasonable conduct—an issue that was not resolved.[107] A purchaser might be able to assert prejudice if the former owner's unreasonable delay led to an inability to recover against an insolvent or unavailable seller.[108] Lapse of time, however, no matter how long, cannot by itself constitute laches.[109]

The difficult evidentiary burdens imposed on a defendant to prove both unreasonable delay *and* prejudice inevitably burden the judicial system with long, complex litigations.[110] Moreover, because a laches inquiry is "particularly fact sensitive," and "[without] any objective standard,"[111] it is generally not resolvable without a trial.

Although a long passage of time would appear to suggest prejudice to a defendant by the loss of proof, including loss of witnesses, which

---

conclusively presumes prejudice from the mere passage of time, while laches requires the defendant to prove actual prejudice.

105. *See, e.g.*, Robins Island Preservation Fund v. Southold Dev. Corp., 959 F.2d 409, 424 (2d Cir. 1992) (holding that overturning a 200-year chain of title would cause gross prejudice to the defendant), *cert. denied*, 113 S. Ct. 603 (1993); *DeWeerth*, 804 F. Supp. at 553 (stating that prejudice "may take several forms," including that "defendant may have changed position in reliance upon the absence of a suit"); Meyer v. Meyer, 426 N.Y.S.2d 320, 322 (App. Div. 1980) (holding that plaintiff's three year delay in bringing suit would result in payment schedule which would prejudice defendant); 75 N.Y. Jur. 2d, *Limitations & Laches* §§ 337-338 (1989). Mere emotional loss, however, is not enough to show prejudice. *See DeWeerth*, 804 F. Supp. at 554.

106. Ildiko P. DeAngelis, *"Old" Loans: Laches to the Rescue?*, C723 A.L.I.-A.B.A. 301 (Mar. 25, 1992); Agnes Tabah, *The Practicalities of Resolving "Old" Loans: Guidelines for Museums*, C723 A.L.I.-A.B.A. 315 (Mar. 25, 1992). The Tabah article also suggests that the cost of maintaining, preserving, and restoring the works may be an element of prejudice, but presumably a court would require the former owner to reimburse the possessor for the value of these services before recovering the art. *Id.*; *see* Hoelzer v. City of Stamford, 933 F.2d 1131, 1133 (2d Cir. 1991) (remanding for determination of value of restoration services, after rejecting restorers claim to mural).

107. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 622-23 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991); *see also Robins Island*, 959 F.2d at 424 (upholding laches defense where "[i]t is unlikely that [defendant] would have purchased the property had it known its title was in dispute").

108. *Cf. DeWeerth*, 804 F. Supp. at 552-53 (favoring rejection of a laches claim because of the presence of a "nonbankrupt third party defendant").

109. *Guggenheim*, 550 N.Y.S.2d at 622; Weinstein, *supra* note 97, ¶ 213.07, at 2-331 ("In order to invoke the doctrine of laches, the time lapse must be more than mere delay; it must be delay that causes prejudice or disadvantage.").

110. *See* DeWeerth v. Baldinger, 804 F. Supp. 539, 553 (S.D.N.Y. 1992), *rev'd on other grounds*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 486 U.S. 1056 (1994); *Guggenheim*, 550 N.Y.S.2d at 622-24 (noting the numerous open factual issues which must be resolved to establish laches).

111. *DeWeerth*, 804 F. Supp. at 553.

would greatly increase the difficulty of defending a claim,[112] courts in fact have not permitted a laches defense as a matter of law to prevent a recovery of long-missing works of art.[113] In *Guggenheim*, for example, it would have been difficult for Lubell, who bought the painting close to the time of the theft, to establish that she had purchased the painting as a result of the Guggenheim's unreasonable inaction or that she had suffered other cognizable prejudice as a result of the Guggenheim's dereliction.

II. *GUGGENHEIM*'S PREDECESSORS AND ITS PROGENY

Guggenheim and its predecessors present a textbook example of the evolution of a judicial doctrine—whether consciously and deliberately or accidentally—from one purpose to its diametric opposite. As this part reveals, the judicially-created demand and refusal rule originated to protect good faith purchasers from suit until they had refused an opportunity to return property to the claimant. This part then shows how, without analysis or explanation, *Menzel v. List*[114] turned this doctrine on its head, but left open the critical question of the former owner's duty of diligence. Although several subsequent federal and state court decisions either simply ignored *Menzel* or recognized and addressed this open issue, the Court of Appeals in *Guggenheim* treated *Menzel*'s pro-owner orientation of the demand and refusal rule as settled historical fact, with "no reason" to create "a duty of reasonable diligence."[115] Finally, this part discusses the post-*Guggenheim* efforts of plaintiffs to exploit *Guggenheim* in pursuit of long-dormant claims to valuable art.

A. *Development of the Demand and Refusal Rule*

As discussed in part I.C., the demand and refusal rule, as first enunciated in *Gillet v. Roberts*,[116] was originally developed and applied by New York courts to protect good faith purchasers from being hauled

112. DeAngelis, *supra* note 106, at 301; Webb, *supra* note 11, at 895.

113. *See, e.g.*, Hoelzer v. City of Stamford, 933 F.2d 1131, 1138 (2d Cir. 1991) (stating that although laches defense had not been expressly asserted at trial, Hoelzer "would have failed to establish the prejudice necessary to sustain such a claim"); *DeWeerth*, 804 F. Supp. at 553 (denying laches defense after bench trial of painting stolen almost 40 years earlier); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991) (remanding case for trial on laches issue of painting stolen 20 years earlier).

114. 253 N.Y.S.2d 43, 44 (App. Div. 1964).

115. 569 N.E. 2d at 430.

116. 57 N.Y. 28, 33 (1874). As the New York Court of Appeals held: "[A]n innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a *tortfeasor* for a wrongful conversion." *Id.* at 34.

In *Gillet*, the owner of timber demanded its return from a bona fide purchaser, who did not refuse to surrender the timber. The owner, however, did not take possession and tried to sue the purchaser for conversion of the timber. The owner then negli-

into court prior to engaging in a knowingly wrongful act—refusing a demand by the former owner for return of his property.[117] For decades, the rule was neither used nor intended as a means to toll the statute of limitations on behalf of owners (diligent or otherwise) as against innocent holders of personal property.

The courts further held that a demand is not necessary when the converter takes possession with knowledge of the plaintiff's claim to the property,[118] or "when the holder exercises an act of ownership inconsistent with the ownership and dominion of the true owner."[119] Accordingly, in the case of the thief or other "bad faith" converter, the conversion occurs at the time of the exercise of dominion over the property, not at the time of a subsequent demand for its return. In such cases, the statute of limitations commences at the time of the physical possession, not at the time of the subsequent demand.[120]

Prior to *Menzel*, with one apparent exception,[121] the courts in New York did not consider that the limitations period commenced against a good faith purchaser only upon demand and refusal. In *Watkins v. Madison County Trust & Deposit Co.*,[122] for example, the Second Cir-

---

gently failed to retrieve the timber from the river where the purchaser had delivered it. *Id.* at 31-33.

117. *See, e.g.*, MacDonnell v. Buffalo Loan, Trust & Safe Deposit Co., 85 N.E. 801, 803 (N.Y. 1908) ("The rule that one who comes lawfully into possession of property cannot be charged with conversion thereof, until after a demand and refusal, is too well established to justify extended discussion. . . . But it has no application in a case where the lawful custodian of property commits an overt and positive act of conversion by an unlawful sale or disposition of the same." (citations omitted)); Tompkins v. Fonda Glove Lining Co., 80 N.E. 933, 934 (N.Y. 1907) (requiring demand upon defendant who "comes lawfully into the possession" of property, although apparently also finding defendant not to be a good faith purchaser); Goodwin v. Wertheimer, 1 N.E. 404, 405 (N.Y. 1885) (cited in *Guggenheim*) ("The original possession . . . not [being] tortious, . . . it was necessary to change the character of his possession by a demand and refusal, before the plaintiffs could maintain an action . . . for conversion . . . ."); Hamilton Assets Corp. v. Kirshberg, 158 N.Y.S.2d 808, 808 (App. Div. 1956) (affirming dismissal of a complaint for conversion in the absence of a demand and refusal); Cohen v. Keizer, 285 N.Y.S. 488, 489 (App. Div. 1936) (cited in *Guggenheim*) (holding that a good faith purchaser is not liable for conversion in the absence of demand for return of property); Branch v. Latham, 174 N.Y.S. 295, 297 (App. Div. 1919) (same); *see also supra* note 57 (citing cases and commentary concerning demand and refusal rule in other jurisdictions).

118. Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 454 (App. Div. 1953).

119. Del Piccolo v. Newburger, 9 N.Y.S.2d 512, 513 (App. Div. 1939); *accord*, Goebel v. Clark, 275 N.Y.S. 43, 47 (App. Div. 1934).

120. *MacDonnell*, 85 N.E. at 803 (holding that statute of limitations commences when lawful custodian attempts to transfer property for his own benefit, which act "was a distinct and unequivocal conversion," for which "[n]o demand was necessary"); Lightfoot v. Davis, 91 N.E. 582, (N.Y. 1910) (denying conversion claim because statute of limitations had commenced at the time of theft).

121. Duryea v. Andrews, 12 N.Y.S. 42, 43 (App. Div. 1890). In a three sentence opinion, the court held that the statute of limitations did not begin to run until demand for delivery of a stolen horse. The opinion is without citations, and it is unclear whether the possessor was a good faith purchaser.

122. 24 F.2d 370 (2d Cir. 1928) (Hand, J.).

cuit applied New York law and held that the statute of limitations for conversion commenced against a good faith recipient of property from the time of the possession and not from the date of demand and refusal.[123] The court did not directly address the interplay between the demand and refusal rule as a requirement to bring suit and as an accrual rule for purposes of the statute of limitations. Rather, in addressing the statute of limitations issue, the court assumed the plaintiff's perspective—that defendant's possession was wrongful from the time of the possession.[124] Commencing the statute of limitations at the time of the defendant's allegedly wrongful possession is perfectly consistent with the requirement of demand and refusal prior to bringing suit: a former owner should not be able to haul an innocent purchaser into court until the former owner has put the purchaser on notice of his putative wrong, but the former owner's time to bring suit runs from the time of the possession that the owner claims is wrongful.[125]

The impact of the demand and refusal rule on the commencement of the limitations period would appear to be resolved by New York's Civil Practice Law and Rules section 206(a), which provides that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time *when the right* to make the demand is complete."[126] The *right* to make demand is complete when a good faith purchaser exercises control over property in a manner inconsistent with the former owner's rights, even if the *ability* to make demand is prevented by lack of knowledge of the identity of the possessor.

In 1964, however, the Appellate Division in *Menzel* rejected the application of section 206(a) to conversion claims and turned the prior demand and refusal caselaw on its head, converting it from a shield for

123. *Id.* at 371.

124. *Id.* (stating that statute of limitations for conversion had begun to run "because the possession was wrongful from the outset, and no subsequent demand and refusal could start it afresh" (citations omitted)). *See also* Ganley v. Troy City Nat'l Bank, 98 N.Y. 487, 494 (1885) (holding that when conversion is committed at time of sale, "statute of limitations commences to run from the time of the conversion and not the time of the subsequent demand"); Smith v. Staten Island Land Co., 162 N.Y.S. 681, 684, 692-93 (App. Div. 1916) (finding that a conversion claim against good faith purchasers commenced to run at the time of purchase, "regardless of whether or not [plaintiff] had notice of the conversion" (citations omitted)).

125. *See* Williams v. Flagg Storage Warehouse Co., 220 N.Y.S. 124, 128-29 (Sup. Ct. 1927) (finding that the limitations period for conversion claim apparently had expired because claim accrued when the *right* to make a demand was complete, but permitting a contract claim because no breach of contract occurred until a demand was made for return of property held by warehouseman). Foreshadowing *Menzel* and *Guggenheim*, however, the court stated that the purpose of commencing the limitations period from the time when the right to make a demand is complete was to protect "the debtor or pledgor, or depositor, or one from whom property had been stolen rather than to limit their rights or remedies." *Id.*

126. N.Y. Civ. Prac. L. & R. § 206(a) (McKinney 1990) (emphasis added).

good faith purchasers into a sword for former owners.[127] In an extremely brief, substantively, two sentence opinion, the court stated that precedents "suggest" that a demand "is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner. . . . If that be so, then the statute of limitations did not begin to run until demand and refusal."[128] Apparently, the court concluded that when there is no tort until demand is made, i.e., that demand is "an essential element of the cause of action,"[129] section 206(a)—being a procedural rule—is inapplicable.[130] The court provided no further elaboration or explanation.[131] Although the court did not address whether the former owner was required to exercise reasonable diligence prior to locating the art, a later decision noted that the Menzels had actively searched for the painting from the end of World War II.[132] The court's decision may have been influenced by the Menzels' victimization by the Nazis, as overtly—and understandably—reflected in a later decision,[133] but the explanation given in that later decision for imposing the loss caused by the Germans on the innocent purchaser avoids the essential issues: "Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith."[134]

Several subsequent cases proceeded to ignore *Menzel*, applied section 206(a) to conversion claims, and commenced the limitations period from when the purchaser took possession—i.e., from the time when the right to make demand was complete, rather than from the time of actual demand and refusal.[135] In at least one decision, the

127. *See* Menzel v. List, 253 N.Y.S.2d 43, 44 (App. Div. 1964); Petrovich, *supra* note 57, at 1136. The Menzels fled Brussels in 1941, leaving behind a painting by Marc Chagall that was confiscated by the Nazis as "decadent Jewish art." Menzel v. List, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966). The painting was purchased by List from the well-known Perls Galleries; both List and Perls were good faith purchasers. *Id.* at 807.

128. *See Menzel*, 253 N.Y.S.2d at 44 (citations omitted).

129. Frigi-Griffin, Inc. v. Leeds, 383 N.Y.S.2d 339, 341 (App. Div. 1976).

130. *See Menzel*, 253 N.Y.S.2d at 44.

131. For a detailed critique of *Menzel* on doctrinal and policy grounds, see Petrovich, *supra* note 57, at 1133-40.

132. The plaintiff discovered defendant's possession in 1962, whereupon demand and refusal were made. *Menzel*, 267 N.Y.S.2d at 807.

133. *Id.* at 820 (referring to "the looting, plunder and pillage by the Nazis, which was of the very essence of evil").

134. *Id.* at 819. The various *Menzel* decisions are silent on whether the Menzels did, or could have, pursued a reparations claim against Germany after the war, although the complaint alleged that no compensation had been received from the Belgian or German governments. *Id.* at 807.

135. *See* Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 22 n.5 (S.D.N.Y. 1976) (stating in dictum that conversion limitations period for art works had long since run because right to make demand was complete at the sale of the works in 1931 (citing N.Y. Civ. Prac. L. & R. § 206(a) (McKinney 1990))); Federal Ins. Co. v. Fries, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974) (holding that the limitations period under § 206(a) ran from the time when the *right* to make demand was complete—when property was

Court of Appeals held that a conversion claim against apparent good faith purchasers commenced at the time of defendant's first use of the property at issue, without addressing the applicability of the demand and refusal rule or section 206(a).[136]

Kunstsammlungen Zu Weimar v. Elicofon[137] was the first case to rely explicitly on *Menzel*'s application of the demand and refusal rule to the statute of limitations. *Elicofon* involved a suit in federal court brought by an East German museum in 1969 against an American collector to recover two paintings by the famed fifteenth-century German artist Albrecht Duerer. The paintings had disappeared during World War II, and Elicofon had held them since 1946.[138] The district court analyzed New York's demand and refusal rule on the limitations issue and concluded that *Menzel* correctly stated that, under New York law, demand was a "substantive," not a "procedural" element of a conversion claim, and that "the rule applied in *Menzel* is the existing New York [conversion accrual] rule."[139] The court, however, recognized that *Menzel* had not resolved the question whether the demand and refusal rule imposed a duty of reasonable diligence on the museum to attempt to locate the Duerers.[140] After discussion of this open question, the court did "not decide this issue because the undisputed evidence clearly demonstrates that the [museum] made a diligent although fruitless effort to locate the paintings. There was no unreasonable delay in making demand."[141]

The Second Circuit, in affirming, closely tracked the reasoning of the district court on the statute of limitations issue.[142] The court rejected Elicofon's various arguments that *Menzel*'s demand and refusal rule is not or should not be the law of New York, based primarily on its understanding of New York case law, not on grounds of policy or

---

transferred—despite the plaintiff's ignorance of the facts creating right to make a demand: factual "ignorance does not stop the clock" (citations omitted)).

136. *See* Sporn v. MCA Records, Inc., 448 N.E.2d 1324, 1327 (N.Y. 1983). The lawsuit was filed 11 years after the subsequent purchasers began to use a master recording of a popular song. The purchasers were apparently unaware of plaintiff's asserted rights. *Id.* at 1325-26. The court did not address specifically whether the purchasers acted in good faith.

137. 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

138. *Elicofon*, 536 F. Supp. at 830, 846.

139. *Id.* at 848-49 (criticizing both *Fries* and *Stroganoff-Scherbatoff* for applying § 206(a) and failing to distinguish between "procedural" and "substantive" demands). As a federal court sitting in diversity, the court stated, "It is not this court's function to improve upon, but only to follow New York law." *Id.* at 848; *see* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

140. *Elicofon*, 536 F. Supp. at 849-50.

141. *Id.* (detailing efforts of museum to locate the missing Duerers). Although the court did not directly address the issue, there was an obvious factual question whether Elicofon was in fact a good faith purchaser, given that he paid $450 for the two Duerers to an ex-serviceman who appeared at his door in 1946. *Id.* at 833.

142. Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1160-64 & nn. 20-25 (2d Cir. 1982).

logic.[143] As the court noted, "[W]e are charged only with applying New York law, not with remaking or improving it."[144] Elicofon, however, apparently did not press his claim that *Menzel* did not foreclose imposing a due diligence requirement on former owners, presumably because of the strong evidence of the museum's diligence. The court, consequently, did not directly address the issue.[145]

In *DeWeerth v. Baldinger*,[146] the Second Circuit for the first time looked behind *Menzel* and conducted a detailed analysis of the origins of the demand and refusal rule and its impact on the commencement of the limitations period.[147] *DeWeerth*, like *Elicofon*, involved a claim for a valuable work of art that disappeared from Germany during World War II, in this case a painting by Claude Monet.[148] The good faith purchaser had held the painting for over 30 years without facing a claim, although her identity was readily accessible through the Monet *Catalogue Raisonne*, available a few miles from the plaintiff's residence near Cologne, Germany.[149]

The Second Circuit acknowledged that *Menzel* stated the law of New York, i.e., that demand and refusal was a substantive, not a procedural, element of a conversion claim and that the claim did not accrue until demand and refusal.[150] The court, however, found *Menzel* to be the starting, not the end point of the inquiry, and answered the question left open in *Elicofon*.[151] In the absence of express state court authority, the court construed the issue to be whether the New York Court of Appeals would impose a duty of reasonable diligence on an owner "prior to learning the identity of the current possessor," and predicted (incorrectly, as it turned out) "that the New York courts would impose a duty of reasonable diligence in attempting to locate stolen property . . . ."[152]

The court then discussed the reasons for this conclusion, including that: several courts had held that "[w]here demand and refusal are necessary to start a limitations period, the demand may not be unrea-

143. *Id.*

144. *Id.* at 1163. The court, however, did reject Elicofon's assertion that New York law treats a good faith purchaser worse than a thief, arguing that New York's tolling doctrine for fraudulent concealment would be construed broadly to prevent a thief from invoking a statute of limitations defense. *Id.* at 1163 & nn. 23-24.

145. *Id.* at 1164 n.25 (assuming New York had a reasonable diligence rule, the museum had exercised reasonable diligence).

146. 836 F.2d 103 (2d Cir. 1987).

147. *Id.* at 106-10.

148. *Id.* at 104-05.

149. *Id.* at 105.

150. *Id.* at 106-07 & n.3.

151. *Id.* at 107-08.

152. *Id.* at 108. The court did not certify the issue to the New York Court of Appeals, *see* N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17 (1986), because it did not believe (again, incorrectly) that the issue would recur with sufficient frequency. *DeWeerth*, 836 F.2d at 108 n.5.

sonably delayed;"[153] the purpose of the demand and refusal rule is "to protect the innocent" purchaser, not the owner; the unreasonable delay rule "serves to mitigate the inequity of favoring a thief over a good-faith purchaser;" its interpretation is consistent with the fundamental statute of limitations policy of repose on behalf of defendants; stolen art may frequently be recovered through investigation; and commencing the limitations period from demand and refusal, regardless of diligence, is inconsistent with the law of all other jurisdictions.[154] The court then reviewed the evidence of DeWeerth's efforts to locate the Monet, and determined that she was non-diligent as a matter of law, particularly in her failure to consult the Monet catalogue.[155]

Rather than confront this history of the demand and refusal rule, the Court of Appeals in *Guggenheim* either ignored it or distorted it.[156] The court treated its interpretation of the rule—that it is intended to protect former owners, not good faith purchasers, and that it imposes no duty of diligence on the former—as non-controversial, well-settled, and supported by the case law. Thus, the court asserted that the demise of the Art Claim Bill, "when considered together with the *abundant case law* spelling out the demand and refusal rule, convince us that the rule *remains* the law in New York and that there is *no reason* to obscure its *straightforward protection of true owners* by *creating* a duty of reasonable diligence."[157]

B. *Post*-Guggenheim *Cases*

Since the Appellate Division's decision in *Guggenheim*, the Second Circuit and Southern District have had occasion in four cases to apply the *Guggenheim* demand and refusal statute of limitations rule in favor of owners of long-lost art. In *Republic of Turkey v. Metropolitan Museum of Art*,[158] the claimant allegedly had actual knowledge of the whereabouts of the artifacts for over 15 years. The court, however, held that, under *Guggenheim*, the limitations period did not begin to run until the formal demand and refusal.[159] Any delay went solely to the issue of prejudice in the equitable defense of laches.[160]

153. *Id.* (citations omitted). As the Court acknowledged, in each of the cited state court cases, however, the delay in demand involved known defendants. *Id.* at 107-08.

154. *Id.* at 108-09.

155. *Id.* at 110-12.

156. In fact, *Menzel* is the only case the court cited that states that the statute of limitations runs from demand and refusal.

157. *Guggenheim*, 569 N.E.2d at 430 (emphasis added).

158. 762 F. Supp. 44 (S.D.N.Y. 1990).

159. *Id.* at 46.

160. *Id.* at 46-47. The case settled with the Metropolitan Museum of Art agreeing to return the artifacts to Turkey. Carol Vogel, *Metropolitan Museum to Return Turkish Art*, N.Y. Times, Sept. 23, 1993, at C13.

Likewise, in *Golden Budha Corp. v. Canadian Land Co. of America*,[161] the court applied the demand and refusal rule to delay commencement of the limitations period for the seventeen years that the former owner was unaware or unable to make a demand for the return of the treasure from allegedly innocent purchasers.[162] Any "unreasonable" delay was, again, only relevant to a laches defense.[163]

In *Hoelzer v. City of Stamford*,[164] Hoelzer, an art restorer, had been commissioned by the General Services Administration ("GSA") to restore several murals created during 1934 under the auspices of the Works Progress Administration. These murals had belonged to Stamford High School, a public school owned by the City of Stamford.[165] During a renovation of the school in 1970, the murals were thrown into the garbage, only to be rescued by a student, who turned them over to the GSA for restoration.[166] After Hoelzer had restored the murals and stored them for eighteen years, all without payment, he sought a declaratory judgment to quiet title to the works in 1989.[167] Applying *Guggenheim*, the court held that the works belonged to Stamford, as the demand and refusal had occurred in 1986, even though Stamford had made virtually no efforts to ascertain the whereabouts, or even the existence, of the murals from 1970 until 1986.[168]

The fourth application of *Guggenheim* involved a procedurally unusual postscript to *DeWeerth v. Baldinger*.[169] After the Court of Appeals' decision in *Guggenheim*, Ms. DeWeerth moved to recall the Second Circuit's mandate and to vacate its judgment in light of *Guggenheim*'s explicit rejection of the Second Circuit's decision in *DeWeerth*. The Second Circuit denied her motion without comment, but the Southern District granted her relief from the original judgment, pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6).[170] Following *Guggenheim*, the court found DeWeerth's claim timely, held that the defense of laches did not bar plaintiff's claim, and ordered the Monet returned to DeWeerth.[171]

The Second Circuit, however, reversed once again, this time on legal issues of finality and DeWeerth's choice of a federal as opposed

161. 931 F.2d 196 (2d Cir. 1991).
162. *Id.* at 201.
163. *Id.*
164. 933 F.2d 1131 (2d Cir. 1991).
165. *Id.* at 1133.
166. *Id.* at 1134.
167. *Id.* at 1134-35.
168. *Id.* at 1138-39. The court kindly referred to the city's investigation into the location of the murals as "less than vigorous." *Id.* at 1138.
169. 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).
170. DeWeerth v. Baldinger, 804 F. Supp. 539, 541 (S.D.N.Y. 1992), *rev'd*, 24 F.3d 416; Nos. 93-7144, 93-7146, 1994 U.S. App. LEXIS 10850 (2d Cir. Oct. 17, 1994) (withdrawn), *and amended after petition for reh'g*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 486 U.S. 1056 (1994).
171. 804 F. Supp. at 554-55 & n.13.

to a state forum.[172] In essence, the court held that DeWeerth, by choosing a federal forum, bore the risk that the federal court would erroneously predict how an open question of state law would be resolved by the state courts and that the interest in finality in litigation outweighed any perceived injustice to DeWeerth that resulted from her poor choice of forum.[173]

III. ALTERNATIVE APPROACHES TO *GUGGENHEIM*

It is easy to critique *Guggenheim*, flawed as it is on grounds of policy, precedent, and pragmatism. It is less easy to develop an alternative approach that balances the legitimate interests of the innocent art theft victims—the former owner and the good faith purchaser.[174] As *Guggenheim* itself noted, there are a variety of alternative approaches to New York's unique demand and refusal rule. These approaches include: (1) a limitations period which commences at the time of either the theft or the purchase; (2) a discovery rule, whether judicially or statutorily created; and (3) statutory notice provisions.[175]

---

172. 38 F.3d at 1272-75.

173. *Id.* In the withdrawn opinion, the court held that DeWeerth assumed the risk of federal, rather than state, court adjudication of an open question of state law. *DeWeerth*, 1994 U.S. App. LEXIS 10850, at *20-21. In the amended opinion, the court stated that DeWeerth "knew that any open question of state law would be decided by a federal as opposed to a New York state court." 38 F.3d at 1273.

174. The commentary that focuses on the question of the appropriate accrual rule for commencing a statute of limitations for recovery of stolen art reflects a lack of agreement similar to that found in the courts, although a majority of commentators favor some version of the discovery rule. For example, commentators have advocated: *Guggenheim*'s demand and refusal rule in conjunction with a laches defense, *see* Drum, *supra* note 10, at 942; Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 Duke L.J. 337, 383 (1993); variations on the discovery rule, *see* Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 Colum.-VLA J.L. & Arts 75, 101 (1993-94); Leah J. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations and Title Disputes In the Art World*, 81 J. Crim. L. & Criminology 1067, 1100-01 (1991); Stephen L. Foutty, Recent Development, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: *Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 Vand. L. Rev. 1839, 1860 (1990); Stephen F. Grover, Note, *The Need For Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 Tex. L. Rev. 1431, 1466 (1992); Petrovich, *supra* note 57, at 1157-58; Webb, *supra* note 11, at 895-99; applying the doctrine of adverse possession to personal property, *see* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 Buff. L. Rev. 119, 162-63 (1988-89); and the abolition altogether of any statute of limitations and its replacement with a mandatory obligation on owners to report stolen art promptly, *see*, Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 Yale L.J. 2437, 2468 (1994).

175. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991). Other alternatives include affirmative defenses that have effects similar to limitations rules, such as adverse possession and transfer of good title. Detailed discussion of these affirmative defenses are beyond the scope of this article, but they have serious flaws that make them unsuitable as realistic alternatives to the art theft statute of limitations problem. Adverse possession is a doctrine traditionally associated with

While preferable to the *Guggenheim* rule, none of these alternative limitation doctrines is entirely satisfactory. As explained below, each of these alternatives ultimately depends on either unfair allocation of losses to one party or the other (accrual at the time of theft or purchase), highly subjective, costly, and burdensome fact-intensive inquiries (the discovery rule), or schemes of limited application (statutory notice provisions).

A. *The Traditional Accrual Rule*

Historically, a replevin or conversion cause of action "ordinarily will run against the owner of lost or stolen property from the time of the wrongful taking."[176] In jurisdictions following this rule, the former owner must find the possession within a few years of the taking, or the action is time-barred.[177] As the Second Circuit noted in *DeWeerth*, "Obviously, this creates an incentive to find one's stolen property."[178]

This traditional rule has two important advantages: certainty as to when the limitations period commences and expires, at least for the good faith purchaser, and simplicity of application in litigation. Unfortunately, the inequity of this rule to owners who are art theft victims, particularly those who diligently seek to recover their property, outweighs these advantages. As noted, unlike most other types of

---

real property, although it has been infrequently applied to chattels. *See, e.g.*, Gatlin v. Vaut, 91 S.W. 38, 39 (Ind. 1905) (applying the elements of adverse possession in an action for the recovery of mules); Lightfoot v. Davis, 91 N.E. 582, 583 (N.Y. 1910) (stating that the doctrine of adverse possession may apply to chattels); Adams v. Coon, 129 P. 851, 852 (Okla. 1913) (applying elements of adverse possession to horse). The requirement of "open and notorious" possession—that the owner either knew or should have known of the adverse possession—makes the doctrine particularly ill-suited to works of art and other personalty. *See* O'Keeffe v. Snyder, 416 A.2d 862, 871-72 (N.J. 1980) (rejecting the adverse possession doctrine as a viable method of resolving disputes over stolen art because of the "open and visible" possession problem); Petrovich, *supra* note 57, at 1140-49 (critiquing adverse possession doctrine in context of stolen art).

As to the transfer of good title, under the U.C.C. and traditional canons of American law, a thief cannot transfer good title; therefore, a thief has "void" title and can only pass this "void" title to subsequent good faith purchasers. *See* U.C.C. § 2-403(1) (1987); *supra* note 7 and accompanying text. By contrast, when the owner has been defrauded of his property, the "swindler" has "voidable" title and can pass good title to the innocent purchaser. *See* U.C.C. § 2-403(1). While a strong case can be made for treating good faith purchasers identically, regardless of whether the *seller* is a thief or a swindler, equality and equity would likely result in both the thief and the defrauder having void, rather than voidable, title. It is unlikely that legislatures or courts would modify this deeply embedded rule to make it easier for a thief to pass good title. *But see* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1400 (S.D. Ind. 1989) (stating that under Swiss law, a thief can pass good title to a good faith purchaser), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

176. O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980); *see supra* note 67.

177. DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

178. *Id.*

personal property, art is easily hidden, may last for centuries, often appreciates in value over time, and may be of enormous economic value.[179] Thus, whereas a traditional three-year rule may be appropriate in cases of perishable or semi-perishable items (e.g., horses, automobiles), or with items of limited value, strict application of this rule with respect to unique and valuable art could "encourage illicit trafficking in stolen art."[180]

One way courts have mitigated the harshness of this rule—at the expense of certainty and simplicity—is through the doctrine of fraudulent concealment, whereby the limitations period is tolled while the chattel is fraudulently concealed from the owner.[181] The fraudulent concealment doctrine, however, generally requires that both the location and possessor of the chattel be actively and fraudulently concealed from the owner, and not merely that the thief or purchaser fails to identify himself or the fact of the theft to the owner.[182]

B. *The Discovery Rule*

The harshness of the traditional rule has also been mitigated by courts in several states through recent adoption of "discovery" rules for actions concerning recovery of stolen art.[183] At least one state—California—has enacted by statute a discovery rule for stolen art claims, and at least two states—Ohio and Oklahoma—have adopted discovery rules for stolen property claims generally.[184] The standard discovery rule contains both a subjective and an objective component: the statute of limitations begins to run when the former owner actually knew or reasonably should have known the whereabouts of the

179. *See supra* text accompanying notes 7-8.

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

181. *See* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1391-92 & n.10 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); O'Keeffe v. Snyder, 416 A.2d 862, 872-73 (N.J. 1980); General Stencils, Inc. v. Chiappa, 219 N.E.2d 169, 170-71 (N.Y. 1966); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 621 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991); 51 Am. Jur. 2d *Limitations of Actions* § 124, at 693; Allen & Lamkin, *supra* note 66, at 851, 856.

182. *See Goldberg*, 717 F. Supp. at 1392; *General Stencils*, 219 N.E.2d at 171; Lightfoot v. Davis, 91 N.E. 582, 586 (N.Y. 1910). *But see supra* note 144 (discussing *Elicofon*'s theory that fraudulent concealment doctrine would be construed broadly in cases of theft).

183. *See, e.g.*, *Goldberg*, 717 F. Supp. at 1391 (applying discovery rule to find that plaintiff's failure to locate stolen art was reasonable due to fear of "physical harm or destruction to human life or the art itself"); *O'Keeffe*, 416 A.2d at 869-70 (finding that discovery rule should be applied in replevin action for stolen painting "[t]o avoid harsh results from the mechanical application of the statute [of limitations]); William L. Prosser, Handbook of the Law of Torts § 30 (5th ed. 1984). Courts first adopted the discovery rule in cases of medical malpractice or exposure to toxic substances, in which the plaintiff could not reasonably have discovered the injury until substantially later. The rule was later expanded to other areas of tort law. *See O'Keeffe*, 416 A.2d at 869.

184. *See supra* note 68.

chattel. This rule requires former owners to exercise reasonable diligence in searching for their stolen property.

The first decision to apply a discovery rule in a case involving stolen art was *O'Keeffe v. Snyder*,[185] a replevin action brought by Georgia O'Keeffe in 1976 to recover three paintings allegedly stolen from An American Place in 1946.[186] Over the years, O'Keeffe made sporadic, informal efforts to locate the missing paintings.[187] The paintings were ultimately located in a gallery in 1975. The court reviewed the steady expansion of the discovery rule under New Jersey law and held that "[t]he discovery rule applies to an action for replevin of a painting. . . . O'Keeffe's cause of action accrued when she first knew, or reasonably should have known, through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings."[188] Because of numerous factual disputes, including the adequacy of O'Keeffe's diligence, the court remanded for a plenary trial.[189]

Similarly, the district court in *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*,[190] applied a discovery rule in an action for the recovery of stolen art. The Republic of Cyprus and the Greek Orthodox Church of Cyprus commenced suit to recover sixth-century Byzantine mosaics that had been looted from a church in Turkish-occupied Cyprus sometime between 1976 and 1979.[191] In 1989, the plaintiffs discovered that the mosaics were in the possession of defendant Goldberg in Indiana, and sued her soon thereafter.[192] In concluding that a discovery rule was appropriate, the court noted, "If a plaintiff is unable to determine the possessor of sto-

185. 416 A.2d 862 (N.J. 1980).

186. *Id.* at 865. An American Place was a renowned cooperative art gallery operated by O'Keeffe's husband, the photographer Alfred Stieglitz. *Id.*

187. *Id.* at 866. O'Keeffe discussed the matter with colleagues in the art world. The theft was never reported to any law enforcement agency or insurance company, nor was its loss advertised in any publications. In 1972, the theft was reported to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. *Id.*

188. *Id.* at 870.

189. *Id.* The trial court was directed to consider the following issues in determining whether O'Keeffe was entitled to the benefit of the discovery rule:

> (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.

190. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

191. *Goldberg*, 717 F. Supp. at 1377-79. Because of the Turkish occupation of the northern part of Cyprus, including the expulsion of the Greek Cypriot population in 1976, the plaintiffs did not learn of the theft until 1979. *Id.* at 1378-80.

192. *Id.* at 1384-85. The case was tried to the court over several days in mid-1989. *Id.* at 1377.

len items, the plaintiff cannot maintain a cause of action in replevin."[193] The court, sitting in diversity and extrapolating as to the result that an Indiana court would reach, held "that the plaintiffs' cause of action did not accrue . . . until the plaintiffs, *using due diligence*, knew or were *on reasonable notice* of the identity of the possessor of the mosaics."[194] The court then chronicled the extensive, international efforts of plaintiffs to recover the mosaics as soon as they learned of their disappearance in 1979. The court held that the limitations period was tolled until the mosaics were located in Goldberg's possession and rewarded the mosaics to plaintiffs.[195]

Whereas the discovery rules in *O'Keeffe* and *Goldberg* mitigated the harsh impact on an innocent owner of the traditional statute of limitations that ran from the time of the theft or purchase, the Second Circuit in *DeWeerth* applied a discovery rule to mitigate the unfair impact of New York's demand and refusal rule on the good faith purchaser. The Second Circuit stated, "A construction of the rule requiring due diligence in making a demand to include an obligation to make a reasonable effort to locate the property will prevent unnecessary hardship to the good-faith purchaser, *the party intended to be protected*"[196] by the demand and refusal rule.[197] The court concluded that DeWeerth's efforts to recover the stolen Monet were "minimal"[198] and that her claim was therefore barred by the statute of limitations.[199]

The discovery rule, while certainly more equitable to purchasers than *Guggenheim*'s demand and refusal rule, still suffers from two of the basic flaws of that rule, albeit to a lesser degree. First, under both rules, the purchaser never has true repose from a claim by a former owner, because there is no date certain from which the limitations period begins to run.[200] Although the limitations period under a discovery regime theoretically commences when the former owner reasonably should have discovered the location of the missing art, that

193. *Id.* at 1389.

194. *Id.* at 1388 (emphasis added).

195. *Id.* at 1391, 1405; *see also* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *36 (E.D. Pa. Feb. 23, 1995) (applying discovery rule to find that former owners exercised reasonable diligence during 33 years between theft and recovery of painting, despite minimal efforts between last contact with FBI in 1979 and registration with Art Loss Register in 1992).

196. DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987) (emphasis added), *cert. denied*, 486 U.S. 1056 (1988); *see also* 836 F.2d at 112 ("To require a good-faith purchaser who has owned a painting for 30 years to defend under these circumstances would be unjust.").

197. *Id.* at 108.

198. *Id.* at 111.

199. *Id.* at 112 & n.7.

200. *See generally* Mucha v. King, 792 F.2d 602, 611-12 (7th Cir. 1986) (stating that the discovery rule lacks a concise standard); Ackerman v. Price Waterhouse, 644 N.E.2d 1009, 1013 (N.Y. 1994) (criticizing accountant malpractice discovery rule for its lack of "certainty and predictability").

point in time is unknowable until it is determined in litigation.[201] The main difference between this aspect of the two accrual rules is that under demand and refusal, the limitations period *never* runs prior to actually locating the chattel, while under the discovery rule, the limitations period may commence running earlier. This fact, however, would not be known to the purchaser prior to litigation, and thus, the purchaser never has actual repose.[202] Moreover, the uncertainty and unpredictability inherent in the discovery rule is heightened because the innocent purchaser's right to retain the art may well turn on a sliding scale of diligence dependent on whether the former owner is unfamiliar with the art world or is a sophisticated collector or a museum.[203]

Second, like the laches inquiry, "[d]etermination of due diligence is fact-sensitive and must be made on a case-by-case basis."[204] Thus, with the exception of cases of gross negligence, such as *DeWeerth* and *Guggenheim*, the issue of due diligence will generally not be amenable to resolution without extensive discovery and a trial.[205] Nevertheless, the discovery rule does have the advantage of avoiding the fact-inten-

201. *See, e.g.*, *DeWeerth*, 836 F.2d at 107 n.4 ("[The discovery] rule, focusing on the plaintiff's conduct, conceptually starts the limitations period at the point where the plaintiff has had an opportunity to use due diligence in locating the property and making a demand, and has failed to do so."); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 621 (App. Div. 1990) ("[I]t is questionable whether *DeWeerth* purports to fix any particular time as the point of accrual."), *aff'd*, 569 N.E.2d 426 (1991).

202. Under the discovery rule, the purchaser has the ability to take steps to make it more likely that the reasonably diligent owner would have located the chattel, such as public display or publication. A private owner of valuable art, however, may not wish to publicize his ownership for legitimate reasons such as fear of theft. Under the demand and refusal rule, such public efforts are irrelevant. *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430-31 (N.Y. 1991).

203. *See* Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *40 (E.D. Pa. Feb. 23, 1995) ("The discovery rule is fact-sensitive so as to adjust the level of scrutiny as is appropriate in light of the identity of the parties; what efforts are reasonable for an individual who is relatively unfamiliar with the art world may not be reasonable for a savvy collector, a gallery, or a museum.").

204. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1389 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). In Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991), the court criticized the discovery rule on the ground that "the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence." *Id.* at 430. The court added that "it would be difficult, if not impossible, to craft a reasonable diligence requirement." *Id.* at 431. Nevertheless, the court remanded the case for a trial of the laches issue, which required just such a "difficult, if not impossible" determination of "reasonable diligence." *Id.*; *see also DeWeerth*, 836 F.2d at 110 (explaining that the determination of what constituted unreasonable delay is a fact-sensitive endeavor); *Erisoty*, 1995 U.S. Dist. LEXIS 2096, at *33 (stating that the discovery rule is "highly 'fact-sensitive,' and flexible" (internal quotations omitted)); O'Keeffe v. Snyder, 416 A.2d 862, 873 (N.J. 1980) (stating that due diligence is a case-specific inquiry); Petrovich, *supra* note 57, at 1150-52 (explaining the various factors required in an inquiry under the discovery rule).

205. *Goldberg*, 717 F. Supp. at 1389; *O'Keeffe*, 416 A.2d at 870.

sive scrutiny of the second prong of a laches defense—prejudice to the defendant attributable to plaintiff's unreasonable delay.

C. *Statutory Provisions and Proposals*

Congress, the New York State legislature, and the European Union ("EU") have considered laws in recent years that address extremely limited aspects of the stolen art statute of limitations problem. The enacted federal legislation is limited to claims by foreign governments concerning foreign "cultural property" imported into the United States, while the New York bill, vetoed by the Governor, was limited to art in the possession of specified not-for-profit institutions. The EU law is limited to "cultural property" of one Member State found in another Member State. Although none of these laws attempt to address the entire universe of stolen art claims, they each suggest that the unique attributes of stolen art require innovative legislative solutions.

1. The CPIA

In 1983, Congress enacted the Cultural Property Implementation Act ("CPIA"),[206] the enabling legislation for United States implementation of the 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[207] The CPIA primarily addresses the Executive's authority to restrict the importation of, and to seize illegally imported, foreign cultural property.[208] The CPIA affords redress only to foreign State parties to the UNESCO Convention through the Executive; it does not provide a private cause of action.[209] Thus, the CPIA is limited to an extremely small, albeit important, subset of potential claims.

The CPIA also contains a complex statute of limitations that prevents State parties from recovering certain works previously imported into the United States.[210] The CPIA appears to be the only statute of limitations in the United States that specifically addresses the issue of stolen art outside of traditional accrual rules. In order to be exempted from recovery under the CPIA's limitations periods, the object must be within the United States, and it must have been: (1) held for more

206. 19 U.S.C. §§ 2601-2613 (1983). The CPIA protects "cultural property" and "archaeological or ethnological material," as defined at 19 U.S.C. § 2601(2),(6).

207. 823 U.N.T.S. 231 (1972) (adopted Nov. 14, 1970, 16th Sess.), *reprinted in* UNESCO's Standard-Setting Instruments, Incorporating Supp. 1, at IV.A.4 (1982).

208. 19 U.S.C. §§ 2601-2613.

209. *See id.* In contrast to typical conversion actions, under certain circumstances, a prevailing State Party must pay a good faith purchaser the amount the purchaser paid for the object. *Id.* § 2609(c)(1).

210. *Id.* § 2611.

than three years by a museum or similar institution which had purchased the object in good faith, so long as the acquisition was reported in specified publications, the object was publicly displayed for at least one year, or catalogued and made available to the public for at least two years;[211] (2) held for not less than ten consecutive years, with public exhibition for at least five of those years;[212] (3) held for not less than ten consecutive years and the foreign State Party received or should have received fair notice of the location of the object;[213] or (4) held for not less than 20 consecutive years and the possessor can prove good faith purchase of the object.[214]

The latter three exemptions apply to cultural property held by individuals and dealers, not just museums or similar institutions. In addition, the second and third exemptions apply whether or not the possessor was a good faith purchaser. These limitations periods appear to be arbitrarily selected, although fairly reasonable. They are not based on any commonly used limitations doctrines, although the last three exemptions are akin to an adverse possession defense. Although the first three exemptions have superficial similarities to a discovery rule, they focus almost exclusively on the acts of the possessor, not the claimant, as is the case under a discovery rule.[215] No reported cases have interpreted the limitations provision of the CPIA.

2. The New York Art Claim Bill

In 1986, in response to the demand and refusal statute of limitations rule as articulated in *Menzel*, the New York State Assembly and Senate passed a bill that would have eliminated that rule for recovery of art objects from certain governmental and not-for-profit organizations, including museums, open to the public or to students, and limited to works that had been acquired in good faith.[216] The Art Claim Bill specifically provided that a cause of action in replevin or conversion commenced upon the happening of the earliest of three specified,

211. *Id.* § 2611(2)(A).

212. *Id.* § 2611(2)(B).

213. *Id.* § 2611(2)(C).

214. *Id.* § 2611(2)(D).

215. The third exemption is ambiguous as to whether the inquiry would focus on what the State Party did to receive notice, or what the possessor did to provide notice. *Id.* § 2611(2)(C).

216. *See supra* notes 69-75 and accompanying text. The Art Claim Bill, unanimously approved by the New York State Assembly and Senate, would have created a new section to the CPLR, § 214-d. "The purpose of the bill is to overrule the substantive demand requirement in *Menzel v. List*, 253 N.Y.S.2d 43 (App. Div. 1964) and create a specific time period when a cause of action accrues for recovery of an art object from certain museums and not-for-profit institutions . . . ." Memorandum in Support of Legislation, A. 11462-A (on file with *Fordham Law Review*); *see also* Drum, *supra* note 10, at 936 (discussing Art Claim Bill).

affirmative notification procedures.[217] The three-year limitations period, however, would be tolled when the claimant could demonstrate that, in the exercise of reasonable diligence, he could not have discovered the whereabouts of the object (the discovery rule).[218]

Supporters of the Art Claim Bill pointed to the "quirk" in New York law that gives the thief repose after three years, but not the good faith purchaser, who is always subject to the former owner's demand.[219] Supporters also noted the long-term danger posed to the state's great museums and private collections in the absence of any repose to good faith purchasers.[220]

The Art Claim Bill, however, while intended to mitigate some of the harm threatened by the demand and refusal rule, would have protected only a relatively small class of good faith purchasers. Its diffuse and complex notification scheme would have been inadequate to provide actual notice to many theft victims. It also did not define good faith purchasers, with the likely result that fact and discovery-intensive litigation would shift to that issue.

Although the Art Claim Bill unanimously passed both houses, several federal agencies and certain influential members of the art world argued that the Art Claim Bill would encourage "laundering" of stolen foreign cultural property and turn New York into a haven for stolen art.[221] As a result of this opposition, the Governor vetoed the Art Claim Bill.[222]

---

217. Art Claim Bill, *supra* note 70, § 214-d(a),(b). These procedures were: (1) the first date of publication of the acquisition of the object by the entity in a publication which regularly contains reports of acquisitions and has a circulation of at least 500, or any regularly published national or multi-state newspaper or periodical, or any New York publication with a circulation of at least 50,000, or a periodical or exhibition publication which is concerned with the type of object acquired; (2) the first date of continuous display of the object for at least 12 months in any 36-month period; or (3) the first date of the cataloguing of such object, in a catalogue available to the public upon request for three consecutive years.

218. *Id.* § 214-d(d). The Art Claim Bill also included separate provisions depending on whether the acquisition was prior to 1976, after 1976 but prior to the Art Claim Bill's effective date, or after the effective date. *Id.* § 214-d(a),(b).

219. Letter from Paul M. Bator, Prof. of Law, University of Chicago Law School, to Gov. Cuomo (July 25, 1986) (on file in Bill Jacket of Art Claim Bill, *supra* note 70).

220. Letter from Thomas D. Nicholson, Director, American Museum of Natural History, to Gov. Cuomo (July 7, 1986); letter from Carroll L. Wainwright, Jr., Partner, Milbank, Tweed, Hadley & McCloy, to Gov. Cuomo (July 28, 1986) (both letters on file in Bill Jacket of Art Claim Bill, *supra* note 70).

221. Molotsky, *supra* note 71, at C15. The Governor received letters and legal opinions opposing the Art Claim Bill from the Departments of State, Treasury, Justice, the U.S. Customs Service, the U.S. Information Agency, IFAR, and other private organizations and individuals. It has been noted that these federal agencies may have their own agenda regarding foreign cultural property: they reportedly use art and antiquities as bargaining chips in negotiations with developing nations in regard to combating illegal drugs. *See* Stille, *supra* note 10, at 32 (noting that the U.S. began using cultural property as bargaining chips during President Nixon's tenure).

222. Veto Message, *supra* note 71, at 863.

3. The European Union Cultural Objects Law

An innovative, albeit limited, approach to the stolen art statute of limitations problem is reflected in a recent EU law that provides for the return of "cultural objects" unlawfully removed from any EU Member State and found in another EU Member State.[223] If the work was stolen within 75 years of its discovery, and the work is from a public or church collection of any EU Member State, that nation may demand the return of the work if found in another Member State, and may sue the possessor for its return if the demand is refused.[224] A good faith purchaser, however, must be compensated by the requesting nation for the return of the work.[225]

In this respect, the new EU law resembles condemnation procedures for the taking of real property by the state.[226] As in condemnation or eminent domain takings of real property, the requesting nation may only "re-patriate" artwork of a *public* nature—i.e., art stolen from a public collection or a church, or from private collections if the object is classified as a "national treasure."[227]

---

223. Council Directive 93/7, 1993 O.J. (L 74) 74 [hereinafter Council Directive]; Godfrey Barker, *Good-Title Insurance Increasingly Necessary*, ARTnewsletter, Dec. 28, 1993, at 5.

224. Council Directive, *supra* note 223, arts. 5, 7. If the cultural object is from a private collection, suit must be brought within thirty years. *Id.* art. 7(1). Return proceedings must be commenced within one year after the requesting Member State became aware of the object's location. *Id.*

225. *Id.* art. 9. This approach is precisely the opposite of the reported settlement in *Guggenheim*, in which the good faith purchaser paid the former owner the current market value to retain the painting she had purchased over 25 years earlier. *See supra* note 56.

226. The Council Directive law also requires Member States to cooperate with each other and to notify other Member States when a cultural object that is believed to have been unlawfully removed from another State is located. *Id.* art. 4.

227. *Id.* art. 1(1) & annex.

The U.S. State Department has been involved in negotiating a multilateral convention known as "UNIDROIT" that has similarities to the EU law, but which would include private owner remedies for stolen "cultural objects", and which would also permit Contracting States to seek recovery of illegally exported art, whether or not stolen. Final Act of the Diplomatic Conference for the Adoption of the Draft Unidroit Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995 (on file with *Fordham Law Review*). As proposed, claims 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" or illegal export. *Id.* arts. 3(3) (theft), 5(5) (illegal export). UNIDROIT also provides that a Contracting State may extend the limitations period for stolen cultural objects to 75 years or longer, *id.* art. 3(5), and that certain categories of particularly important stolen "cultural objects" shall be subject only to the three years from actual discovery rule. *Id.* arts. 3(4), 3(8). As with the EU law, former owners would have to reimburse good faith purchasers for the value of the work recovered. *Id.* arts. 4(1), 6(1). One factor in determining whether the possessor obtained the object in good faith is whether the possessor "consulted any reasonably accessible register of stolen cultural objects." *Id.* art. 4(4). It is uncertain whether the State Department will support the convention as currently drafted; the U.S. may support the provisions regarding stolen art, but

IV. THE AVAILABILITY OF AN INTERNATIONAL STOLEN ART REGISTRY

In its 1980 decision in *O'Keeffe*, the New Jersey Supreme Court lamented the absence of "a reasonably available method for an owner of art to record the ownership or theft of paintings."[228] The court recognized that an "efficient registry" of art works might better serve the art community than arcane legal doctrines.[229] Unable to "mandate the initiation of a registration system," the court resorted to the discovery rule.[230]

Apparently unknown to the New Jersey Supreme Court, in 1976, the non-profit International Foundation for Art Research, Inc. ("IFAR")[231] had begun to maintain a manual registry of stolen works of art. For a fee, theft victims could register their stolen art and potential purchasers could inquire whether a proposed acquisition had been registered as stolen. In addition, law enforcement agencies contacted the registry to determine if suspicious works of art had been registered as stolen.

In the late 1980's, IFAR began to computerize its paper records in order to make its searches more efficient and accurate. In 1991, IFAR joined with Sotheby's, Christie's, London-based insurance brokers, and other British and American companies to establish the International Art & Antique Loss Register, Ltd. (the "Art Loss Register" or "ALR"), a British for-profit corporation. The ALR has been emerging as the leading international clearinghouse for information on stolen art, and it demonstrates the technological feasibility of an international computerized stolen art registry.

The ALR maintains a sophisticated computerized database in both New York City and London with information and images of over 50,000 stolen art objects.[232] Art theft victims or their insurers may

---

not the provisions related to the illegal export of art. Spencer P.M. Harrington, *UNIDROIT, Aimed at Europe, May be "Tough Sell" in U.S.*, ARTnewsletter, June 28, 1994, at 1-2 (commenting on prior draft of UNIDROIT); *see also* Barker, *supra* note 223, at 5 (stating that the U.S. is expected to sign a proposed provision requiring legal owners to reimburse good faith purchasers). If adopted, UNIDROIT would effectively supplant the CPIA.

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

229. *Id.*

230. *Id.*

231. IFAR is a New York City-based organization dedicated to recovering and to preventing the circulation of stolen, forged, and misattributed works of art.

232. Leonard W. Boasberg, *Artful Sleuths*, Phila. Inquirer, Sept. 7, 1994, at E1, E10. For a description of the operation and technology of the ALR computer system, see Daly, *supra* note 1, at 21-23. "ALR taps multimedia technology, combining text, sound, pictures and video in an interactive manner." *Id.* at 21. The system was also installed for trial in Scotland Yard's Art Squad and at FBI headquarters in Washington, D.C. The Int'l Art & Antique Loss Register, Ltd., 1993/1994 Annual Review 5 (1994) [hereinafter Annual Review] (on file with *Fordham Law Review*).

register stolen art with the ALR for approximately $65 per item.[233] Before the ALR will register a work, its theft must have been reported to the police and it must have a value in excess of $2000.[234] In addition, law enforcement agencies may register stolen objects. In 1993 alone, the ALR reported that almost 9000 items were registered.[235]

The ALR also provides an Art Theft Search Service for buyers who wish to determine if a work has been reported as stolen, as well as for law enforcement officials who have come into possession of or are aware of art work of a suspicious nature.[236] The ALR charges potential buyers a $50 fee to search the registry to see if a work has been reported as stolen; it does not charge a fee to law enforcement officials. In addition, the ALR conducts catalogue searches on behalf of the major American and British auction houses, including Sotheby's, Christie's, Phillips, Bonhams, and Butterfields.[237] The Metropolitan Museum of Art announced in February 1994 that it would screen all proposed acquisitions in excess of $35,000 with the ALR, and the J. Paul Getty Museum regularly uses the ALR.[238] From 1991-93, the ALR claims to have played a role in the recovery of over 400 works of art, 200 of which were recovered in one location.[239]

V. Proposed Legislative Solution

A. *Principles of the Proposed Legislation*

Taking a cue from the New Jersey Supreme Court in *O'Keeffe*, this Article proposes as an ultimate goal a national legislative solution to the stolen art statute of limitations problem based on an international stolen art registry such as the ALR. Ideally, an ALR-type registry would be operated by the government—such as the FBI, the Library of Congress, or the Smithsonian Institution—or by a nonprofit entity (as it was initially). The ALR, however, is currently the only available registry of its scope and quality, and this legislative solution should not be deferred until a comparable government or nonprofit registry is created.[240] As an interim measure, this Article proposes that state

233. *See* IFARreports, Jan. 1994, at 16 (on file with *Fordham Law Review*).

234. *Id.* Approximately 240 insurance companies (including 120 syndicates at Lloyd's of London) in the United States and Europe have entered into fixed fee arrangements with the ALR that enable them to register any art losses of their insureds. Annual Review, *supra* note 232, at 8, 19.

235. *Id.* at 8.

236. *Id.* at 9.

237. *Id.* at 2, 9.

238. Andrew Decker, *Met Institutes Screening of Proposed Acquisitions*, ARTnewsletter, Feb. 22, 1994, at 3.

239. Annual Review, *supra* note 232, at 10.

240. In the absence of a competing registry, legislation may need to include standards that address such issues as price-setting, confidentiality, and quality control. If the ALR's for-profit status were to cause serious impediments to passage of legisla-

legislatures, particularly in important art markets such as New York, adopt this proposal.[241] This proposal is premised on five basic principles.

First, "art" is qualitatively different from other forms of personal property, thereby justifying special innovative treatment under the law. Second, both the former owner and the good faith purchaser are by definition legally innocent of wrongdoing. Therefore, one innocent party will likely gain at the expense of the other innocent party, particularly as the guilty parties—the thief and bad faith purchasers—will rarely be available to compensate the victims.[242] Given that both parties are innocent, the burdens and responsibilities of locating stolen art and discouraging its purchase should be allocated where they can most easily and practicably be met. Third, unlike other legislative proposals, the statute should cover as much of the stolen art universe as is feasible. Fourth, pursuant to traditional canons of American law, the former owner of the stolen property has superior title even as against a good faith purchaser. Those rights, however, should be subject to a definite statute of limitations. As with virtually all other areas of American law, the art theft victim who sleeps on his rights ultimately should lose those rights. Finally, the proposal should provide a substantial degree of certainty in result and simplicity in appli-

---

tion, then its current owners, as well as the major museums, insurance companies, galleries, and auction houses that currently use the ALR should seriously explore whether the ALR could be returned to its original non-profit status or whether a competing non-profit registry is feasible.

241. A recent Note proposes prospective abolition altogether of the statute of limitations based on mandatory registration by the former owner with both the ALR and law enforcement. *See* Bibas, *supra* note 174, at 2460-67. Under that exclusively owner-focused proposal, an owner who registers faces no limitations bar; an owner that fails to register promptly (apparently within weeks for individuals, six months to one year for museums) has no recourse against a good faith purchaser. *Id.* Although the Note criticizes the notion that good faith purchasers are "innocent," *id.* at 2453-54, contrary to both fundamental legal doctrine and the facts of many of the stolen art cases, the proposal itself is surprisingly harsh on non-registering and late registering owners. That proposal also does not provide for the purchaser's use of the registry retroactively—thus leaving out a vast universe of stolen art. It does not address the use of the registry as a theft recovery mechanism, and it ignores some of the factual nuances, such as the rights of subsequent purchasers, that the more balanced and detailed proposal discussed further in this part attempts to address. The purchaser's use of a centralized registry to commence the limitations period has previously been suggested by James A.R. Nafzinger, *Repose Legislation: A Threat to the Protection of the World's Cultural Heritage*, 17 Cal. W. Int'l L. J. 250, 264 (1987).

242. Former owners can mitigate their losses through loss insurance, but they will still experience the loss of the unique work of art, perhaps higher premiums, and the potential substantial increase in value over time. Art "title" insurance for purchasers, however, is only available to a very few institutions, and is extremely expensive. Barker, *supra* note 223, at 5. In some cases, as in the reported *Guggenheim* settlement, the purchaser might be able to mitigate his losses by recovering from the seller who, however, may *also* be a good faith purchaser. *See* Menzel v. List, 267 N.Y.S.2d 806, 807 (Sup. Ct. 1966); *supra* note 127 (discussing *Menzel*); *supra* note 56 (discussing the *Guggenheim* settlement).

cation, without unduly sacrificing fairness. One must, however, recognize that no legislative solution can respond perfectly to all the myriad permutations that exist in the stolen art universe.

B. *Prospective Legislative Proposal*

Under this legislative proposal, both owners and purchasers would be encouraged, but not required, to use one specified international art theft registry, which would maintain a confidential record of the contact with the registry. Owners and purchasers who used the registry would receive specified protections from the other party.

Former owners (or their insurers) who registered their stolen art soon after the theft with both law enforcement and the registry would receive protection from a statute of limitations defense from a subsequent purchaser. Either that subsequent purchaser consulted the registry and ignored the information that the work was stolen, or did not consult the registry.[243] In either event, the purchaser would not be considered a good faith purchaser under the terms of the statute, and the purchaser's right to repose would be subject to the discovery rule.[244] The statute could treat the registration as per se due diligence (effectively eliminating a statute of limitations defense), or as creating a strong, but rebuttable, presumption of due diligence.[245]

If the prospective purchaser consults the registry and the work is not registered, the statute would consider him a good faith purchaser. A confidential record would be kept of the inquirer's name and address and the location of the art. The statute of limitations would commence running in favor of this purchaser at the time of the in-

243. A third possibility exists—that no match is found because the items are described differently or the registry made an error. The parties should be required to provide sufficient detail to minimize these problems, and a purchaser should be required to pursue carefully evidence of a possible match. The registry would need to be protected from liability for such errors.

244. For all the reasons discussed in this Article, the anomalous demand and refusal rule should be abandoned altogether. The authors propose that the discovery rule be treated as the "default" rule, i.e., when the specific procedures of the proposed statute are inapplicable, the discovery rule would apply. Although permitting the bad faith purchaser to invoke the statute of limitations may appear inequitable, it must be remembered that under traditional limitations rules, an owner's claim runs from the time of theft or bad faith purchase, absent fraudulent concealment. *See supra* notes 53, 120, 144, 181, and accompanying text. The discovery rule should also apply where the registry erroneously failed to match a theft report with a purchaser's inquiry.

245. Making the presumption rebuttable has the advantage of creating incentives for the owner to take additional steps that will increase the likelihood that the art will be recovered, but also the disadvantages of the expensive and uncertain litigation that is associated with the discovery rule. *See supra* notes 200-05 and accompanying text. The concern with making the registration dispositive is that an owner could then take no other steps for years, yet recover from a non-registering purchaser whose possession was so public that minimal efforts would have disclosed the object's location.

quiry.[246] Subsequent good faith purchasers—those who checked the registry and found the work not registered—would be able to tack on the time period from the initial good faith purchase.[247] Thus, three years after the initial good faith purchase, the limitations period would expire, and ownership would effectively vest in the current good faith holder of the work who could then transfer good title to subsequent purchasers.

This proposal also gives substantial protection to the former owner who does not report the theft to the registry until *after* the good faith purchase. The proposal permits the former owner in excess of three years (i.e., from the time of the theft to the good faith purchaser's inquiry, plus three years) to discover the theft,[248] register the stolen art, and locate and bring suit against a prior good faith purchaser. When an owner registers the stolen art work after a purchaser's inquiry, the registry would provide the former owner with identifying information regarding the inquirer, the date of the inquiry, and the then-location of the art. At that point, the diligent owner—with the aid of law enforcement—should be able to locate the work relatively quickly.[249] Active concealment by the inquirer of the current possessor's identity or the location of the art when faced with such an inquiry would toll the limitations period.[250]

Such an approach should also deter commerce in stolen art by encouraging purchasers and dealers to investigate provenance beyond inquiry with the registry. Because the registered good faith purchaser is at risk of discovery by the former owner for three years after registration (including that his identity and the location of the art is available to the former owner), he has strong incentives to take steps beyond inquiring with the registry to determine provenance at the time of purchase. For example, if "suspicious circumstances sur-

246. As noted, this is the accrual rule—although typically measured from the date of purchase—followed in most jurisdictions. *See supra* part III.A.

247. The requirement that subsequent purchasers also consult the registry is intended to avoid a situation in which the former owner registers the work after the initial good faith purchase but within the limitations period, and the possessor then tries to sell the work to avoid recovery by the former owner. Regardless, registration by the former owner more than three years after the initial purchaser's inquiry would be ineffective against subsequent purchasers.

248. Although large institutions may not immediately discover theft of works in their possession, particularly those not on display, *see, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 428 (N.Y. 1991), this proposal gives these institutions both a reasonable time to determine that a work is missing and an incentive to adopt technologies designed to keep track of their collections.

249. *See, e.g.*, Erisoty v. Rizik, No. 93-6215, 1995 U.S. Dist. LEXIS 2096, at *16 (E.D. Pa. Feb. 23, 1995) (stating that painting, stolen in 1960, was recovered within six weeks of IFAR report to FBI in 1993 that stolen painting had been seen by museum curator in 1989).

250. *See supra* notes 181-82 and accompanying text.

rounded the sale,"[251] the purchaser would be well-advised to investigate further, lest he be forced to relinquish the object two or three years down the road.

Moreover, because the good faith purchaser can maintain an action against the seller,[252] reputable professional dealers and auction houses would have a strong incentive to investigate the art's provenance prior to their own purchase or sale on consignment. This investigation would reduce the likelihood that the seller is dealing in stolen art and that the seller would be subject to a third party suit within the next three years. This contrasts with the present situation, where a dealer selling a work of questionable provenance to a good faith purchaser may reasonably choose to take the risk that the former owner will not discover the location of the object, and that even if the owner does fortuitously discover the work in a decade or more, the dealer may be unavailable, judgment-proof, or otherwise not liable.

To encourage use of the registry, it is crucial that the information provided be kept confidential, with the following exceptions: (1) the registry should notify the prospective purchaser that the work has been reported as stolen, but identifying information as to the former owner should be disclosed to the purchaser only at the owner's option; (2) the registry should report the prospective purchaser's inquiry of a stolen work of art, including identifying information, to the owner or the owner's insurer, and appropriate law enforcement; and (3) the registry should report the owner's report of stolen art to law enforcement authorities if the owner has not already done so.[253]

Additionally, the registry should be fully financed by inquiring owners and purchasers. User fees should include an amount sufficient for national and international promotion of the registry, because the registry's utility is dependent on worldwide notice of its availability. Although worldwide dissemination of the existence and role of the registry may appear at first blush to be an insurmountable task, the realities of the art world, particularly as to currently valuable art, greatly ease the effort. The ALR, for example, although in existence for only a few years, already has a strong international presence, at least in the West.[254] Dissemination of information regarding the registry through trade publications targeted at museums, universities and similar institutions, art dealer associations, auction houses, insurers, collectors, and law enforcement agencies would effectively reach the

251. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1400 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

252. *See, e.g.*, DeWeerth v. Baldinger, 836 F.2d 103, 105 (2d Cir. 1987) (impleading gallery owner), *cert. denied*, 486 U.S. 1056 (1988); Menzel v. List, 246 N.E.2d 742, 743 (N.Y. 1969) (same); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618 (App. Div. 1990) (same), *aff'd*, 569 N.E.2d 426 (1991).

253. Alternatively, report of the theft to law enforcement officials could be a precondition of registration, as ALR currently requires.

254. *See supra* notes 232-38 and accompanying text.

great majority of parties who play a significant role both in legitimate art transactions and in the reporting and recovery of stolen art.

Owners may choose not to use the registry for a number of reasons—the object is not valuable enough, insurance proceeds have been recovered,[255] the former owner considers it unlikely the art will turn up in a jurisdiction in which registration is relevant, or he is simply negligent. As noted, if the purchaser *has* consulted the registry and the owner has not, for whatever reason, the former owner's cause of action would expire three years after the purchase.

Purchasers may also choose not to consult the registry for several reasons—for example, they may realize the provenance of the art is questionable and they do not want to risk revealing their identities to the police or the owner, or they are simply negligent.[256] In these cases, and where the former owner has previously reported the stolen art, the owner should be the beneficiary of the rules set forth above.

In cases in which neither party registers, the most appropriate rule would be a discovery rule. With a discovery rule, the non-registering owner must be diligent in other ways, while the non-registering purchaser runs the risk that the diligent owner could recover the property in ten, twenty, or thirty or more years after purchase. The uncertainties for both parties of a discovery rule create an added incentive to use the registry.

C. *Retroactivity and Other Issues*

The three primary difficulties with the proposal concern: (1) when one party registers and the other party is reasonably unaware of the registry; (2) whether to apply the proposed statute retroactively; and (3) the "gap" problem, in which the innocent purchaser consults the registry, but the former owner subsequently registers the art within the limitations period and claims the art.

The easiest way to deal with the first issue is not to create any special exemptions and to treat the non-registering owner or purchaser the same as any other non-registering party, as set forth above. There may be cases, however, in which it is truly unfair to expect the owner or purchaser, particularly individuals in developing countries, to be aware of the registry. The standard in such cases should be whether a reasonably diligent owner, who affirmatively seeks to recover his property, or a reasonably diligent purchaser investigating the provenance of the object, knew or reasonably should have known of the

255. Insurers presumably could then either register the object, pursuant to standard insurance provisions whereby the insurer takes title to the stolen object upon payment to the insured, or require the owner to register the stolen object.

256. In many transactions, the provenance of the art may be so certain or the market value of the art so minimal that the purchaser sees no reason to consult the registry.

existence of the registry.[257] The burden should be on the party asserting the exception, but where the exception does apply, the courts should use the discovery rule to measure the limitations period.

As to retroactivity, the easiest approach again would be to make the statute non-retroactive, except to the extent of overruling *Guggenheim* and retroactively applying a discovery rule. This would, however, leave decades of stolen art (and tens of thousands of valuable objects) outside the scope of the registry system. This article, therefore, proposes that former owners (or their insurers) of art that was stolen prior to the statute's effective date be afforded the opportunity to register the object within a reasonable "window" (for example, two years after the effective date) to obtain the statute's benefits. This registration, however, would necessarily be inapplicable to the rights of possessors at the time of the effective date (although it could be evidence of diligence),[258] because it is unreasonable to expect present possessors of art to check all their current possessions against the registry.[259]

Such registration by former owners (or failure to register), however, would operate against subsequent purchasers. Thus, if the subsequent purchaser consults the registry and the object is not registered, the statute would run from that date.[260] Likewise, if the former owner registers and the subsequent purchaser does not, the rules discussed in part V.B. would apply and the registration would be either presumptive or dispositive evidence of diligence from the time of registration. The former owner's registration, however, should not revive any rights that the owner had lost under a discovery regime if it had been non-diligent during the years from the theft to the registration. In such events, the owner's registration would be a legal nullity. Otherwise, an anomolous situation would exist, whereby the former owner could not recover against the original good faith purchaser, yet the art would be unmarketable. In such situations, a present holder or subsequent purchaser could bring a claim to quiet title, and prevail on a showing that, prior to the statute's enactment and subsequent registration, the former owner had been non-diligent and the limitations period had run.[261]

---

257. The inquiry *should not* be whether the party understood the legal consequences of registering or not registering.

258. Claims against present possessors should be controlled by the discovery rule.

259. The Metropolitan Museum of Art, for example, holds over 3 million art objects, of which one third are on exhibit at any given time.

260. If the current possessor chose to consult the registry, then he should receive the same protections as any other registering purchaser.

261. To illustrate the somewhat complex retroactivity provisions by way of examples, assume the following facts: a painting is stolen from Owner (O) in 1970 and has been held by a good faith Purchaser (P) since 1980, and the statute's effective date (January 1, 1997) has passed:

The third problem—what might be termed the "gap" problem—involves the apparent unfairness to the good faith purchaser who consults the registry, finds the art is not registered, pays fair market value, and then is forced to return the object when the former owner *subsequently* (but within three years of the registration) learns of its location. This result, however, is not a function of the proposed statute, but of the Anglo-American rule that provides that the thief cannot pass good title to the good faith purchaser and that the former owner's title remains superior to the purchaser's within the limitations period. As noted,[262] this result also increases incentives for the seller and the purchaser to investigate provenance beyond registration. Because this proposal shortens and defines the limitations period, it does potentially mitigate this unfairness to the purchaser in two ways. First, the purchaser's chances of recovering against a solvent seller is greatly enhanced because the purchaser's liability runs only three years. Second, because title insurance would only be needed for three years, the likelihood that such insurance would be made more generally available and affordable should increase.

As mentioned, this legislative proposal cannot address every stolen art permutation, nor can it eliminate all harm to an innocent party. However, through the use of widely available, relatively low cost technology, this proposal allocates burdens, rights, and duties far more equitably and pragmatically than current limitations rules, while at the same time encouraging the recovery of stolen art and deterring the stolen art trade.

---

1. Neither O nor P uses the registry. O's rights against P are governed by the discovery rule, based on O's diligence since 1970. O's nonregistration would be evidence of non-diligence.

2. O registers the painting but P does not. O's rights against P are governed by the discovery rule. O's registration would be evidence of diligence, *but* if O had not been diligent since 1970, the registration could not restore O's lost rights.

3. P registers, but O either does not register or O registers after P. O will be notified of P's registration. O must bring suit against P within three years of P's registration. O's rights will depend on O's diligence since 1970, as in #2.

4. O registers, then P registers. O will be notified of P's registration. P does not "become" a bad faith purchaser. O's rights are governed by the discovery rule, based on O's diligence since 1970, as in #2.

Now, assume P sells to P_2 after January 1, 1997:

5. O registers before P_2 checks the registry. P_2 cannot be a good faith purchaser under the statute. O's rights against P_2 are governed by the discovery rule, with registration a presumption of diligence. However, if O was non-diligent since 1970, O's rights are not restored against P_2 by O's registration.

6. P_2 registers; O either does not register or registers after P_2. O has three years from P_2's registration to sue. If O was nondiligent since 1970, O cannot recover even if the suit is brought within three years of P_2's registration, as in #5.

7. P registers and sells to P_2, who also registers. O either does not register or registers after P_2. O has three years from P's registration to sue P_2. Even then, O's rights against P_2 depend on O's diligence since 1970.

262. *See supra* note 251 and accompanying text.

CONCLUSION

New York's demand and refusal rule, as interpreted in *Guggenheim*, unfairly rewards non-diligent former owners and punishes innocent purchasers. The rule is legally and logically unsound, fails to recognize that two innocent parties are involved, and is premised on a fundamental lack of understanding of the workings of the art world. It injects such an element of uncertainty into ownership interests in art that it threatens to disrupt commercial art dealings in New York and to burden the court system with long stale claims. Although alternative traditional limitations doctrines are more preferable to *Guggenheim*, they also have significant shortcomings of their own. Given the unique attributes of stolen art, this Article proposes an innovative legislative solution based on a registry system that incorporates modern computer technology. This proposal imposes reasonable diligence burdens on all parties and losses on the parties that can best avoid or mitigate them. If adopted by Congress or by state legislatures, particularly those with important art markets and collections in their jurisdictions, it will, we believe, go a long way in bringing repose to holders of art and will increase the likelihood that former owners will locate and recover their stolen art. At a minimum, the New York legislature should overrule *Guggenheim* at the earliest opportunity and replace the demand and refusal rule with a more equitable discovery rule.