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The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World

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COMMENTARY

THE MISSING PIECE: A DISCUSSION OF THEFT, STATUTES OF LIMITATIONS, AND TITLE DISPUTES IN THE ART WORLD

I. INTRODUCTION

On November 11, 1987, a buyer paid $53.9 million for Vincent Van Gogh's painting entitled *Irises*.[1] This price seems particularly extravagant when one considers that the seller originally purchased the painting for only $87,000 in 1947.[2] Two years later, another owner sold Pablo Picasso's painting entitled *Yo Picasso* for $47.85 million.[3] While this amount did not break the record sale price commanded for Van Gogh's painting, the owner did earn $42.02 million on his investment.[4]

Such exorbitant sale prices are by no means extraordinary. The art market as a whole has flourished in recent years. Art sales by the world's largest auction house, Sotheby Parke-Bernet, rose from $108 million in 1971-72 to $610 million in 1980-81.[5] In 1987, the combined sales of Sotheby's and Christie's, the other leading auction house, totaled more than $2.2 billion.[6] By 1988, Sotheby's gross income alone had topped $2.3 billion.[7] Indeed, the art trade has become a world-wide industry whose gross turnover may be as high as $50 billion per year.[8]

This rise in prices, primarily resulting from the growing interest

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1 Muchnic, *Price Shatters Old Mark by More Than $10 Million; Van Gogh Painting 'Irises' Brings Record $53.9 Million*, L.A. Times, Nov. 12, 1987, sec. 1, at 27, col. 1.

2 Hughes, *The Anatomy of a Deal; How Alan Bond Bought a $53.9 Million Painting, With More Than a Little Help*, TIME, Nov. 27, 1989, at 66-67.

3 Hughes, *Sold!*, TIME, Nov. 27, 1989, at 63.

4 *Id.*

5 Reif, *Sotheby's and Cristie's Detail Decline in Sales*, N.Y. Times, July 10, 1982, at 11, col. 1.

6 Lee, *Greed is Not Just for Profit*, FORBES, Apr. 18, 1988, at 68.

7 Hughes, *supra* note 3, at 61.

8 *Id.* at 63; *but see* Peers, *No Sale: Art Market's Boom Comes to Sudden Stop as Buyers Back*

in art as an investment,[9] has fueled the trafficking of stolen art and artifacts. Scholars have noted this effect:

> [T]he publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses, and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities, and to attract illicitly acquired goods to the auction and sales rooms of the 'art market' states.[10]

By some estimates, the illegal trade in art has become over a $1 billion industry.[11] Indeed, the thriving black market in artworks is surpassed only by the international illicit drug trade.[12]

Moreover, efforts to control this illegal industry and to protect cultural property have met with little success. In the international arena, art-rich countries' attempts to protect their treasures through unilateral legislation have failed because these countries lack the political and economic power to protect their property.[13] Similarly, in the national arena, the United States' attempt to control art theft through the enactment of the National Stolen Property Act ("NSPA") also has met with little success.[14]

Faced with the failure of unilateral efforts, art-rich nations historically have banded together, occasionally with the support of art-acquiring nations such as the United States, to effectuate plans for

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Off, Wall St. J., Nov. 15, 1990, sec. A, at 1 (explaining that recent auction sales and prices suggest that the art market boom is over).

9 *Id.*; *see also* Lewis, *Pic-ah-so: Why the Japanese Love French Art*, NEW REPUB., Nov. 26, 1990, at 17.

10 Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYR. J. INT'L L. & COM. 333, 345 (1983).

11 Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYR. J. INT'L L. & COM. 323, 327 (1983) (quoting Salinger, *Alias A. John Blake: The Underworld of the Art World*, 118 ABC Closeup 1, 9 (July 16, 1983)); Lambert, *Magazine of Art & Larceny*, Wall St. J., July 22, 1988, at 16.

12 *See* Esterow, *Confessions of an Art Cop*, ARTNEWS, May 1988, at 134; *see also A Special Agent Speaks Out*, ART & ANTIQUES, Nov. 1986, at 59; Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1182 (1989).

13 Partington & Sage, *The American Response to the Recovery of Stolen and Illegally Exported Art: Should the American Courts Look to the Civil Law?*, 12 COLUM. J.L. & ARTS 395, 397 (1988). Examples of art-rich countries include Italy and Latin American countries such as Mexico and Peru. Examples of art-acquiring nations include the United States, Canada, Japan, and Switzerland. Although art-acquiring nations produce art, these countries have the capital surplus to control the international market for valuable art.

14 The NSPA prohibits the transportation "in interstate or foreign commerce [of] any goods . . . of the value of $5,000 or more," with the knowledge that such goods were "stolen, converted or taken by fraud." 18 U.S.C. § 2314 (1982). The broad application of this statute has not met with much success, because the property must fall within the United States' narrow, legal definition of "stolen." Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 472 (1988).

curbing the illegal exportation and importation of art objects.[15] However, the differing interests of art-rich and art-acquiring nations have thwarted such efforts. For instance, of the more than fifty signatories to the Convention of the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("UNESCO convention"), only one country, Canada, is considered an art-acquiring nation.[16] Thus, since most art-acquiring nations do not adhere to the convention's regulations, this multilateral effort has not had great success.[17]

The rapid growth of the illicit trafficking of art, combined with

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[15] For instance, early multilateral agreements, starting with the League of Nations resolution in 1922, served to protect cultural property during wartime. Prott, *supra* note 10, at 337. In 1970, the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property ("UNESCO Convention") expanded this protection to cultural property during peacetime. *See* Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, No. 11806, 823 U.N.T.S. 231 (1972).

The UNESCO Convention provides for the prevention of the export of stolen cultural property from source nations and the import of such property to other nations. Partington & Sage, *supra* note 13, at 398. It empowers each nation to establish its own system of regulatory controls to fulfill the convention's goals. Generally, signatory nations require government authorization, including the issuance of export certificates, before allowing the export of cultural property. These nations also classify some objects as ineligible for export. *Id.*

By 1985, fifty-three nations had become parties to the 1970 convention. Comment, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 96 (1985) [hereinafter Comment, *The Continuing Development*]. By the following year, five more countries had become parties to the convention, although this group did not include any more art-acquiring nations. Merryman, *Two Ways of Thinking About Cultural Property*, 80 A.J.I.L. 831, 843 (1986); *see also* Moustakis, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (noting that such significant art-acquiring nations as Switzerland, Japan, West Germany, and England have not become signatories of the UNESCO Convention).

The United States became a signatory to the UNESCO Convention in 1983; however, it terminated its membership on December 31, 1984. Comment, *The Continuing Development*, this note, at 98. The United States claimed that UNESCO was mismanaged and that the United States had become a target for ideological attacks since UNESCO had begun moving toward the left and had become a forum for non-aligned and Eastern Bloc nations. *Id.* Nevertheless, the United States still retains the text of the convention as its policy regarding the protection of cultural property. *See* Convention on Cultural Property Law, title III, 19 U.S.C. §§ 2601-13 (1982).

[16] J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 96 (1987). Following the withdrawal of the United States from the convention in 1984, Canada became the only art-acquiring signatory. *See* Merryman, *supra* note 15, and accompanying text. The other art-acquiring nations—which include England, Germany, Japan, and Switzerland—still have not become members. *Id.* at 843. For a more thorough discussion of the UNESCO Convention, see *supra* note 15.

[17] For a more detailed discussion of the inadequacies of the UNESCO Convention, see Note, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles*, 72 GEO. L.J. 1155, 1160 (1984); Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1893 (1985).

the ineffectiveness of both unilateral and multilateral attempts to protect cultural property, leaves art owners in a precarious position. Once art objects are stolen, owners often have no other alternative but to wait for their property to resurface on the art market.[18] Even if stolen art objects reappear, owners are not necessarily guaranteed the return of their property.

United States courts increasingly face the difficult task of evaluating the claims of original owners of art objects against subsequent bona fide purchasers of such objects.[19] In order to reach this issue, courts have had to address the preliminary issue of whether the applicable statute of limitations has terminated the original owner's right to bring an action to recover his or her stolen property. Due to the difficulty and delay in recovering stolen art, courts have been reluctant to hold that the applicable statute of limitations bars a theft victim's right to recover his or her property. Over the years, courts have employed several distinct doctrines to aid their determinations of whether an original owner can bring suit, beyond the applicable limitations period, against a bona fide purchaser of his or her stolen art.[20] Early doctrines focused on the actions of subsequent purchasers or arbitrary events.[21] Conversely, today's reigning doctrine, the discovery rule, focuses solely on the original owner's actions to determine whether such an owner can bring a claim.[22]

This Comment examines the prior doctrines, including the statute of limitations bar, the adverse possession doctrine, and the demand and refusal rule, employed by courts to determine whether original owners of stolen art can bring suit against subsequent bona

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18 Stolen art typically filters into otherwise legitimate markets. As ex-art-squad detective Robert Volpe explained, "[u]nless you (the thief) know or have ties to the legitimate market, you won't be able to make a profit." Esterow, *supra* note 12, at 135.

19 *See, e.g.*, DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980); Porter v. Wertz, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981); Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept. 1964), *on remand*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), *modification rev'd*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969).

20 *See, e.g.*, Rabinof v. United States, 329 F. Supp. 830 (1971) (adverse possession); *Menzel*, 22 A.D.2d 647, 253 N.Y.S.2d 43 (demand and refusal rule); *O'Keeffe*, 83 N.J. 478, 416 A.2d 862 (discovery rule).

21 For a thorough discussion of the adverse possession doctrine and the demand and refusal rule, see *infra* notes 48-83 and accompanying text.

22 For a thorough discussion of the discovery rule, see *infra* notes 84-127 and accompanying text.

fide purchasers regardless of the expiration of the applicable limitations period. This Comment notes the reasons why these doctrines are becoming obsolete. It also discusses the evolution and application of today's reigning doctrine, the discovery rule.

This Comment recognizes that, at first glance, the discovery rule appears to provide the most equitable method for resolving whether original owners can bring suit to recover their stolen property beyond the expiration of the limitations period. Nevertheless, this Comment determines that the discovery rule places a tremendous burden on present possessors and original owners, because the courts have not established objective standards of conduct for possessors and owners to follow. Moreover, this Comment argues that the current doctrine promotes an inefficient method for determining whether an individual may bring a legal claim once the limitations period expires. This Comment also argues that the current method fails to discourage art theft effectively. Finally, this Comment argues that the implementation of the discovery rule creates an irreconcilable conflict with the previously-established legal notion that a thief does not obtain good title to stolen property.

Therefore, given the shortcomings of the discovery rule, this Comment concludes that courts must re-evaluate their use of this doctrine. Rather than employing the doctrine in its present form, courts should amend the discovery rule to establish a more efficient and more equitable rule which places the burden of action equally upon the original owner and the subsequent purchaser of stolen art.

II. STATUTE OF LIMITATIONS

The civil action of replevin constitutes the primary means of securing a stolen painting's return from a bona fide purchaser.[23] As

[23] *See* R. BROWN, THE LAW OF PERSONAL PROPERTY § 4.1, at 33 (3d ed. 1975). An action in replevin is:

> an action whereby the owner or person entitled to repossession of goods or chattels may recover these goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels.

BLACK'S LAW DICTIONARY 1299 (6th ed. 1990). *See* Epps v. Cortese, 326 F. Supp. 127 (D.C. Pa. 1971), *vacated*, Parham v. Cortese, 407 U.S. 67 (1972); Jim's Furniture Mart, Inc. v. Harris, 42 Ill. App. 3d 488, 356 N.E.2d 175 (1976).

Another common method of securing the return of property is the tort action of conversion. Conversion protects owners from major interferences with their chattel or with their rights to said chattel. To determine the severity of the interference and whether justice requires the defendant to pay full value for the chattel under a forced judicial sale, courts consider all the relevant factors of a case, including:

> the extent and duration of the defendant's exercise of control over the chattel; the defendant's good faith or bad intention; the extent and duration of the resulting interference with the plaintiff's right of control; the harm done to the chattel; and the expense and inconvenience caused to the plaintiff.

with all civil actions, the requirement that the original owner file his or her claim within the established statute of limitations period restricts this right.[24] As a general rule, the expiration of the established limitations period precludes the original owner's right to sue the subsequent bona fide purchaser of his or her stolen property in replevin, and vests ownership status in that bona fide purchaser.[25]

To judge if a statute of limitations bars a particular claim, one must understand the policy goals behind both the limitation and the accrual of the cause of action, which is the event that marks the time when the limitations period begins to run. Statutes of limitations do not intend either to shield wrongdoers or to provide them with peace of mind concerning potential liability.[26] Rather, the rationale behind statutes of limitations is the realization that the passage of time can make the prosecution of delayed claims burdensome and unfair.[27] A limitations period prevents unfairness to a defendant by relieving her of the burden of defending lawsuits after she has enjoyed a substantial period of repose and during which time evidence may have been lost, destroyed or manufactured, memories may have faded, and important witnesses may have died or disappeared.[28]

Statutes of limitations also serve a punitive function by depriving a plaintiff of the right to sue if he or she does not bring a claim promptly to court.[29] Part of the rationalization for this function rests upon the image of the prospective plaintiff as a "sleeping claimant" who intentionally or negligently postpones bringing an action.[30] This rationalization presumes that those who have valid

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W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 15, at 90 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 222(a) (1957).

24 Today, every state has comprehensive statutes establishing limitations periods for substantially all actions arising by virtue of statutory or common law principles. Most federally created rights of action also have specific statutes of limitations. For a general compilation of these statutes, see 4 AM. JUR. *Trials and Statutes of Limitations* § 5.5 (1966).

25 *See* R. BROWN, *supra* note 23, at 33.

26 Comment, *The Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?*, 53 CHI. KENT L. REV. 673, 699 (1977) [hereinafter Comment, *Evolution of Illinois Tort Statutes*] (citing Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 6 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (1975); Romano v. Westinghouse Elec. Co., 336 A.2d 555, 560 (R.I. 1976)).

27 *See* Williams, *Limitation Periods on Personal Injury Claims*, 48 NOTRE DAME LAWYER 881, 884 (1973).

28 *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

29 Statutes of limitation "stimulate litigants to prosecute their causes of action diligently. . . . They penalize dilatoriness and serve as a measure of repose." Rosenau v. New Brunswick, 51 N.J. 130, 136, 238 A.2d 169, 172 (1968).

30 Comment, *Evolution of Illinois Tort Statutes*, *supra* note 26, at 676; *see also* Phoebe v.

causes of actions will not delay in asserting them.[31]

Typical statutes of limitations provide that courts compute the period within which a plaintiff can bring an action from the time the "cause of action" accrues. Unfortunately, most statutes are disturbingly vague regarding how to determine the accrual time of a limitations period.[32] While state legislatures typically designate the length of a limitations period, they tend to leave the responsibility for determining when the accrual period begins to the courts.[33] Thus, the New Jersey Supreme Court explained:

> Although New Jersey's Legislature has provided that every action at law for injury to the person shall be brought within two years after the cause of action shall have accrued, it has . . . never sought to define or specify when a cause of action shall be deemed to have accrued within the meaning of the statute . . . .[34]

Yet, even where the statute of limitation clearly defines the accrual period, courts have ruled that the literal language of such statutes should yield to other considerations. Courts have recognized that the application of an absolute bar can create the adverse effect of removing the legal remedy for a meritorious claim.[35] Courts therefore have claimed that in each case, they must identify, evaluate, and weigh the equity claims of opposing parties.[36] Primarily, courts have employed two methods to avoid giving effect to statutes of limitations that act to bar potentially just claims: (1) case-by-case

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Jay, 1 Ill. 268, 273 (1820) (statutes of limitations "favor the diligent and not the slothful").

31 *See* Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868).

32 Rather than specifying a definite time or event marking the beginning of the period for each type of action, the typical statute of limitations provides rather generally that the period shall be computed from the time the cause of action accrues. Comment, *The Recovery of Stolen Art: Of Paintings, Statutes, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1128 (1980) [hereinafter Comment, *Recovery of Stolen Art*]. *See, e.g.*, CAL. R. CIV. P. § 312 (West 1954) (requiring that an existing right to bring a cause of action cannot be summarily cut off without giving the parties a reasonable time to exercise that right, but what constitutes a reasonable time is not defined).

33 Courts have relied upon various rules to determine when an accrual period begins. Examples of such rules include starting the running of the limitations period: (1) from the time of the wrongful taking or possession for actions in replevin; and (2) from the commission of the tortious act for actions in tort. *See* Comment, *Recovery of Stolen Art*, *supra* note 32, at 1129-30.

34 Fernandi v. Strully, 35 N.J. 434, 449, 173 A.2d 277, 285 (1961).

35 Comment, *Battle Over a Monet: The Requirement of Due Diligence in a Lawsuit by the Owner Against a Good Faith Purchaser and Possessor*, 9 LOY. ENT. L.J. 57, 62 (1989). The harshness of the traditional, strict application of statutes of limitations has met with severe criticism, particularly in the medical malpractice area. *See, e.g.*, Petersen, *The Undiscovered Cause of Action and the Statute of Limitations: A Right Without a Remedy in Illinois*, 58 ILL. B.J. 644 (1970); Comment, *Limitations in Professional Malpractice Actions*, 28 MD. L. REV. 47 (1968).

36 *See, e.g.*, Lopez v. Swyer, 62 N.J. 267, 274, 300 A.2d 563, 567 (1973).

determinations whether to remove the bar based upon policy considerations;[37] and (2) conclusions that the cause of action did not accrue until a relatively recent date.[38]

Courts generally have preferred to avoid the statute of limitation bar by employing the second method. This method consists of judicial manipulation of the definition of the "accrual" of a cause of action.[39] Because legislatures often have left this matter undecided,[40] in cases where a plaintiff legitimately is ignorant of his or her right to sue, courts have altered the definition of the accrual of a cause of action. In such cases, courts have defined the accrual of a cause of action as the time of its discovery, rather than the traditionally accepted standard that the cause of action accrues upon the commission of the tortious act.[41]

Like most replevin actions, the cause of action for the recovery of stolen art traditionally accrued at the time of the wrongful taking, and not upon the discovery of the identity of the party in possession of the property. However, due to the growing recognition of the difficulty of discovering who possesses stolen property and the ease with which individuals can hide property, the judiciary has manipulated the statute of limitations bar to expand plaintiffs' rights to bring such claims beyond the expiration of the applicable limitations

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37 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1132. This method of creating an exception to statutes of limitation focuses on the policy of allowing a potential plaintiff to bring an action when, through no fault of his or her own, the plaintiff has been kept ignorant of his or her ability to sue. In such cases, courts often conclude that the obvious injustice to the plaintiff outweighs the broader policy considerations favoring the defendant.

38 *Id.* at 1132-33.

39 *See, e.g.*, Lipsey v. Michael Reese Hosp., 46 Ill. 2d 32, 262 N.E.2d 450 (1970); Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

40 *See supra* notes 33-34 and accompanying text.

41 In Lipsey v. Michael Reese Hospital, for example, the Illinois Supreme Court followed this line of reasoning. 46 Ill. 2d 32, 262 N.E.2d 450 (1970). In *Lipsey*, the plaintiff brought an action against her doctor, who had failed to diagnose properly her excised tumor as malignant. *Id.* After removing the plaintiff's arm, shoulder, and breast for malignancies, the doctor reexamined his original biopsy and discovered the error that he had made in diagnosing the biopsy three years before. *Id.* at 34-35, 262 N.E.2d at 452. In the plaintiff's subsequent malpractice action, the court focused upon the doctor's defense that the plaintiff had not brought her action within the two year limitation period because the statute began to run from the time of the alleged negligence. *Id.* at 37, 262 N.E.2d at 453. The court disagreed with the defendant's argument and decided that, in medical malpractice cases, the cause of action accrued when the harmed individual learned of her injury or reasonably should have learned of it. *Id.* at 39, 262 N.E.2d at 455. By reaching this conclusion, the court joined "a 'wave of decisions' favoring [this] rule of time of discovery." *Id.* at 40, 262 N.E.2d at 455 (citations omitted). *See also Fernandi*, 35 N.J. at 451, 173 A.2d at 286 (limitation period began to run when the plaintiff knew or had reason to know about the foreign object left in her body during surgery and the existence of a cause of action based upon the object's presence).

period.[42]

Judicial treatment of this conflict between the statute of limitation bar and the difficulty of locating stolen property has not been uniform. Many courts have expanded plaintiffs' rights to bring actions by implying that knowledge of who possesses one's art begins the accrual period.[43] Other courts have expanded plaintiffs' rights by employing judicially-created doctrines in order to achieve equitable results. Such courts have granted or denied relief based upon uneven applications of corollary doctrines such as fraudulent concealment,[44] adverse possession,[45] the demand and refusal rule,[46] and, most recently, the discovery rule.[47]

III. COROLLARY DOCTRINES

A. ADVERSE POSSESSION

In addition to relying upon the expiration of the statute of limitations, courts have considered the transfer of title to property via the doctrine of adverse possession when determining whether an original owner can bring legal action to recover stolen property.[48] The historical doctrine of disseisin explains the origin of this usage of adverse possession.[49] Traditionally, before the statute of limitation expired, the possessor had the property and the right to keep it unless the original owner claimed it. Hence, the only imperfection in the possessor's right to retain that property was the original owner's right to repossess it. Once the running of the limitation period removed this imperfection, the possessor had good title to the property for all purposes.[50]

At first glance, one might think that the statute of limitations and the adverse possession doctrine merely work together to determine whether an owner can bring an action to recover his stolen property from a subsequent purchaser. Indeed, the two doctrines

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42 For examples of these cases, see *supra* note 19.

43 *See* Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976).

44 *See* Jackson v. American Credit Bureau, Inc., 23 Ariz. App. 199, 202, 531 P.2d 932, 934 (1975).

45 *See infra* notes 48-65 and accompanying text.

46 *See infra* notes 66-83 and accompanying text.

47 *See infra* notes 84-127 and accompanying text.

48 *See* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 157-58 (1971); R. BROWN, *supra* note 23, at 33.

49 Under the doctrine of disseisin, courts treated a wrongful possessor, as long as her possession continued, as the owner, and the dispossessed occupant was considered merely to have a personal right to attempt to recapture his property. O'Keeffe v. Snyder, 83 N.J. 478, 500, 416 A.2d 862, 874 (1980) (quoting R. BROWN, *supra* note 23, at 34).

50 *Id.* (citing Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 321 (1890)).

are inextricably linked: beyond barring the owner's right to maintain legal proceedings to recover his property, the running of the limitations period has the added effect of transferring title to the property to the subsequent possessor when employed under the adverse possession doctrine.[51] However, the application of the adverse possession doctrine provides several advantages over a straight application of the statute of limitation bar.

The statute of limitation focuses upon the length of an individual's possession to determine the accrual time of the cause of action. Unlike this doctrine, adverse possession focuses upon the character of the defendant's possession to determine the accrual of an action in replevin. Where an individual holds the peaceable, undisturbed, and open possession of property under an assertion of ownership, the running of the limitations period confers good title upon her, even against the original owner.[52] The defendant asserting such title by adverse possession bears the burden of proving the existence of each element of the doctrine by clear and convincing evidence.[53] Moreover, the limitation period does not begin to run until the claimant satisfies each required element of the adverse possession doctrine.[54]

For example, in *Rabinof v. United States*, the court refused to pass title to a violin from the owner of record to the defendant possessor, because the defendant could not demonstrate the fulfillment of all

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51 R. BROWN, *supra* note 23, at 33 (footnotes omitted).

52 Rabinof v. United States, 329 F. Supp. 830, 842 (S.D.N.Y. 1971); Lightfoot v. Davis, 198 N.Y. 261, 267, 91 N.E. 582, 583 (1910). *See also* Reid v. New York, 274 N.Y. 178, 8 N.E.2d 326 (1937); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913). For a court to confer title on a possessor of property, the possessor must demonstrate: "1) actual, 2) open and notorious, 3) exclusive, 4) continuous, and 5) hostile [possession] under a claim of right." Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U.L. REV. 1122, 1123 (1984-85) (footnotes omitted). Actual possession requires that the possessor demonstrate the ability to control the property in question and the intent to exclude others from such control. Open and notorious possession requires that one's possession be so conspicuous that this possession generally is known to the public. Exclusive possession requires that the possessor holds possession of the property for himself and/or that he maintains sole dominion over the property and its appropriation for his sole use and benefit. Continuous possession requires that the possessor maintain the uninterrupted possession of the property for the full period designated by the pertinent statute of limitations. Finally, hostile possession requires that the possessor intend to dispossess the true owner and the rest of the world. *See* 3 AM. JUR. 2D *Adverse Possession* § 202 (1986); 2 C.J.S. *Adverse Possession* § 60 (1972); Annotation, *Effect of Public Use on Adverse Possession*, 56 A.L.R. 3D 1182 (1974); 7 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 1012 (Supp. 1990); R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 11.7, at 758 (1984).

53 *See, e.g.*, *Rabinof*, 329 F. Supp. at 841-42.

54 *See id.*

of the adverse possession doctrine's requirements.[55] Although the defendant demonstrated that his possession had been open, notorious and exclusive, he did not demonstrate that his possession of the violin had been hostile to the rights of the owner of record.[56]

Thus, while the statute of limitation relies upon an arbitrary time period to determine whether an owner can bring suit to recover his stolen property from a subsequent purchaser, adverse possession focuses upon the possessor's fulfillment of several factors demonstrating the character of his possession. This focus better protects original owners, because the doctrine places more stringent requirements on subsequent possessors.[57]

Traditionally, the doctrine of adverse possession applied to claims involving the acquisition of titles to land.[58] However, it also is well-settled that a possessor may acquire title to chattels by adverse possession.[59] Thus, given the advantages of the adverse possession doctrine over the statute of limitation and the doctrine's applicability to chattels, the judiciary has employed the adverse possession doctrine when addressing claims by original owners against subsequent possessors of their chattels.[60]

While the application of the adverse possession doctrine to chattels treats owners more fairly than a similar application of the statute of limitations, its application still risks great injustice and arbitrariness. An inherent problem with many kinds of personal property is that it always is debatable whether an individual has openly, visibly, and notoriously possessed such property.[61] This problem is particularly acute with respect to works of art. Like many types of

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55 *Id.* at 843.

56 *Id.* Rabinof's use of the violin was not hostile, because the owner originally gave him permission to use it. *Id.* at 842. For an explanation of the requirements of adverse possession, see *infra* note 57.

57 Under adverse possession, the possessor must act deliberately to obtain permanent possession of the property rather than passively awaiting the passage of the arbitrary time limit designated by the statute of limitation. Furthermore, adverse possession can lengthen the limitations period by introducing additional elements to the cause of action which the possessor must demonstrate before the action can accrue. Comment, *Recovery of Stolen Art*, *supra* note 32, at 1141. These requirements give original owners more time to locate and recover their property.

58 POWELL ON REAL PROPERTY §§ 1012-27 (R. Powell & P. Rohan abr. eds. 1968).

59 J. BRUCE, J. ELY & C. BOSTICK, MODERN PROPERTY LAW 669 (1984); *see also* 3 AM. JUR. 2D *Adverse Possession* § 12 (1986); 51 AM. JUR. 2D *Limitations of Actions* § 90 (1986).

60 *See, e.g.*, Campbell v. Holt, 115 U.S. 620 (1855) (recognizing the right to adversely possess property); *In re* Estate of Wright, 192 F. Supp. 812 (1961) (finding decedent's possession of the superficiary house for over fifty years entitled her to be adjudged its owner by adverse possession).

61 Partington & Sage, *supra* note 13, at 415. For a discussion of the elements of adverse possession, see *supra* note 57.

personal property, one can readily move and easily conceal art objects. Therefore, either an original owner must overcome the practically insurmountable task of attempting to locate his stolen property, which may be displayed privately, or the present possessor, to prove open and notorious possession, must publicly display the art object in question.

Given this inherent problem, the New Jersey Supreme Court recognized the need to replace the adverse possession doctrine in *O'Keeffe v. Snyder*.[62] In that case, the defendant displayed O'Keeffe's paintings in his home.[63] Rather than attempting to manipulate the standard for determining whether the defendant's possession of the paintings was sufficiently open and notorious under the adverse possession doctrine, the court adopted a new rule focusing on the plaintiff's actions.[64] Many courts have followed *O'Keeffe* and dispensed with the adverse possession doctrine.[65] These courts have employed other judicially-created doctrines to determine whether an original owner can bring an action against a subsequent bona fide purchaser for the recovery of his stolen property.

B. THE DEMAND AND REFUSAL DOCTRINE

Unsatisfied with the adverse possession doctrine's ability to curb the potential injustice of a mechanical application of the statute of limitations bar, some courts have relied upon the judicially-created demand and refusal rule to measure the accrual time of a cause of action. Under this doctrine, to commence an action to recover stolen property from a bona fide purchaser, an original owner must prove that the purchaser refused, upon demand, to return the prop-

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[62] 83 N.J. 478, 416 A.2d 862 (1980). Courts also have disapproved of the adverse possession doctrine, because it solely focuses upon the possessor's actions. *See supra* notes 52 and 57 and accompanying text.

[63] *O'Keeffe*, 83 N.J. at 486, 416 A.2d at 866.

[64] *Id.* at 496-97, 416 A.2d at 872.

In recognizing the potential unfairness to both parties of determining ownership on the grounds of whether the defendant had open and notorious possession of the paintings, the court remarked:

> O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes.

Id. at 496, 416 A.2d at 871. For a more thorough discussion of *O'Keeffe*, see *infra* notes 99-107 and accompanying text.

[65] *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982).

erty in question.[66]

Until the original owner demands the return of her property, one cannot consider the innocent purchaser's possession wrongful or unlawful. Since the purchaser has had no notice of a claim, the demand serves to establish that the purchaser wrongfully has retained the original owner's property.[67] Informing the purchaser of the defect in the title affords the purchaser the opportunity to return the property to the original owner before a court holds him liable.[68]

Menzel v. List[69] constitutes the quintessential example of the judiciary's use of the demand and refusal rule in its attempt to manipulate the accrual time of the applicable statute of limitations. In *Menzel*, the plaintiff and her husband left a painting by renowned artist Marc Chagall in their apartment in Brussels when they fled from the Nazis in 1941.[70] The plaintiff subsequently settled in the United States, and once the war ended, began searching for the painting.[71] She finally located it in the defendant's possession in 1962. The plaintiff demanded its return, the defendant refused, and the plaintiff then filed an action for replevin.[72]

As one of his five defenses, the defendant claimed that the statute of limitations for the plaintiff's action had expired, because fourteen years had passed between the time when the plaintiff asserted that the Nazis had stolen the painting and the time when the defendant bought the painting.[73] The court quickly dispensed with this defense, stating that for actions in replevin, as well as in conversion, the cause of action against a bona fide purchaser arose upon the defendant's refusal to convey the chattel on demand, rather than upon the stealing or the taking of that chattel.[74]

Courts have considered such a demand for the return of stolen property a substantive, rather than a procedural, part of the cause of action.[75] This distinction has played a particularly important role in the determination of whether an owner can bring a suit to recover stolen property, because it assures that the limitations period will

66 Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); Gillet v. Roberts, 57 N.Y. 28 (1874).

67 *See* Butler v. Wolf Sussman, Inc., 221 Ind. 47, 50, 46 N.E.2d 243, 244 (1943).

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

69 22 A.D.2d 647, 253 N.Y.S.2d 43 (1963), *on remand*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), *modification rev'd*, 24 N.Y. 91, 298 N.Y.S.2d 979, 246 N.E.2d 74 (1969).

70 *Id.* at 301, 267 N.Y.S.2d at 806.

71 *Id.* at 301, 267 N.Y.S.2d at 807.

72 *Id.*

73 *Id.* at 304, 267 N.Y.S.2d at 807.

74 *Id.* at 304-05, 267 N.Y.S.2d at 809.

75 *See id.*; Dickinson v. Mayor of New York, 92 N.Y. 584, 590 (1st Dept. 1880).

not begin to run until the owner actually demands that the possessor return the property.[76] Courts consider demands procedural when the demand constitutes a condition for bringing the action but not an essential part of the action.[77] Unlike substantive demands, procedural demands provide for the accrual of the cause of action at "the time the right to make the demand is complete."[78] Hence, considering the demand a substantive part of the action extends the period before the accrual of the action from the time when the object is stolen to the time when the owner demands its return.

The *Menzel* court's determination that such a demand for the return of an art object constituted a substantive part of the cause of action has served as the basis for similar determinations in later proceedings. For example, citing *Menzel*, the Second Circuit recognized that the original owner of a stolen painting by Claude Monet had the undisputable duty, among other duties, to demand its return before the court would toll the applicable statute of limitations.[79]

The *Menzel* courts's demand and refusal rule better protects the interests of original owners than the adverse possession doctrine, because owners have the opportunity to take action to recover their stolen property. Yet, this rule also has met with a storm of criticism due to its harsh treatment of innocent purchasers. Principally, the *Menzel* doctrine "reduces the repose of innocent purchasers to a nullity" by allowing aggrieved owners to bring causes of action, regardless of the passage of the statute of limitations' designated time limit, as long as the owner meets the demand requirement.[80] Moreover, if the possessor is a wrongful taker or a purchaser with knowledge, courts should not require a demand, because the possessor already has notice of his wrongful retention of the original owner's property.[81] Because the demand requirement in this instance would not constitute a substantive part of the cause of action, the statute of limitations presumably would begin running immediately in favor of the purchaser upon his taking possession of the chattel. Thus, the demand and refusal rule could lead to the anomalous result of

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76 *Menzel*, 22 A.D.2d at 647, 253 N.Y.S.2d at 43.

77 *Dickinson*, 92 N.Y. at 590.

78 Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 848 (E.D.N.Y. 1981) (quoting N.Y. CIV. PRAC. L. & R. § 206(a) (McKinney 1990)).

79 DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988); *see also Kunstsammlungen Zu Weimar*, 536 F. Supp. at 848 (museum's cause of action to recover its Duerer paintings, which were stolen during World War II, did not accrue when the American citizen purchased the paintings, but instead accrued when the American refused, upon demand, to return them).

80 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1140.

81 *Id.* at 1139.

favoring a bad faith possessor, or a thief, over a good faith possessor.[82] For these reasons, many states have rejected *Menzel*'s rule of accrual because it leads to results contrary to public policy.[83]

C. THE DISCOVERY RULE

Increasingly, courts have employed the judicially-created discovery rule. This rule tolls the running of the limitation period until the injured party, by the exercise of due diligence, discovers or reasonably should have discovered the facts constituting the basis of his claim.[84] Properly interpreted, courts have intended to use the discovery rule as a vehicle for acknowledging equitable considerations when applying statutes of limitations.[85] Like most equitable doctrines, such as those discussed previously, it developed as a means of mitigating the often harsh results of a rigid adherence to a strict application of the statute of limitations.[86]

Under this rubric, courts have claimed that the discovery rule functions as a balancing test between the defendant's legitimate aims of repose[87] and the hardship to the plaintiff of having a claim barred even though she reasonably could not have known that she had a claim until after the limitations period expired.[88] To satisfy

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[82] *Id.*; *see also DeWeerth*, 836 F.2d at 108 (delay of original owner's demand also delays accrual of the cause of action; thus, the good faith purchaser will remain exposed to suit long after an action against a thief or a bad faith purchaser would be time barred).

[83] Comment, *Recovery of Stolen Art*, *supra* note 32, at 1139. *See, e.g.*, Harpending v. Meyer, 55 Cal. 555 (1880); *see also* Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 181 (S.D.N.Y. 1976). In *Stroganoff-Scherbatoff*, the Southern District of New York carried its argument against the application of the demand and refusal rule beyond such policy considerations. The court never actually reached the statute of limitations issue, because it dismissed the case on other grounds. However, in dicta, the court noted certain statutory language apparently overlooked by the *Menzel* court, which provided that courts must measure the limitations period from the time when the right to make a demand was completed. The *Menzel* court, on the other hand, held that the cause of action accrued when the plaintiff demanded the return of his property and the defendant refused.

Courts also have disapproved of the demand and refusal doctrine because it encourages possessors to conceal art objects. *See supra* III.B.

[84] O'Keeffe v. Snyder, 83 N.J. 478, 499, 416 A.2d 862, 870 (1980). As summarized by Justice Handler:

> When a party is either unaware that he has sustained an injury or, although aware that an injury has occurred, he does not know that it is, or may be, attributable to the fault of another, the cause of action does not accrue until the discovery of the injury or the facts suggesting the fault of another person.

Id.

[85] *Id.* at 498, 416 A.2d at 869.

[86] Lopez v. Swyer, 62 N.J. 267, 273-74, 300 A.2d 563, 566 (1973).

[87] For a more thorough discussion of the statute of limitation's purpose of protecting defendants, see *supra* notes 26-31 and accompanying text.

[88] *Lopez*, 62 N.J. at 274, 300 A.2d at 566-67; *see also* Mucha v. King, 792 F.2d 602, 611

this equitable obligation, courts have considered all aspects of a case relevant to the determination of the accrual time. Hence, advocates of the discovery rule claim that the meaning of "due diligence" and its application have varied according to the facts of each case.[89] The party claiming the indulgence of the rule traditionally has borne the burden of proving such relevant factors and circumstances as:

> the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, [and] whether the delay may be said to have peculiarly or unusually prejudiced the defendant.[90]

The discovery rule first appeared in the medical malpractice area in 1917,[91] but it was not considered a potent theory until its adoption by the California Supreme Court in 1936.[92] In 1961, the New Jersey Supreme Court brought attention to this vital, yet still relatively obscure, doctrine by applying it in a medical malpractice case.[93] Although the holding in that case expressly confined the discovery rule to foreign object malpractice actions, subsequent decisions have recognized the pertinence of the doctrine in a host of other contexts, including those in which the plaintiff remained ignorant of the entire cause of action.[94]

With time, courts, led by the New Jersey Supreme Court, have recognized that a rule requiring reasonable diligence in attempting to locate stolen property is especially appropriate with respect to

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(7th Cir. 1986); Nolan v. Johns-Manville Asbestos, 85 Ill. 2d 161, 167-168, 421 N.E.2d 864, 867 (1981); Rozney v. Marowl, 43 Ill. 2d 54, 70, 250 N.E.2d 656, 664 (1969); Franzese, *"Georgia on my Mind" — Reflections on O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1, 8-9 (1989); Comment, *Recovery of Stolen Art*, *supra* note 32, at 1151.

89 *O'Keeffe*, 83 N.J. at 499, 416 A.2d at 873.

90 *Id.*

91 Hahn v. Claybrook, 130 Md. 179, 100 A. 83 (1917) (plaintiff's cause of action began to run at the time of her discovery of her doctor's negligence in treating her stomach condition).

92 Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936) (finding that the plaintiff did not and could not have discovered through due diligence the drainage tube left in her body by her surgeon); *see* Comment, *Recovery of Stolen Art*, *supra* note 32, at 674 n.10.

93 Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961) (statute of limitations should not have commenced running until the plaintiff knew or had reason to know of the presence of a wingnut left in her abdomen following surgery).

94 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1153. *See, e.g.*, Diamond v. New Jersey Bell Telephone Co., 51 N.J. 594, 596-97, 242 A.2d 622, 624 (1968) (negligent installation of an underground conduit); Brown v. College of Medicine and Dentistry, 167 N.J. Super. 532, 536-37, 401 A.2d 288, 290-91 (1979) (breach of union's duty to fairly represent bargaining unit); Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 334 N.E.2d 160 (1975) (defamation); Praznik v. Sport Aero, Inc., 42 Ill. App. 2d 330, 355 N.E.2d 686 (1976) (wrongful death action).

stolen art.[95] Although art often is kept in private collections, courts advocating the discovery rule claim that investigations can uncover the whereabouts of such property.[96] Discovery is possible because art loses its value if altered and those who see valuable art objects tend to remember them. Thus, owners of stolen art have a better chance of succeeding in their investigations, and ultimately recovering their property, than most owners of stolen property.[97]

With respect to stolen art, the use of the discovery rule has developed slowly.[98] In the few cases where courts have chosen to employ the discovery rule, they repeatedly have relied upon the 1980 case *O'Keeffe v. Snyder*[99] as authority for the doctrine's application.[100] In *O'Keeffe*, the renowned artist Georgia O'Keeffe alleged that in 1946, several of her paintings disappeared from a cooperative gallery exhibiting her work.[101] O'Keeffe never reported the disappearance to the local police department or any other law enforcement agency, never attempted to obtain a reimbursement from an insurance agency since she had not insured the paintings, nor advertised the loss in any publication.[102] She did discuss it, however, with associates in the art world. Finally, in 1972, she reported the theft to the Art Dealers Association of America, Inc.'s recently-created registry of stolen paintings.[103] In 1975, O'Keeffe learned that Barry Snyder, a gallery owner in New Jersey, possessed the paintings. When Snyder refused her demand that he return the paintings, she

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95 *See, e.g.*, O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 486 U.S. 1056 (1988).

96 *Id.* at 109; *see* Feldman & Burnham, *An Art Archive: Principles and Realization*, 10 CONN. L. REV. 702, 724 (1978) (French and Italian authorities credit art registries and investigation efforts for recovery rates as high as 75%). Other authorities disagree with this estimate. *See* Esterow, *supra* note 12, at 134.

97 *DeWeerth*, 836 F.2d at 109.

98 Part of the reason for the slow development and expansion of the discovery rule is that matters requiring its application rarely are litigated. Franzese, *supra* note 88, at 16.

99 83 N.J. 478, 416 A.2d 862 (1980).

100 Franzese, *supra* note 88, at 18 (*O'Keeffe's* principle legacy to date may reside in its value as precedent for the continued expansion of the discovery rule). *See also DeWeerth*, 836 F.2d at 103; Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

101 *O'Keeffe*, 83 N.J. at 484, 416 A.2d at 865. The defendant's factual contentions in this case were inconsistent with O'Keeffe's allegations of theft in 1946. The dealer who sold the paintings to the defendant traced his possession to his father. Claiming a family relationship with O'Keeffe's husband, a relationship which O'Keeffe denied, the dealer recalled seeing the paintings in his father's apartment in New Hampshire as early as 1941-1943, a time period preceding the alleged theft. *Id.* at 486, 416 A.2d at 866.

102 *Id.* at 485, 416 A.2d at 866.

103 *Id.*

instituted an action in replevin.[104]

With *O'Keeffe*, the New Jersey Supreme Court became the first court to adopt the discovery rule with respect to stolen art.[105] The court found that the introduction of equitable considerations through the discovery rule provided a more satisfactory response than adverse possession.[106] The rule would permit "an artist who use[d] reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession."[107] The continued expansion of the discovery rule with regard to art theft has depended upon the New Jersey Supreme Court's conclusion that the discovery rule more equitably responds to the problem of stolen art than previously employed doctrines.

Most recently, the District Court for the Southern District of Indiana followed the New Jersey Supreme Court's lead by applying the discovery rule to an action to recover stolen art.[108] In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, the court determined the ownership of four Byzantine mosaics[109] which were removed from the Church of the Panagia Kanakaria ("Kanakaria Church") during the Turkish military occupation of Cyprus in the 1970's.[110] Discovering, in 1979, that the mosaics of the Kanakaria Church were missing,[111] the Republic of

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104 *Id.* at 486, 416 A.2d at 866.

105 *Id.* at 478, 416 A.2d at 862.

106 *Id.* at 499, 416 A.2d at 872.

107 *Id.* at 498, 416 A.2d at 872.

108 Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989). The United States Court of Appeals for the Seventh Circuit recently affirmed this decision. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

109 The mosaics, created in the early sixth century, originally were part of a larger mosaic, affixed to the apse of the Church of the Panagia Kanakaria, depicting Jesus as a young boy seated in the lap of the Virgin Mary. The large mosaic deteriorated over the centuries, so that all that remained were the four mosaics depicting the figure of Jesus and the busts of the North Archangel and two apostles. The court considered these mosaics of "invaluable and irreplaceable significance to Cyprus's [sic] cultural, artistic, and religious heritage." *Autocephalous Greek-Orthodox Church of Cyprus*, 717 F. Supp. at 1378.

110 In 1963, civil disturbances broke out between Greek and Turkish Cypriots in the young, independent republic of Cyprus. Turkish military forces invaded Cyprus in 1974 and began a military occupation of the northern 37% of the island. The Turkish military established a government in this region which no nation, other than Turkey, recognizes as legitimate. *Id.*

111 Since the Turkish invasion in 1974, the government of the republic of Cyprus and the Church of Cyprus have been denied access to the occupied Northern region of the island where the Kanakaria Church is located. However, the Department of Antiquities of the Republic of Cyprus received reports from visitors allowed access to the occupied area that the Kanakaria Church was vandalized and the mosaics forcibly removed from the apse. *Id.* at 1379.

Cyprus sought the mosaics' recovery by contacting and requesting assistance from a host of organizations including UNESCO, the International Council of Museums, individual American and European museums, international auction houses, and Harvard University's Dumbarton Oaks Institute for Byzantine Studies.[112]

In 1989, the Republic of Cyprus finally discovered that Peg Goldberg, of Goldberg & Feldman Fine Arts, Inc. in Indianapolis, Indiana, possessed the mosaics.[113] Goldberg, an art dealer who dealt almost exclusively in nineteenth and twentieth century works,[114] acquired the mosaics in Europe through a Dutch art dealer and a California attorney.[115] All the information Goldberg received regarding the mosaics came from these men.[116] These men told Goldberg that the seller supposedly found the mosaics in the rubble of an "extinct" church in northern Cyprus while serving there as a Turkish archaeologist.[117]

On Goldberg's request, the attorney met with the seller and determined that the mosaics had been properly exported from northern Cyprus.[118] Goldberg then negotiated an agreement for the sale of the mosaics for $1.08 million, with the attorney and the art dealer serving as two of the three middlemen for the deal.[119] Goldberg then returned with the mosaics to the United States.[120]

When Goldberg refused their demand that she return the mosaics, the Republic of Cyprus and the Autocephalous Greek-Orthodox Church of Cyprus instituted an action in replevin.[121] Noting that the applicable limitations period was six years, the court concluded that its decision was not limited by a mechanical application of the statute of limitation bar.[122] Since Indiana recognized the use

112 *Id.* The Republic of Cyprus also sent a resolution to the Council of Europe, mailed letters, addressed symposia, congresses and other such meetings of scholars and artists, and sent press releases on a routine basis so that the information regarding the theft was disseminated to journalists, Congressmen, legislative assistants, and individuals in academia and archaeology with an interest in Greek and Cypriot affairs. *Id.*

113 *Id.* at 1385.

114 *Id.* at 1381.

115 *Id.*

116 *Id.* Goldberg worked with the Dutch art dealer even though she had been told that the dealer once had been convicted for forging Marc Chagall's signature and that he also had been sued by an art gallery for failing to fulfill an obligation. Goldberg also knew that the California attorney represented both the Dutch art dealer and the art dealer, with whom she was acquainted from Indianapolis, who introduced her to these men. *Id.*

117 *Id.*

118 *Id.* at 1382.

119 *Id.*

120 *Id.*

121 *Id.* at 1385.

122 *Id.* at 1386.

of the discovery rule in other contexts, the court applied this rule to the facts of the case.[123] The court determined that the Republic of Cyprus and the church had exercised due diligence in their search to locate and recover the mosaics[124] and that they did not know and reasonably could not have known the whereabouts of the mosaics or the identity of the possessor of the mosaics until 1988.[125] Therefore, since the action accrued in 1988 and the Church and the Republic filed their claim in 1989, the claim fell within the six year statute of limitations.[126]

The recent adherence of the Indiana District Court in *Autocephalous* to the discovery rule demonstrates the grasp that this doctrine presently holds on the judiciary when addressing limitations periods for the recovery of stolen art. At the same time, this case suggests the need to reevaluate the discovery rule. Indeed, one must question whether the discovery rule's sole focus upon the original owner's actions constitutes the most equitable and efficient method for determining his right to bring an action to recover stolen property.[127]

IV. Discussion and Analysis

A. Apparent Advantages of the Discovery Rule over Recently-Espoused Doctrines

Since the recognition of the inherent dangers of mechanically applying statute of limitation bars, courts have searched for an ap-

123 *Id.*; *see* Burks v. Rushmore, 534 N.E.2d 1101 (Ind. 1989); Barnes v. A.H. Robins Co., Inc., 476 N.E.2d 84 (Ind. 1985). Assuming that the district court had greater expertise in interpreting and applying the law of the state in which it sat, the Seventh Circuit gave great deference to the district court's resolution of such issues. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Fineman Fine Arts, Inc., 917 F.2d 278, 288 (7th Cir. 1990). The Seventh Circuit concluded that the district court accurately determined the applicability of the discovery rule in Indiana courts. *Id.*

124 *Autocephalous Greek-Orthodox Church of Cyprus*, 717 F. Supp. at 1398.

125 *Id.* at 1388. The Seventh Circuit agreed with the district court's determination in this instance. Indeed, the Seventh Circuit noted that the "evidence . . . [made] it clear that, although the Republic of Cyprus may not have contacted all the organizations Goldberg in hindsight would require, it took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them." *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 290.

126 *Autocephalous Greek-Orthodox Church of Cyprus*, 717 F. Supp. at 1388. The remainder of the opinion addressed who properly owned the mosaics. Applying Indiana law, and even in the alternative Swiss law, the district court determined that defendant Goldberg never obtained either good title or any right of possession of the mosaics. *Id.* at 1404. Accordingly, the court ordered Goldberg to return the mosaics to the Church of Cyprus. *Id.*

127 For a thorough discussion of this issue, see *infra* notes 137 to 172 and accompanying text.

propriate corollary doctrine to determine whether owners can bring actions against subsequent bona fide purchasers to recover stolen art.[128] The use of the currently espoused doctrine, the discovery rule, appears at first glance to impede this undesirable result more effectively than previously employed corollary doctrines such as adverse possession and the demand and refusal rule. Unlike these prior doctrines, the discovery rule allegedly attaches equitable considerations to the statute of limitations defense by shifting the emphasis from the conduct of the possessor to the conduct of the owner. This shift assures that the law does not frustrate the attempts by the owner to recover stolen art, while still discouraging the trafficking of stolen art.[129]

Proponents of the discovery rule assert that the shift in emphasis from the conduct of the possessor to the conduct of the owner plays a vital role in differentiating the discovery rule from the previously employed adverse possession doctrine and the demand and refusal rule. Adverse possession's focus favors the possessor, because it potentially allows a possessor to obtain title to an art object merely because the owner's attempts to recover it have been fruitless during the limitations period. Conversely, the discovery rule allegedly recognizes that courts should not necessarily bar an individual kept ignorant of the location of her stolen artwork or the identity of its possessor from asserting a claim.[130] By focusing on the actions of the owner, rather than on those of the possessor, advocates of the discovery rule claim that the doctrine protects innocent victims by allowing them to retain title to their stolen property as long as they take appropriate steps to recover it.

Similarly, proponents assert that the discovery rule's shift in emphasis better protects innocent victims than the demand and refusal rule. Although the demand and refusal rule does not focus solely upon the actions of the possessor, it centers on the occurrence of a particular, arbitrary event.[131] Thus, like the adverse pos-

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128 Strictly applying the statute of limitations can create the adverse effect of prohibiting a legal remedy for a meritorious claim when the claimant reasonably could not have brought an action before the expiration of the applicable limitations period. Comment, *Evolution of Illinois Tort Statutes*, *supra* note 26, at 697. For a more detailed discussion, see *supra* note 46 and accompanying text.

129 Partington & Sage, *supra* note 13, at 412; *see* O'Keeffe v. Snyder, 83 N.J. 478, 497-98, 416 A.2d 862, 872-73 (1980).

130 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1157.

131 It has been suggested that the event required for an action to recover stolen property to accrue should not be the original owner's demand that the subsequent possessor return his stolen property, but instead should be the time when the owner had the right to make such a demand. *See* Comment, *Recovery of Stolen Art*, *supra* note 32, at 1136. This interpretation of the demand requirement also unduly favors the purchaser of stolen art.

session doctrine, the demand and refusal rule ignores the original owner's attempts to recover his stolen property. In fact, the demand and refusal rule may encourage possessors to take greater steps to conceal such property, because concealment further impedes the owner's ability to locate the stolen object and thus demand its return.

Proponents of the discovery rule emphasize that such concealment does not handicap the possessor's title claim. Unlike the adverse possession doctrine, under the discovery rule the possessor does not need to fulfill a requirement of open and notorious possession. The discovery rule does not rely upon an arbitrary event to establish an owner's right to bring an action in replevin. Since it varies with the facts of each case, defenders of the discovery rule assert that the doctrine does not encourage possessors to conceal art objects and gives owners an opportunity to protect their title through the exercise of due diligence.[132]

Proponents also have claimed that the discovery rule actively pursues an equitable solution to the conflict between an owner's right to recover his stolen property and a possessor's right to repose through a more comprehensive inquiry into the facts of each case. Because adverse possession only requires an inquiry into the defendant's possession, it ignores the possibility that the plaintiff attempted to recover his property or failed to pursue productive avenues of recovery.[133] Moreover, adverse possession requires that the defendant prove all of the elements of adverse possession, even though a substantial lapse of time may have impaired his ability to gather and produce the necessary evidence.[134] Thus, while adverse possession does not afford a plaintiff the opportunity to take helpful steps to protect his or her title to a stolen art object, the doctrine's narrow scope of inquiry also may prevent a defendant from presenting conclusive evidence of his or her right to title.

Similarly, the demand and refusal rule suffers from a narrow scope of inquiry. The only factor relevant to a court's determination of whether an owner can bring an action against a subsequent purchaser of his stolen property is the arbitrary time when the owner demands that the possessor return that property. While the

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If the statute of limitations runs from the time that the right to make a demand is complete, the victim's right to make a demand presumably becomes complete when the purchaser's innocent possession begins. The act of "[a]rbitrarily fixing the accrual at this time fails to recognize that this 'right' is impossible to exercise, since the identity of the party in possession is unknown." *Id.* at 1156.

132 *See O'Keeffe*, 83 N.J. at 499, 416 A.2d at 873.

133 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1156.

134 *Id.* at 1157.

adverse possession doctrine at least considers the defendant's actions following his receipt of the stolen property, the demand and refusal rule completely ignores the plaintiff's and defendant's actions prior to the time of the plaintiff's demand. Hence, under this rule, courts determine whether an owner has the right to bring an action without considering such relevant factors as the plaintiff's attempts or failure to pursue his stolen property, or the defendant's intentional concealment of the property.

Defenders of the discovery rule assert that the doctrine's requirement of a comprehensive inquiry into the facts of each case shields litigating parties from such potentially inequitable determinations.[135] Since this line of inquiry will vary depending upon the nature of the theft and subsequent possession, and the value of the property, neither the plaintiff nor the defendant is completely free from the scrutiny of the court. Considerations of equity may uphold the limitations bar if the plaintiff has not taken sufficient steps to recover his property; alternatively, the plaintiff's right to a legal remedy may defeat the limitations bar if the plaintiff took diligent steps to recover his property or the defendant took intentional steps to conceal the stolen object. Thus, proponents declare that the flexibility of the discovery rule not only refuses to favor the possessor over the owner, but it also may contribute to more conscientious practices by art owners and purchasers.[136]

B. CRITICISMS OF THE DISCOVERY RULE

1. The Equitable Problems of Shifting the Focus to the Owner's Actions

Although supporters of the discovery rule assert that the doctrine offers a better solution than prior doctrines to the question of whether owners have the right to bring actions beyond the limitations period, it fails to provide a truly equitable solution. The discovery rule places a tremendous burden upon owners of stolen property while exposing subsequent bona fide purchasers to suits

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135 *O'Keeffe*, 83 N.J. at 498, 416 A.2d at 873. For a more detailed discussion of the discovery rule's method of balancing defendants' and plaintiffs' interests, see *supra* notes 87-90 and accompanying text.

136 Since the definition of due diligence varies with the facts of each case, defenders of the discovery rule declare that the doctrine encourages owners and purchasers to take extra steps to protect their investments. For example, the *O'Keeffe* court demonstrated the varying applications of the due diligence requirement:

> [w]ith respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

83 N.J. at 499, 416 A.2d at 873.

which may have been initiated ten, twenty, or even one hundred years earlier.[137] As long as an owner fulfills her obligatorily "diligent" search, subsequent possessors may have to defend claims even though the evidence with which the possessor would vindicate his title no longer exists.[138]

The likelihood of a possessor's prolonged exposure to a suit instituted by a true owner depends upon a court's subjective determination of the facts of the case.[139] Reliance on this basis presents problems for both parties. First, possessors generally cannot control whether the court will allow them to retain title to their purchases. In some cases, since the court can consider all the relevant evidence,[140] the possessor may prevail. Yet, the discovery rule generally focuses on the owner's actions. The possessor's lack of control in this instance presents a problem similar to that faced by possessors under the adverse possession doctrine.[141]

Second, owners do not necessarily know how thorough a search a court will require to fulfill the discovery rule's due diligence standard. Courts still have not clarified whether to measure due diligence by an objective standard of reasonableness or by a subjective assessment that considers a given owner's unique abilities or resources.[142] For example, in *DeWeerth*, the Second Circuit determined that the plaintiff, "a wealthy and sophisticated art collector," could have retained someone to carry out an extensive investigation even if she could not have done it herself.[143] On the other hand, in *O'Keeffe*, the New Jersey Supreme Court considered O'Keeffe's decision to only "discuss[] it with associates in the art world"[144] sufficient to fulfill the due diligence requirement.[145]

These disparate determinations demonstrate the discovery rule's lack of clarity. O'Keeffe certainly possessed the knowledge of

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137 Comment, *Evolution of Illinois Tort Statutes*, *supra* note 26, at 697.

138 *Id.*

139 One legal scholar has developed a theory regarding such subjective, case-by-case determinations. According to this scholar, judgmental rules consist of inherently flexible rules developed on an ad hoc basis which can be manipulated by courts to achieve equitable or economically efficient results. Conversely, mechanical rules consist of rigidly applied bright-line rules. The discovery rule is an example of a judgmental rule, while the statute of limitations is an example of a mechanical rule. *See* Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 23-24 (1985).

140 *See O'Keeffe*, 83 N.J. at 499, 416 A.2d at 873.

141 *See supra* note 130 and accompanying text.

142 Franzese, *supra* note 88, at 13 n.107.

143 DeWeerth v. Baldinger, 836 F.2d 106, 112 (2d Cir. 1987) (plaintiff had not fulfilled her obligation to use reasonable diligence in attempting to locate her stolen painting and thus could not bring an action for its return).

144 *O'Keeffe*, 83 N.J. at 485, 416 A.2d at 866.

145 *Id.*

the art world and the sophistication, which the Second Circuit imputed to DeWeerth, to at least contact the police. Yet for no discernable reason, the New Jersey Supreme Court chose not to impose such a duty upon O'Keeffe.

This lack of clarity and consistency among the various jurisdictions places owners and possessors of stolen art in precarious positions. To protect her property, an owner may tend to overcompensate by taking excessive investigatory measures. This behavior may result in unreasonable expenditures, which would place a tremendous financial burden on the owner. An owner then would have to chose between spending vast sums of money conducting a "diligent" search, or forgoing this expense and giving up the hope of recovering her stolen property. Requiring an innocent victim of art theft to make such a choice hardly comports with the discovery rule's intention to provide an equitable solution.

The discovery rule places a possessor in an equally precarious position because he cannot control an owner's fulfillment of the due diligence requirement. An owner automatically can fulfill the due diligence requirement by taking excessive investigatory steps. If the owner takes such steps, the possessor has no way to counter the owner's actions and thus retain the item at issue.

Given the possessor's vulnerability to a discovery rule claim, his best method of assuring continued dominion over an art object is to conceal it so that no one has the opportunity to recognize the art object as stolen. This concealment problem actually parallels the concealment problem fostered by the demand and refusal rule, which the discovery rule ironically attempts to circumvent. As under the demand and refusal rule, the possessor's lack of control over the owner's ability to fulfill the requirements to bring an action in replevin may motivate him to take extra steps to impede the owner's ability to locate his stolen property. Thus, an owner's burden of demonstrating a "diligent" effort to recover his property may create the anomalous result of forcing an owner to choose between taking excessive investigatory measures or giving up her claim to her stolen property; similarly, it may encourage a possessor to conceal art objects from the public.

Indeed, the discovery rule fails to promote an equitable method for addressing the issue of the recovery of stolen art for the same reason that the previous doctrines failed: the discovery rule favors one litigating party at the expense of the other. Courts have wrestled with the question of which party's actions to focus upon since their decision that the application of the statute of limitations provided too arbitrary a solution to the dilemma of whether owners can

bring action against subsequent purchasers for the recovery of stolen property. Thus far, the courts have changed their opinion from focusing on the possessor under the adverse possession doctrine to focusing on the owner under the discovery rule. Yet, no strong policy reason exists to favor either the owner or the possessor. As much as the courts wish to protect owners against art theft, the courts also do not wish to discourage individuals from trading and buying art.

To deter such unwarranted favoritism of either owners or bona fide purchasers of stolen art objects, courts should establish clearer, more objective measures for determining whether an owner can bring an action to recover stolen property from a subsequent purchaser. By relying upon more objective standards, rather than the subjective standards currently relied upon, parties can tailor their actions in accordance with the courts' expectations. Thus, an original owner will know how to fulfill her obligation to diligently search for stolen property, and a subsequent purchaser will know how to take precautions against buying stolen art objects.

One might argue that the courts may encounter difficulties in establishing more objective standards, because the facts of each case vary widely. Nonetheless, courts at least can establish objective guidelines which vary in stringency according the nature and the value of the property. As the New Jersey Supreme Court explained in *O'Keeffe*:

> [w]ith respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.[146]

The use of such guidelines would fulfill the dual goals of providing objective standards upon which parties can rely while still allowing leeway for the resolution of a broad range of case scenarios.

The most significant objective requirement which courts should consider is whether potential plaintiffs have contacted law enforcement agencies and art foundations which investigate and disseminate information on art thefts. Unfortunately, law enforcement efforts to handle art theft cases have been regarded as fragmentary and underdeveloped.[147] Similarly, art foundations which collect and disseminate information on art theft have been considered un-

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146 83 N.J. at 499, 416 A.2d at 873.

147 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1125 n.12. For example, the FBI has a small number of art theft specialists. However, their work cannot help many art theft victims, because the FBI's jurisdiction is limited to the investigation of the inter-

organized and inefficient.[148]

Although such efforts have been criticized in the past, these agencies have made great strides in recent years. The International Criminal Police Organization's ("INTERPOL") art program maintains records on stolen objects through a computerized case-tracking system.[149] This system enables INTERPOL to store and retrieve data on stolen art objects so that they can disseminate such information to interested parties, as well as carry out their own investigations.[150] Furthermore, INTERPOL also publishes a biannual poster, "The Twelve Most Wanted Works of Art," which features photographs of stolen objects accompanied by vital information written in French and English.[151] INTERPOL distributes these posters to law enforcement agencies, art-theft archives, art publications, major museum, and police departments in all INTERPOL-member countries.[152]

Art foundations have made similar advances in gathering and disseminating information about stolen art. The Art Dealers Association of America, Inc., a non-profit organization of select art dealers, established an extensive archive of stolen art in 1971.[153] Likewise, the International Foundation for Art Research ("IFAR") established an inventory of stolen art in 1975.[154]

Since law enforcement agencies and art foundations are readily available to provide costless methods of pursuing one's stolen property, reporting an art theft to such an agency should fulfill an owner's obligation of diligence under the discovery rule. Reporting thefts to the appropriate agency demonstrates the desire to recover and retain title to one's property, and may hasten the owner's recovery of her property.[155]

The use of law enforcement agencies and art registries also benefits potential purchasers of stolen art, because they provide

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state transport of stolen art objects valued in excess of $5,000. *Id.*; *see* Feldman & Burnham, *supra* note 96.

148 Comment, *Recovery of Stolen Art*, *supra* note 32, at 1125 n.12.

149 Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 460 (1983).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 459.

154 *Id.* at 461.

155 Reporting art thefts to the appropriate agency, particularly art foundations with art registries, also serves other functions. For example, registries also may serve as a warranty of title from a seller. *See* Dickson, *The Need for a National Registry of Cultural Objects*, 11 FORDHAM INT'L L. J. 839, 859 (1988); L. DUBUFF, THE DESKBOOK OF ART LAWS 471-72 (1977).

purchasers with a means of verifying the title of a particular object. Given that the courts would require an owner to register stolen art objects to satisfy the due diligence requirement, a subsequent purchaser could feel confident in the validity of his title to an art object as long as it had not been registered as stolen. The registration of stolen art objects benefits both original owners and subsequent purchasers, and imposes no costs on either party. Hence, this requirement does not violate equitable considerations by favoring one party at the expense of the other.

Requiring art theft victims to comply with such an objective standard of diligence in searching for their stolen property will encourage continuity in courts' decisions. Using more objective criteria also will discourage owners from overcompensating when conducting diligent searches as they may feel the need to do under subjective criterion.[156] Courts should require wealthy and knowledgeable art collectors, as well as average buyers or investors, to exert the same effort to be eligible to bring a claim to recover their stolen property. Courts still may consider the facts of each case in order to tailor their decision, but, to the extent possible, relying on objective criteria better warns owners and possessors of the courts' likely expectations.[157]

2. *The Inefficiency of Focusing Solely upon the Owner's Actions*

The discovery rule also fails to provide an efficient method for determining whether an owner can bring an action against a subsequent purchaser of his stolen property. The discovery rule places the burden of proof entirely on the owner. It does not place a similar duty of diligence on the subsequent possessor who, innocently

156 *See supra* III.B.

157 While this article was in preparation, an article appeared in the New York University Law Review which also recognized the need for clearer requirements under the due diligence standard. Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U.L. REV. 909, 943 (1989). That article also suggested that individuals could fulfill the requirements of the due diligence standard by contacting authorities. *Id.* However, the article advocated reliance upon a demand and refusal rule, *id.* at 942, because it questioned the value of relying upon relatively new art registries. *Id.* at 941. Although this concern is an issue worth addressing, as noted previously, art registries are developing rapidly. Furthermore, the value of requiring a theft victim to contact such registries goes well beyond the actual recovery of the art object; it demonstrates the original owner's intent to seek the recovery of his property. As we have seen in cases such as *O'Keeffe*, the fact that one's efforts were fruitless is irrelevant to the determination of whether that person has met the standard for due diligence. For a more thorough discussion of the development and value of requiring registration with art foundations and law enforcement agencies, see *supra* notes 147-155 and accompanying text.

or not, actually has trafficked in stolen art.[158] By failing to place a reciprocal duty on the purchaser, courts fail to employ a valuable resource which might discourage the theft and resale of art, deter the illegal possession of art, and secure the return of stolen property to its rightful owner.

Purchasers of valuable art often are either art dealers or individuals who employ art dealers to carry out their transactions. Such individuals often are in a better position than original owners to stop the transfer of stolen art objects, because they have the opportunity to investigate the validity of the object's title before purchasing it.[159] A purchaser has the opportunity to inspect the art object, meet the seller and question him as to how he acquired the object, and check art and law enforcement registries of stolen art. Conversely, an art owner faces the overwhelming obstacle of investigating the theft of their often hidden or disguised property.

Purchasers of art have another tool at their disposal to prevent the transfer of stolen art which is not available to original owners. A purchaser has the opportunity to consider the circumstances of the sale to determine whether the art is stolen. For example, in *Autocephalous*, the defendant knew that the art dealer who told her about the Byzantine mosaics had been convicted for forging an artist's signature and sued for failing to pay an art gallery.[160] Rather than questioning the art dealer's credibility, the defendant employed him to act as a middleman for her purchase.[161] The defendant also relied upon that art dealer's attorney to determine the validity of the mosaics' export papers.[162] She accepted the attorney's determination even though one might question the plausibility of the seller's explanation for his possession.[163] Even after inspecting the mosaics, the defendant did not think to verify the validity of the seller's title, although the objects obviously were extremely old and valuable.[164] Particularly given that the defendant was an art dealer, one

158 O'Keeffe v. Snyder, 83 N.J. 478, 512, 416 A.2d 862, 878 (1980) (Handler, J., dissenting).

159 Moore, *supra* note 14, at 480. Art dealers should be able to verify successfully the validity of an object's title. Because of their expertise in the art field, dealers fairly can be held to a higher standard of care in such cases than private purchasers. Wertheimer, *The Implications of the O'Keeffe Case*, 6 ART & LAW 44, 46 n.105 (1981).

160 Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1381 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

161 *Id.* at 1382.

162 *Id.*

163 The seller supposedly found the mosaics in the rubble of an "extinct" church in northern Cyprus while serving there as a Turkish archaeologist. *Id.* at 1381.

164 *Id.* at 1382. The defendant did testify that

[s]he inquired as to whether the mosaics had been reported as stolen or missing and

must question why the defendant ignored the suspicious backgrounds of the parties in such an unusual sale.

One would think that the extremely suspicious circumstances of this sale would put the purchaser, particularly a purchaser who is an art dealer, on notice that the seller was not the true owner of the mosaics. Even if the purchaser was not put on notice, it is not unreasonable to expect that the suspicious circumstances surrounding the sale at least would raise a doubt as to the seller's rightful possession, calling for further verification before consummating the purchase.[165] While no court has required purchasers of art to fulfill a duty of due diligence, the Seventh Circuit recently noted that art purchasers faced with circumstances as suspicious as those faced by Goldberg in *Autocephalous* "would do best to do more than make a few last minute phone calls" to protect their purchase.[166] Hence, the imposition of a reciprocal duty of diligence under the discovery rule would encourage subsequent purchasers, such as Goldberg, to take note and investigate aspects of the transaction that call the seller's title into doubt.

Since purchasers have different resources and more opportunities to investigate the validity of an art object's title, a more efficient method of determining whether an owner has the right to sue a subsequent purchaser would be to retain the discovery rule's investigatory duty on the owner and add a reciprocal investigatory duty on the purchaser. Courts would consider both the owner's as well as

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whether any applicable treaties might prevent the mosaics from being imported into the United States. She testified that she contacted, by telephone, [IFAR] in New York and UNESCO's office in Geneva. [The defendant also] claims she telephoned customs offices in the United States, Germany, Switzerland, and Turkey.

Id. Although the court did not discuss the validity of the defendant's claims, they seem implausible. The defendant allegedly contacted several of the same organizations to whom the Republic of Cyprus reported the theft of the mosaics. Yet, the defendant claims to have obtained no information regarding this theft. *Id.*

For a more thorough discussion of the suspicious circumstances of the sale of the mosaics, see *id.* at 1400-02.

165 *See* Porter v. Wertz, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1st Dept. 1979). The court noted that the purchaser made no effort to verify that the seller was the true owner of an Utrillo painting or that he was authorized by the owner to sell the painting. *Id.* at 146, 416 N.Y.S.2d at 257. The court argued that although the listing of the Utrillo in a catalogue of the artist's work may not have been enough to put the purchaser on notice that the seller was no the true owner, it could have raised a doubt as to the seller's rightful possession, calling for further investigation before purchasing the painting. *Id.* at 147, 416 N.Y.S.2d at 258.

166 Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Fineman Fine Arts, Inc., 917 F.2d 278, 294 (7th Cir. 1990). The court recommended that in such suspicious cases, purchasers could "(and probably should) take steps such as a formal IFAR search; a documented authenticity check by disinterested experts; a full background search of the seller and his claim of title; insurance protection and a contingency sales contract; and the like." *Id.*

the possessor's actions in their determination of whether the statute of limitations should be tolled. In this manner, both parties must take affirmative steps to avoid the sale of stolen property. Purchasers will not risk buying objects of questionable origin, because courts will view such a purchase as a violation of the purchaser's investigative duty. At the same time, owners will continue to search for their stolen property, because courts will consider the owner's diligence in searching for his property.

Along with increasing the likelihood of discovering a stolen object's whereabouts and that object's resale, placing a reciprocal duty on purchasers would serve the additional function of discouraging the art theft market as a whole. In fact, the most effective means of slowing the art theft rate is placing liability on buyers for purchasing stolen objects.[167] Thus far, focusing on the prosecution of thieves and fences has proven an ineffective method of slowing the stolen property industry. Focusing on the prosecution of thieves has been ineffective because individual crimes are costly and arduous to solve. Furthermore, the prosecution of thieves does not lesson the economic motivation for theft, because it ignores the market for stolen goods.[168] Focusing on the prosecution of sellers of stolen property (fences) also has been ineffective, because they also are difficult to convict. Sellers often can plausibly explain their possession through bills of sale, they rarely have prior criminal records, and prosecutors cannot use evidence of a seller's bad reputation unless the defense raises the issue.[169] Given such roadblocks, the placement of a reciprocal investigatory duty on purchasers of art may help to curb the tremendous rise in art thievery, which the prosecution of thieves and fences has failed to curtail.

Deterring secondary purchasers better thwarts the stolen property industry, because it substantially reduces the thieves' and sellers' incentive and the opportunity to traffic in stolen works. Holding purchasers accountable for possessing stolen property will encourage them to take greater steps to investigate the validity of titles. Purchasers will become wary of buying goods with questionable titles because they will run the risk of having to relinquish the object to its rightful owner.[170] Particularly with respect to valuable

167 Moore, *supra* note 14, at 478.

168 Note, *Property Theft Enforcement and the Criminal Secondary Purchaser of Stolen Goods*, 89 YALE L. J. 1225, 1230 (1980).

169 J. HALL, THEFT, LAW, AND SOCIETY 189-90 (2d ed. 1952).

170 A purchaser who has relied upon an art merchant to investigate an object's title will have recourse against that merchant should the investigation fail to discover the original owner's valid right to the object. *See* Gerstenbluth, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501, 505 (1988). In *Menzel* for exam-

art objects, buyers will stand to lose a tremendous amount of money if they must return their purchases to the true owners. Since art buyers will take greater care in investigating their purchases, they will reduce their number of purchases from suspicious sellers. This drop in sales, in turn, will decrease thieves' and sellers' incentives to continue their illegal activity. Thus, placing a reciprocal duty on purchasers provides the most effective method of deterring art theft, as well as increasing the efficiency of courts' determinations whether owners can sue subsequent bona fide purchasers of their stolen property beyond the limitations period.[171]

3. Statutory and Common Law Considerations

A final problem with the discovery rule, and its focus upon the true owner's actions, is that it conflicts with a fundamental common law and statutory tenet.[172] Under the common law, "a bona fide purchaser of personal property taken tortiously or wrongfully, as by trespass or theft, does not acquire a title good against the true owner."[173] The codification of the Uniform Commercial Code ("UCC") has not changed this legal axiom.[174]

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ple, the defendant possessor impleaded the gallery from whom he bought the art object claiming a breach of the implied warranty of good title. Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dept. 1964), *on remand*, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dept. 1967), *modification rev'd*, 24 N.Y.2d 91, 94, 298 N.Y.S.2d 979, 980, 246 N.E.2d 742, 743 (1969). The Court placed the full burden of investigation of the state of the art object's title on the gallery. *Id.* As a result of such cases, art merchants increasingly have insisted on guarantees of the authenticity and/or authorship of art objects they sell. Gerstenbluth, this note, at 531. Although such practices appear relatively generous, such guarantees come with limitations on liability and damages. *Id.*

171 For a general discussion of thwarting the stolen property industry by deterring secondary purchasers, see Chamberlain, *Anti-Fence Legislation*, 14 A.B.A. J. 517 (1928).

172 Indeed, the discovery rule's conflict with the legal notion that a thief cannot acquire title to stolen property exemplifies the conflict faced by all the corollary doctrines employed thus far to overcome the mechanical application of the statute of limitations bar. Only the application of a purely mechanical rule could overcome this conflict. For a more detailed discussion of mechanical and judgmental rules, see *supra* note 139.

173 Kutner Buick, Inc. v. Strelecki, 111 N.J. Super. 89, 97, 267 A.2d 549, 554 (Ch. Div. 1970); *accord* Joseph v. Lesnevich, 56 N.J. Super. 340, 153 A.2d 349 (App. Div. 1959). The courts have firmly established the principle that a thief cannot convey title as against a true owner. *See, e.g.*, Shaw v. Railroad Co., 101 U.S. 557 (1880); Silsbury v. McCoon, 3 N.Y. 379 (1850); *Menzel*, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742; Heckle v. Lurvey, 101 Mass. 344 (1869).

174 O'Keeffe v. Snyder, 83 N.J. 478, 514, 416 A.2d 862, 881 (1980) (Handler, J., dissenting). The Uniform Commercial Code "assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support, which it displaces to the least possible extent, and without which it could not survive." Gilmore, *Article 9: What is Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966); *see* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 2, at 6 (1972).

From this legal axiom it follows that as between the true owner who has had her property stolen and a subsequent bona fide purchaser, the true owner is entitled to the goods.[175] The true owner retains title to the object, because the thief who sold the chattel to the innocent purchaser had no title to give.[176] Courts consistently have applied this axiom in ownership claims over artistic works between true owners and subsequent possessors.[177]

Even though this tenet pervades the law, courts have not addressed the discovery rule's inconsistency with it.[178] Courts have ignored the inconsistency between giving the possessor title to a stolen object when the original owner fails to diligently search for it and the tenet that such a purchaser cannot obtain valid title to a stolen object because the thief never possessed a valid title which he could transfer to the purchaser. For example, the *O'Keeffe* court merely recommended that purchasers inquire whether a work of art has been reported as lost or stolen.[179] It failed to discuss the effect of a purchase having been stolen on the buyer's right to possession. The district court in *Autocephalous* did not give this issue even the *O'Keeffe* court's cursory consideration.[180]

Regardless of the courts' failure to address the issue, this bla-

175 *O'Keeffe*, 83 N.J. at 514, 416 A.2d at 881 (Handler, J., dissenting).

176 *Kutner Buick*, 111 N.J. Super. at 97, 267 A.2d at 553.

177 *See, e.g.*, *Porter*, 416 N.Y.S.2d at 259, 68 A.D.2d at 149 (true owners of Utrillo painting could recover the painting or damages against the defendant gallery, which purchased the painting from an individual who had acquired it wrongfully from another, who was not authorized by the owner to sell it); Lieber v. Mohawk Arms, Inc., 314 N.Y.S.2d 510, 512, 64 Misc. 2d 206, 208 (Sup. Ct. 1970) (owner of Hitler's personal effects could recover these items stolen from him by transferor to bona fide purchaser).

178 Justice Handler of the New Jersey Supreme Court is one of the few judges who has addressed the incompatibility of the discovery rule doctrine and this basic legal tenet. *O'Keeffe*, 83 N.J. at 513-16, 416 A.2d at 878-82 (Handler, J., dissenting). Justice Handler argued:

> if we were to view this record as presenting only the undisputed fact that the paintings were stolen and could thus not be validly transferred thereafter to [the defendant] as a bona fide purchaser, plaintiff O'Keeffe would clearly be entitled to prevail.

Id. at 515, 416 A.2d at 882.

179 *Id.* at 498-99, 416 A.2d at 873.

180 *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D.Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). However, in his concurrence, Judge Cudahy of the Seventh Circuit favored reliance upon the legal notion that the statute of limitations should not run against an original owner who lacks the facts necessary to institute a suit, as long as the property was held by the original thief or by a subsequent holder acting in bad faith. *Autocephalous Greek-Orthodox Church of Cyprus*, 917 F.2d at 294 (Cudahy, J., concurring). Applying such a good faith requirement to the facts in the instant case, he concluded that the defendant was not a bona fide purchaser with good title to the mosaics at issue, because she undertook "only a cursory inquiry into [the seller's] ability to convey good title under circumstances which should have aroused the suspicions of a wholly innocent and reasonably prudent purchaser." *Id.*

tant inconsistency leaves the viability of the discovery rule in question. Following the established doctrine that thieves cannot obtain title to goods which they have stolen, courts do not need to place the burden of proving one's right to bring a claim on a true owner of stolen art, because the subsequent possessor has no legal right to that property. Since a subsequent possessor does not have title to the stolen art object, an owner automatically has the right to bring an action for its recovery.[181]

Denial of the owner's right to bring an action hardly comports with the discovery rule's desire to resolve the issue of the right to sue in an equitable fashion. One must question whether the courts can reconcile this conflict, because courts probably will not wish to punish good faith purchasers for accidentally buying stolen art, nor will they wish to protect purchasers by granting thieves the right to pass the title of such stolen goods. Thus, regardless of the previously noted shortcomings of the discovery rule, unless courts can ameliorate the doctrine's inconsistency with the well-established tenet that thieves cannot pass title, they rightfully cannot apply this doctrine to determine whether an owner can bring an action against a subsequent purchaser.

V. CONCLUSION

Although proponents of the discovery rule claim that the doctrine presents a more equitable alternative to prior doctrines, in its present state, courts should not rely upon it to determine whether an owner has the right to bring an action against a subsequent possessor of his stolen property. Even if the courts can reconcile the rule's conflict with the legal axiom that a thief cannot pass title, the discovery rule still does not provide the equitable determination that it supposedly promotes and does not provide an efficient method of investigating titles to art objects or discouraging art theft. A better method for making this determination would be to impose a duty, based on objective criteria, on true owners to search for their stolen art and to impose a reciprocal duty on buyers to investigate the validity of the title to their purchases. This method would assure that courts consider both owners and the purchasers' interests. It also would encourage owners and purchasers to take more pre-

181 Several defenses are available to defendants, including the equitable defenses of laches, unclean hands, estoppel or mistake. *See O'Keeffe*, 83 N.J. at 516, 416 A.2d at 883 (Handler, J., dissenting).

cautionary measures which would help curb the art theft industry which runs rampant today.

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