The Last Prisoners of War: Returning World War II Art to Its Rightful Owners - Can Moral Obligations Be Translated into Legal Duties?

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THE LAST PRISONERS OF WAR: RETURNING WORLD WAR II ART TO ITS RIGHTFUL OWNERS—CAN MORAL OBLIGATIONS BE TRANSLATED INTO LEGAL DUTIES?

INTRODUCTION

“We will from now on, lead an unrelenting war of purification, an unrelenting war of extermination, against the last elements which have displaced our Art.”

Throughout World War II, Adolph Hitler and the Nazi troops looted and confiscated thousands of works of art as part of a massive art theft program designed to transform Hitler's Reich government into the cultural capital of the Western World. By the time Paris was liberated from the Nazi troops in 1944, it is estimated that between one-fourth and one-third of all the art in Europe had been pillaged. Although the Allied forces worked to locate and return these and other assets to their original prewar owners, thousands of works of art were integrated into the international art market where they soon disappeared. Today, tens of thousands of works of art are still missing, but many of the clues as to the current whereabouts of these works lead straight to American museums, auction houses, art dealers, and individual private collectors. Now, current possessors of valuable artwork, many of whom purchased or acquired the works in good faith, are faced with a moral dilemma—should the works be returned to their true, prewar owners or should good faith purchases and acquisitions be protected? Does society have a moral obligation to Holocaust survivors, and if so, can that moral obligation be transformed

4. Id. at 4. See also James Rosen & Tom Hamburger, Looted Treasures: Museums Confront the History Behind the Canvas, Star Trib., Nov. 9, 1999, at 2, available at 1999 WL 7517159.
5. See infra notes 47-57 and accompanying text.
6. See infra note 58 and accompanying text.
7. See Feliciano, supra note 2, at 4.
into an affirmative legal duty? These are some of the questions currently facing the American legal system.

This Comment will consider whether moral obligations can be translated into affirmative legal duties to reinforce the efforts to return art looted during World War II to its true owners. Part II briefly surveys the history surrounding today's claims to World War II looted art and traces the development of case law that addresses the quest to restore looted and stolen art to its true owners. Section III examines and analyzes the legal doctrines that courts have applied in cases involving looted and stolen art and notes the trends, problems, and shortcomings in the courts' reasoning. Finally, Section IV looks at the effect that the existing case law has had on art owners, be they institutions or individuals, and considers how the law should develop in the future. Specifically, this section will consider whether federal legislation is necessary to better ensure that looted art is returned to its rightful owners. However, in order to reach solutions to the problems of World War II looted art, it is important to begin by looking at wartime Europe as the backdrop for current claims regarding the return of such art.

II. BACKGROUND

In order to discuss how to resolve claims for the recovery of World War II looted art, it is necessary to first examine the history and circumstances surrounding the claims for the return of missing works of art, as well as case law that addresses the issue of stolen art in general.

A. History of Art in World War II

On January 30, 1933, Adolph Hitler was sworn in as Chancellor of Germany. The following year, on August 2, 1934, just hours after the death of President von Hindenberg, Hitler assumed the posts of

8. See infra notes 12-63 and accompanying text.
9. See infra notes 64-271 and accompanying text.
10. See infra notes 272-351 and accompanying text.
11. See infra notes 352-426 and accompanying text.
12. See Lippman, supra note 3, at 5. Hitler was sworn in as Chancellor by the "increasingly senile" President Paul von Hindenberg. Id. Because he lacked majority support in parliament, Hitler persuaded von Hindenberg to call for new elections. Id. Then, when the Reichstag burned (historical evidence indicates it was set fire by the National Socialist Party, or Nazi activists) on February 27, 1933, Hitler seized the opportunity to consolidate his control. Id. Nazi officials warned of a Bolshevik uprising, and the following day, Hitler convinced von Hindenberg to adopt defensive measures against the Communist Party. Id. By March 1933, Hitler had managed to attract enough votes in parliament to pass the Enabling Act, which authorized the Reich government to disregard the constitution and turn plenary power over to Hitler. Id. at 6. In May 1933, the Reich government declared that their National Socialist Party,
both Chancellor and President. On the same day, it was announced that henceforth Hitler would be referred to as Führer and Reich Chancellor. Despite his political successes, however, Hitler considered himself to be a true artist. Twice rejected from the School of Fine Arts in Vienna and once rejected from the Vienna School of Architecture, Hitler dreamed of seizing and consolidating Europe’s most prized works of art in order to establish Germany as the cultural capital of the Western World.

“Inherent in Hitler’s dreams of a pure Germanic race was a vision of pure Germanic art. His two-fold plan involved ridding his empire of ‘degenerate art’ and amassing a vast collection of pure Germanic art . . . .” “Degenerate art” was unacceptable art and included modern or abstract works, art by Jewish artists or depicting Jewish subjects, and anything that was critical of Germany or did not depict Germany as the Nazis perceived it. For the most part, “degenerate art” was associated with the Jews and was considered inferior because the human form was often unfinished or exaggerated. Hitler warned that German culture “was on the verge of being irrevocably contaminated . . . by the Jewish-Bolshevik disease.” Hitler believed that the triumph of the modern artistic sensibility had led to a loosening of morals which, in turn, had resulted in rampant crime, sexual licentiousness, prostitution, the proliferation of inter-racial sexual relations and to the spread of venereal disease and crime. It was led by Hitler, was Germany’s sole political party and that the formation of other parties was prohibited. See Lippman, supra note 3, at 6.

13. Id.
14. Id.
16. Id.
17. Lippman, supra note 3, at 1-2. Hitler aspired to rewrite art history “in order to highlight Aryan supremacy.” Id. at 96. He believed that the future of the human race depended on the creative abilities of the Aryans. Id. at 4.
18. Kelly Ann Falconer, Comment, When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art, 21 U. PA. J. INT’L ECON. L. 383, 394 (2000). Hitler aimed to rid the world not only of degenerate artworks, but also the artists who had created the works. Id.
20. Id.
21. Lippman, supra note 3, at 3. “The Nazis viewed modern art as a Jewish invention which was designed to ensure Semitic domination over contemporary culture.” Id. at 27. In fact, Hitler’s concerns were more than just aesthetic; he “attributed the collapse of German society to . . . cultural corrosion.” Id. at 4.
imperative to cleanse art . . . and to place art in the ‘service of a moral, political and cultural idea.’

For these reasons, in 1937, Hitler ordered German museums to rid their collections of “degenerate art.” The Nazis then sponsored “degenerate art” shows throughout Germany in order to stress the need for racial and cultural purity. Following the shows, the “degenerate art” was traded, sold, or destroyed. The Nazis traded what they considered to be “degenerate art” for any type of German or Germanic art, even if the German artworks were in bad condition or anonymous.

Beginning in 1938, Hitler and the Nazis began confiscating private art collections, “in part for propagandistic reasons, in part for reasons related to Hitler’s extreme dislike for anything of cultural significance to be owned by Jews or other ‘inferior’ races . . . .” Nazi officials organized military groups and empowered government branches with staffs of art historians and other scholars to assist with the looting campaign.

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22. Id. at 4 (quoting ADOLF HITLER, MEIN KAMPF 255 (Ralph Manheim trans., 1971) (1924)).
23. Michelle I. Turner, Note, The Innocent Buyer of Art Looted During World War II, 32 VAND. J. TRANSNAT’L L. 1511, 1515 (1999). In fact, Hitler’s propagandistic speeches addressing the purification of German culture were themselves “prophetic of his plans to exterminate people along with their art . . . .” See Cuba, supra note 1, at 471.
24. Turner, supra note 23, at 1515. As one author noted, “[A]rtists and their works were deemed to be degenerate for various reasons . . . . [However] [t]he criteria was so complex that even Nazi officials were confused at times.” Lippman, supra note 3, at 26.
25. Turner, supra note 23, at 1515, 1517. Following the final auction of degenerate art in March 1939, most of the remaining works were burned. Id. at 1515.
26. Feliciano, supra note 15, at 3. While German museums and collectors were compensated in this way, Jews and other enemies of the state were not compensated at all. Walton, supra note 19, at 556.
27. Walton, supra note 19, at 554. The Nazis confiscated private Jewish art collections via statutes such as: the Ordinance for the Registration of Jewish Property, the Ordinance for the Attachment of the Property of the People’s and State’s Enemies, and the Ordinance for the Employment of Jewish Property. Cuba, supra note 1, at 471-72. As one author noted, Hitler and other top level Nazis considered themselves cultured art admirers and collectors, and art became one way in which the Nazis defined themselves. Being associated with great works of art became another characteristic defining the Aryan conception of moral, intellectual and genetic superiority, and looted artworks were considered trophies.
Walton, supra note 19, at 553.
28. Hitler was aided, and even rivaled, in his efforts to transform culture by three top party officials: Joseph Goebbels, Bernhard Rust, and Alfred Rosenberg. Walton, supra note 19, at 553-554.
29. Cuba, supra note 1, at 472. Despite the involvement of other top Nazi officials and the creation of groups for the purpose of collecting and organizing the looted art, “Hitler was so obsessed with the stolen art programs that he alone determined the fate of almost every piece of art . . . .” Walton, supra note 19, at 554-555.
The countries of Western Europe were “viewed as components of the Greater Reich and their artistic collections were considered to be under German control.”30 Consequently, Hitler’s “looting commandos” swept through the nations of France, Belgium, the Netherlands, Austria, and Germany,31 systematically seizing works of art and other property that belonged to the Jews.32 As one author noted, “[B]y the tragically ironic logic of the Nazis, the confiscation of Jewish collections was the natural extension of their policy of racial annihilation.”33

In Eastern Europe, however, the pattern was different.34 In the Slavic nations of Eastern Europe, the Nazis’ goal was to strip these countries of their cultural heritage.35 Because the Germans considered the Slavs to be an inferior race, the Nazi troops looted and pillaged private homes, as well as state museums and churches.36

The Nazis justified the art looting campaign by pointing to the German treasures stolen during the Napoleonic Wars and World War I.37 Indeed, “the Nazis were far from ashamed of what they were doing. To the Nazis, looting artwork was not stealing, rather artwork was ordinary bounty due the victors of war.”38 It should be noted that, although the capture of cultural property during times of war is an ancient practice, the Nazi art looting campaign was conducted on an “unprecedented scale.”39 As one scholar noted, “[F]or Hitler, both the acquisition and cleansing of art fell squarely within his plan of a pure Germanic empire.”40

The Nazis meticulously inventoried, catalogued, and photographed all of the art they looted.41 They considered German and Germanic

31. Cuba, supra note 1, at 473. The Jeu de Paume Museum in Paris became one of the main European warehouses for storing looted art. Id. There, art historians would stamp artworks with a swastika that read “Property of the Third Reich.” Id.
32. See Turner, supra note 23, at 1516. Those Jews who had been sent “to concentration camps were considered to have fled and their possessions were ‘legally’ confiscated.” Cuba, supra note 1, at 473.
33. Falconer, supra note 18, at 395.
34. Id.
35. See Lippman, supra note 3, at 27. See also Falconer, supra note 18, at 383.
37. Id. at 1514. As one author noted, “[W]hen they confiscated the possessions of French-Jewish dealers, they were retaliating against the enemies of Germany, and when they pillaged ‘Germanic art’ from museums, churches, and private collections, . . . they were simply taking back what was theirs and destroying items of no value.” Id. at 1514-15.
38. Feliciano, supra note 15, at 3.
39. Falconer, supra note 18, at 383.
40. Id. at 383-84.
41. Walton, supra note 19, at 559. One scholar commented that “[w]orks of art deemed worthy of the Reich were carefully stored, preserved, and treasured, while the lives of millions of human beings were disregarded as worthless.” Id. at 555.
art, which included Dutch and Flemish art, to be at the pinnacle of artistic accomplishment.\textsuperscript{42} Hitler's "grand plan" for the art that he considered worthy of the Third Reich "was to assemble the greatest art collection of all time and house it in the 'Führermuseum' in Linz, Austria, Hitler's birthplace."\textsuperscript{43} The Linz museum was intended to be a monument to the Reich that would affirm the cultural dominance of the German state.\textsuperscript{44} Further, it was "[t]his vision of cultural preeminence and consolidation [that] was invoked to justify the Reich's extension of Germany's borders across the European continent."\textsuperscript{45}

As the Allied armies closed in on Germany, the Nazi troops moved their collection of looted art into hundreds of bunkers, castles, churches, sheds, and mines located throughout Germany.\textsuperscript{46} In 1944, when it became clear that Germany was on the verge of collapse, the United States sent representatives to London to ensure proper representation.\textsuperscript{47} When World War II ended in 1945,\textsuperscript{48} the United States and the other Allies soon "became embroiled in the search for the hordes of art and riches hidden all over Europe."\textsuperscript{49}

The Allied armies quickly established special agencies charged with finding the true owners of recovered art.\textsuperscript{50} France created the Commission de Récupération Artistique one week after the liberation of Paris to investigate and locate stolen artworks.\textsuperscript{51} Similarly, the United States and Britain established Monuments, Fine Arts and Architec-

\textsuperscript{42} Feliciano, \textit{supra} note 15, at 3. As one author noted, the Nazis aspired to return to a lost golden age. Its artistic palette was limited to traditional landscapes, depictions of town and village life, still lifes, animal portraits and visions of the noble and courageous knights of the Middle Ages. The human body invariably was cast in a pale and classically proportioned form which embodied the alleged superior beauty, strength, courage and grace of the Aryan race. These figures were portrayed in a collective, compliant and coordinated effort that represented the organic unity and intellectual leadership of the State. Art that did not fit this format was condemned.

\textsuperscript{43} Walton, \textit{supra} note 19, at 557. Hitler had a three hundred page inventory of artworks, titled the Kummel Report, that listed every work of art that had left Germany since the year 1500. Cuba, \textit{supra} note 1, at 473. Hitler intended to collect every work listed in the Kummel Report so he could pay homage to them at Linz. \textit{Id}.

\textsuperscript{44} Lippman, \textit{supra} note 3, at 27.

\textsuperscript{45} \textit{Id}.

\textsuperscript{46} \textit{Id.} at 28.

\textsuperscript{47} Walton, \textit{supra} note 19, at 561.

\textsuperscript{48} By the time Paris was liberated from Nazi control in 1944, it is estimated that as much as one-third of all art housed in private European collections had been looted. Feliciano, \textit{supra} note 2, at 3-4.


\textsuperscript{50} Rosen & Hamburger, \textit{supra} note 4, at 2.

\textsuperscript{51} Feliciano, \textit{supra} note 2, at 172-73.
ture (MFA & A) to create precise lists of the victims of confiscation and inventories of stolen works in an effort to ensure that recovered artworks were returned to their rightful owners.\textsuperscript{52} The United States' and Britain's policy was to return recovered art objects to their countries of origin.\textsuperscript{53} However, when works that had belonged to the state collections of Germany were recovered, it was the United States' policy to remove those works temporarily to the United States.\textsuperscript{54}

Though the Allied agencies worked diligently to return recovered works of art to their countries of origin, many problems arose. Objects were stored haphazardly or disappeared from their places of storage, works were falsely claimed at the collecting points and subsequently disappeared into the black market, and seemingly legitimate owners simply could no longer prove ownership.\textsuperscript{55} The Allied forces also lacked a uniform policy on restitution.\textsuperscript{56} Nevertheless, "it is not quite right to say that nothing was done after the war. Hundreds of thousands of works were returned to their owners, but, of course, not everything was found or claimed."\textsuperscript{57} Despite the efforts of both the Commission and the MFA & A, thousands of stolen works of art were reintegrated into the art market where their origins were either effaced or forgotten, until finally, the artwork disappeared.\textsuperscript{58}

As the Cold War slowly came to an end in the early 1990s, many previously classified government documents were released,\textsuperscript{59} prompting many Jewish families to renew their searches for lost art.\textsuperscript{60} However, in order to make a claim for the recovery of stolen art or even to realize the existence of a claim, it is necessary to investigate family

\textsuperscript{52} Id. The Allies had art specialists on their side to identify and sort out the vast quantities of art that were recovered and to preserve and salvage these works. Falconer, supra note 18, at 397.

\textsuperscript{53} Lippman, supra note 3, at 29.

\textsuperscript{54} See Falconer, supra note 18, at 398. Also, "heirless property," which is property that was looted from those Jews who were exterminated, was turned over to the Jewish Restitution Successor Organization, a group that distributed the objects to Jewish communities. Lippman, supra note 3, at 29.

\textsuperscript{55} See Walton, supra note 19, at 563.

\textsuperscript{56} See Falconer, supra note 18, at 397-98.


\textsuperscript{58} See Feliciano, supra note 2, at 177.

\textsuperscript{59} The Cold War is one reason why documents remained classified for so long. Turner, supra note 23, at 1520. As this author noted, "[T]he need for America and its Western European [including West Germany] allies to present a unified front [during the Cold War] may have contributed to a desire not to inquire too deeply into the activities of those allies during and after the war." Id.

\textsuperscript{60} See Rosen & Hamburger, supra note 4, at 3.
archives and auction records in addition to government files.\textsuperscript{61} These sources of information are often located in several different countries.\textsuperscript{62} Furthermore, the difficulty in conducting a thorough investigation is only aggravated by the passage of time. Today, with tens of thousands of works of art still missing, the need for further investigation is demanded by World War II survivors and their heirs.\textsuperscript{63}

\textbf{B. Case Law: Addressing Claims for the Recovery of Stolen Art}

The key to resolving claims for the recovery of World War II looted art lies in finding legal doctrines that allow courts to impose legal duties that are concurrent with society’s moral obligations. In order to determine which legal theories are best suited to the resolution of these claims, however, it is necessary to first explore some of the major case law dealing with claims for the return of looted and stolen art.

\textit{1. Menzel v. List}\textsuperscript{64}

One of the earliest cases to examine which legal doctrines and rules apply to looted art claims was \textit{Menzel v. List}.\textsuperscript{65} On the defendant’s appeal from the trial court’s order denying his motion to dismiss the complaint, the appellate court affirmed the denial while managing to establish some fundamental rules.\textsuperscript{66} The court first established that “with respect to a bona fide purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural prerequisite to the bringing of an action . . . .”\textsuperscript{67} The court went on to state that because the demand of a bona fide purchaser is substantive, the statute of limitations should not begin to run until demand and refusal has occurred.\textsuperscript{68} In this way, the court determined that the plaintiff’s cause of action was not time-barred and the case was allowed to proceed to trial.\textsuperscript{69}

\textsuperscript{61} See Cuba, \textit{supra} note 1, at 461-462.
\textsuperscript{62} Id.
\textsuperscript{63} \textit{Restitution of Holocaust Assets: Hearing before the House Banking & Financial Services Comm.}, 106th CONG. 94 (2000) (statement of Glenn D. Lowry, Director, The Museum of Modern Art). One author has suggested that governments and institutions should not only be encouraged, but should be pressured to grant the public access to their records. Cuba, \textit{supra} note 1, at 462.
\textsuperscript{65} Id.
\textsuperscript{66} Menzel, 253 N.Y.S.2d at 43.
\textsuperscript{67} Id. at 44.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
At trial, the facts surrounding the case were revealed. The plaintiff, Mrs. Menzel, wished to recover the Marc Chagall painting that she and her husband had left in their Brussels apartment when they fled the Nazi invasion in March 1941. Mr. and Mrs. Menzel had begun searching for the painting following the end of World War II, but were unable to locate it until 1962 when Mrs. Menzel noticed a reproduction of the painting in an art book. The art book stated that the painting was in the possession of Albert A. List. List, a well-known art collector, purchased the painting from Perls Galleries on October 14, 1955. Upon discovering that the painting was in List's possession, Mrs. Menzel demanded its return, List refused, and this legal action ensued.

In her replevin action, Mrs. Menzel alleged that she was, and at all times since 1932 had been, the lawful owner of the painting. Mrs. Menzel further alleged that she had been and was now entitled to the rightful possession of the painting. In her prayer for relief, Mrs. Menzel demanded possession of the painting or its value, which was estimated to be $22,500. In his answer, defendant List asserted the

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70. Menzel, 267 N.Y.S.2d 804 (N.Y. Special and Trial Term, New York County 1966).
71. Id. at 806. The painting was entitled “Le Paysan a L’echelle,” or in English, “The Peasant and the Ladder.” Id. at 807. The Nazi forces left a receipt indicating that the Chagall painting was among the artworks taken into “safekeeping” on or about March 31, 1941. Id. at 806.
72. Mr. Menzel passed away in 1960 and was, therefore, not a party to this action. Id. at 807.
73. Id.
74. Menzel, 24 N.Y.2d at 93-94.
75. Id.
76. Perls Galleries sold the painting under the name “L’echelle de Jacob,” or “Jacob’s Ladder.” Menzel, 267 N.Y.S.2d at 807.
77. Id. at 807. The whereabouts of the painting from 1941, when the Menzels fled Brussels, to 1955, when Perls Galleries purchased the painting from Galerie Art Moderne in Paris, are unknown. Id. at 808.
78. Id. at 807. List brought in Klaus G. and Amelia B. Perls as third party defendants, who were the proprietors of the Perls Galleries, the art gallery from which he purchased the painting. Id. List alleged that the Perls were liable to him for breach of implied warranty of title. Menzel, 24 N.Y.2d at 94. In fact, it was undisputed that Perls Galleries represented and warranted to List that they had valid title and were empowered to sell the painting to him. Menzel, 267 N.Y.S.2d at 807. In their defense, the Perls argued that, among reputable art galleries, the offer of sale of any painting was, in and of itself, warranty of title. Id. at 808. The Perls asserted that this was part of the custom of trade among galleries. Id.
79. The Menzels purchased the painting in 1932 from the collection of Walter Schwarzenberg through Galerie Georges Giroux in Brussels, and it remained in their home until 1941. Id. at 807-08.
80. Id. at 807.
81. Menzel, 267 N.Y.S.2d at 807.
82. Possession of the personal property at issue is the customary form of relief in replevin actions. Id.
83. Id. The record reveals that the Menzels had purchased the painting in 1932 for 3800 Belgian francs, the equivalent of $150. Id. at 808. The Perls purchased the painting from Galerie
affirmative defense that the action was time-barred by the New York Statute of Limitations.84

The court upheld the jury’s verdict, holding that Mrs. Menzel was the sole and rightful owner of the painting.85 The court found that the Menzels had not abandoned the painting when they fled Belgium86 and the Nazis could not have conveyed good title to subsequent purchasers.87 Further, the court reasoned that the defendant’s statute of limitations defense was unavailable because it was settled law in New York that “[i]n replevin, as well as in conversion, the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant’s refusal to convey the chattel upon demand.”88 The court further stated that “[p]rovisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.”89 Noting that “[t]he law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors,”90 the court ordered that the painting be returned to Mrs. Menzel.91

Art Moderne in Paris in July 1955 for $2,800 in French francs. Id. Mr. List, in turn, purchased the painting from Perls Galleries in New York City on or about October 14, 1955 for $4,000. Id. at 807.

84. Menzel, 267 N.Y.S.2d at 807.
85. Id. at 820.
86. “Abandonment” is defined as the “voluntary relinquishment of a known right.” Id. at 809. The court explained that the Menzels’ relinquishment of the painting “in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup.” Id. at 810. As evidenced by the history of their search for the painting, the court found an obvious intent to reclaim. Id.
87. Menzel, 267 N.Y.S.2d at 804. The court also rejected the notion that the seizure of the painting constituted the lawful booty of war by conquering armies. Id. at 810. Instead, the court found that the painting’s taking constituted pillage, or plunder, which is the taking of private property for the immediate prosecution of the war effort and is illegal. Id. at 811. In holding that the Nazi troops could not have conveyed good title to subsequent purchasers, the court recognized that “[w]here pillage has taken place, the title of the original owner is not extinguished.” Id. (citing Mazzoni v. Finanze dello Stato, LII II Foro Italiano 960 (Tribunale di Venezia, 1927)); Collac c. Etat Serbe-Croate-Slovene Yugoslavia, supra, IX Recueil des Decisions des Tribunaux Arbitraux Mixtes 195, VI Hackworth, supra, at 403.
89. Id. at 819 (citing Law #59, U.S. Military Government for Germany, 10 Nov. 1947; Military Government Gazette, Amtsblatt der Militarregierung Deutschland, Amerikanisches Kontrollgebiet, Part I, Article 1, Para. 2).
90. Id. at 820.
91. Id. at 808. The court further held that List, upon delivery of the painting to Mrs. Menzel, should recover its value, $22,500, from Perls Galleries. Id. at 808. This part of the holding was the subject of further litigation. See Menzel, 279 N.Y.S.2d at 608-09 (modifying the judgment by reducing the amount to be paid to List to the purchase price, $4,000, plus interest), rev’d, Menzel, 24 N.Y.2d at 97 (holding that List could only be put in the position he would have occupied if the contract had been kept by Perls Galleries if he recovers the value of the painting at the
One of the first cases to examine the choice of law and legal theories that apply to looted art claims was *Kunstsammlungen Zu Weimar v. Elicofon*. The Federal Republic of Germany (West Germany) commenced this action in 1969 by bringing a claim to recover possession of two portraits painted by the fifteenth century German artist Albrecht Duerer. The paintings disappeared from a castle in the German countryside where they were sent for safekeeping during World War II in the summer of 1945, which was the time that the American troops in Germany were replaced by Soviet troops. In time of judgment, $22,500). The New York Court of Appeals rejected Perls Galleries' argument that a rule awarding the full value of the painting could ruin innocent sellers, such as themselves. Id. at 98. The court stated that on the contrary, sellers could protect themselves by taking steps to ascertain the status of title, and "should . . . an inquiry produce no reasonable reliable information as to the status of title, it is not requiring too much to expect that, as a reasonable businessman, the dealer would himself either refuse to buy or, having bought, inform his vendee of the uncertain status of title." Id.


93. Id.

94. Political differences and disagreement over the future of post-war Germany led to a division between the Soviet Union and its Western Allies. Id. at 831. The Federal Republic of Germany was established in the former British, French, and United States zones on September 21, 1949. Id. at 832. The German Democratic Republic was established on October 7, 1949 in the former Soviet zone. Id.

95. *Elicofon*, 678 F.2d at 1152 n.1. The paintings, executed around 1499, are portraits of Hans Tucher and his wife, Felicitas Tucher, painted in oil on wood.

96. Dr. Scheidig, the director of the Staatliche Kunstsammlungen Zu Weimar museum (KZW) at the time of the paintings' disappearance, testified and offered documents supporting the allegation that the paintings were stolen sometime between June 12, 1945, when he last saw them in a storeroom at the castle, and July 19, 1945, when the theft was discovered. *Elicofon*, 536 F. Supp. at 836-37. In a letter to the Land Ministry dated July 21, 1945, Dr. Scheidig reported that certain paintings had been stolen from the art depot and described the Duerer paintings as among "the most valuable possessions of the Land of Thuringia." Id. at 835. Based on Dr. Scheidig's testimony, the district court found, as a matter of law, that KZW presented a prima facie case establishing that the Duerers were stolen from the Schloss Schwarzburg Castle sometime between June 12, 1945 and July 19, 1945. Id. at 837.

97. In 1943, after World War II had begun, Dr. Scheidig, anticipating the bombardment of Weimar, had the paintings along with other valuable museum items transferred to a storeroom in the nearby Schloss Schwarzburg Castle, located in the District of Rudolstadt in the Land of Thuringia. Id. at 831. The paintings remained in their place of safekeeping at the castle until the time of their disappearance in 1945. Id.

98. Following the surrender of Hitler's government on May 8, 1945, the Allies issued a declaration on June 5, 1945, stating that the Allied Powers assumed "supreme authority with respect to Germany." Id. "For the purposes of occupation, Germany was divided into four zones with one of the Four Powers assuming military authority over each zone to effect its own policy in regard to local matters and the policy of the Allied Control Council in regard to matters affecting Germany as a whole." Id. The American troops occupied (and were quartered at) the area surrounding Schloss Schwarzburg Castle at the beginning of the summer of 1945, but were replaced by more permanent Soviet troops in July of that year. *Elicofon*, 678 F.2d at 155-56.
1966, the paintings were discovered in the possession of Edward Elicofon who purchased the paintings in good faith in 1946 from an American serviceman in Brooklyn, New York.

Following the recognition of the German Democratic Republic (East Germany), the Kunstsammlungen Zu Weimar (KZW), a museum operating in its capacity as an arm of the East German government, was granted the right to intervene as a plaintiff in 1975. Soon after, West Germany discontinued its claim without prejudice. In 1978, the District Court for the Eastern District of New York dismissed the intervener complaint that was filed by the Grand Duchess of Saxony-Weimar and held that the Grand Duchess' right to pos-

Records kept by the United States Army indicate that Russian troops replaced the Americans in “Landkreis Rudolstadt” at about midnight on July 2, 1945. Elicofon, 536 F. Supp. at 835 n.5. A local newspaper, the Thuringer Volkszeitung, also reported the entry of Soviet troops into the area on July 2, 1945. Id.

99. Elicofon discovered the true identity of the Duerer paintings in 1966 when a friend saw them listed in a book describing art that had been looted during the war. Elicofon, 678 F.2d at 1156. Upon this discovery, Elicofon made his possession of the paintings public which in turn precipitated the museum’s demand for their return. Elicofon, 536 F. Supp. at 833. The demand was refused, and this litigation ensued. Id.

100. Id. at 830. Elicofon purchased the two unsigned Duerer portraits for $450. Elicofon, 678 F.2d at 1156.

101. In a Memorandum of Decision and Order dated September 25, 1972, the court denied the Kunstsammlungen Zu Weimar’s motion to intervene on the ground that the museum was an arm of the German Democratic Republic (GDR), a nation not recognized by the United States at the time. Elicofon, 536 F. Supp. at 832. However, when, on September 4, 1974, the United States granted formal recognition to the GDR, the court accordingly vacated its prior order and permitted the KZW to intervene as a plaintiff. Id.

102. The Kunstsammlungen Zu Weimar was a museum located in what was at the time the GDR. Id. at 830. Until 1943, the paintings were displayed in the Staatliche Kunstsammlungen Zu Weimar, a museum located in Weimar, Thuringia and the predecessor to the post-German Democratic Republic Kunstsammlungen Zu Weimar. Id. at 831. This was the basis for the museum’s claim to recover the paintings and the reason the court granted the museum the right to intervene as plaintiff in this action. Id. at 830.

103. Id. at 830-31.

104. Id. Once the United States formally recognized the GDR government and the court had thus permitted KZW to intervene as plaintiff, “the FRG in December 1975 was granted leave to withdraw and discontinue its claim with prejudice on the ground that ‘prior impediments to the ability of Kunstsammlungen Zu Weimar to pursue this action’ had been removed.” Elicofon, 678 F.2d at 1156.

105. The court stated:

Until 1927, the Duerer portraits which are the subject of this suit formed part of the private art collection of the Grand Duke of Saxe-Weimar-Eisenach. Under the terms of a Settlement Agreement of 1927 between the Land of Thuringia and the widow of Wilhelm Ernst, the then owner of the private collection, title to the Grand Ducal Art Collection had been transferred to the Land of Thuringia. Thuringia was created by Federal German Law of April 20, 1920 and was the legal successor to the territory of Weimar, which included as one of its seven subdivisions Saxe-Weimar-Eisenach, the territory over which the Grand Dukes formerly had presided before being ousted from power.
session had passed to East Germany. Consequently, by the time the merits of the case were considered, the only remaining parties were plaintiff KZW and defendant Elicofon.

At trial in the United States District Court for the Eastern District of New York, KZW argued that while it was undisputed that Elicofon had purchased the paintings in good faith, good faith was irrelevant to the inquiry. KZW asserted that it was clear from the testimony of Dr. Scheidig, the Deputy Director of KZW, that the paintings had been stolen and Elicofon did not have good title because under New York law, a thief cannot transfer good title even to a subsequent good faith purchaser.

The court agreed and found as a matter of law that KZW had presented a prima facie case establishing that the Duerers had been stolen. The court held that the statute of limitations did not begin to accrue until KZW demanded the return of the paintings and Elicofon refused. The court also held that KZW had been “reasonably diligent” in its efforts to locate the paintings, and consequently, any delay in making a demand was reasonable and excusable as a matter of law. As a result, the court held that KZW had an immediate right to possession.

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Elicofon, 536 F. Supp. at 831. The court dismissed the intervener complaint of the Grand Duchess, who had asserted ownership of the Duerers by assignment from her late husband, the Grand Duke Carl August, on the basis of the Settlement Agreement of 1927. Id. at 831 n.1. The court found that the Settlement Agreement of 1927 foreclosed any claim of ownership asserted by the Grand Dukes after 1927. Id.

106. Id.
107. Id. at 830-31.
108. Id. at 846. Good faith was irrelevant to the inquiry because the court found the paintings were stolen and it was impossible for a thief to pass good title to a subsequent purchaser even if the purchaser was acting in good faith. See infra note 295 and accompanying text.
110. Id. at 837.
111. Id. at 829-830.
112. Id. at 852.
113. Id. at 857. Elicofon made two additional arguments that were rejected by the court at trial. Id. at 829. First, Elicofon argued that even if the paintings were stolen from the castle, he still could have acquired good title under the German law of "good faith acquisition." Elicofon, 536 F. Supp. at 839. Elicofon asserted that Fassbender, an architect living on the castle grounds at the time of the disappearance of the paintings, stole the paintings but was able to transfer good title to the paintings to the American serviceman, an innocent purchaser, from whom Elicofon in turn purchased the paintings. Id. The court held that Fassbender was a Besitzdiener, or possessor's servant, and, therefore, he lacked the element of possession that was necessary for good title to be transferred to a bona fide purchaser under German law. Id. at 842-43. The court alternatively held that Fassbender could not have conveyed good title to the American serviceman because United States Military Government Law, which was in effect in Germany and superseded German law at the time of transfer, rendered void the transfer of any cultural property. Id. at 843. Second, Elicofon argued that, even if he did not acquire good title to the paint-
In 1982, the United States Court of Appeals for the Second Circuit affirmed the district court's holding.\textsuperscript{114} The issue on appeal was whether Elicofon acquired good title either by his good faith purchase or as a result of his uninterrupted good faith possession for twenty years.\textsuperscript{115} Elicofon argued that he purchased the unsigned Duerers in 1946 from an American serviceman who claimed that he purchased the paintings at the end of the war, and that the paintings remained on display in Elicofon's home for over twenty years.\textsuperscript{116}

The court found that New York law prevented a subsequent good faith purchaser from acquiring good title from a thief.\textsuperscript{117} Further, KZW's claim was not time barred because New York applies the demand and refusal rule.\textsuperscript{118} Applied to the case at bar, the court held that KZW's statute of limitations did not begin to run until October 1966 when the museum first learned that the Duerer paintings were in Elicofon's possession, the museum demanded their return, and Elicofon refused to return them.\textsuperscript{119} Therefore, because KZW's action commenced in 1969, it was well within the three-year statute of limitations and the action was not time-barred.\textsuperscript{120} Further, because KZW established that the paintings were stolen and it had a right of possession, the court ordered Elicofon to return the paintings to KZW.\textsuperscript{121}
3. DeWeerth v. Baldinger

The DeWeerth v. Baldinger line of cases examines the doctrines of due diligence and demand and refusal. These cases resulted from a claim brought by Mrs. DeWeerth, the original owner of a Claude Monet painting entitled “Champs de Blé à Vetheuil,” who sought its return from a subsequent good faith purchaser. Mrs. DeWeerth inherited the painting from her father upon his death in 1922. In August of 1943, in the midst of World War II, Mrs. DeWeerth sent the painting, along with other valuables, to her sister’s house in Southern Germany for safekeeping. Although the van that carried the goods arrived safely, Mrs. DeWeerth never saw the painting again. It disappeared from her sister’s home in the fall of 1945 without evidence to explain the reason for the disappearance.

Upon learning of the painting’s disappearance, Mrs. DeWeerth made immediate efforts to locate it. In 1946, she reported the loss to the military government that was administering the area at that time. The courts noted that Claude Monet was perhaps “the most well-known and widely admired member of the school of impressionist painters active in France in the late nineteenth and early twentieth centuries.”

The painting in the pending case, Monet’s ‘Champs de Blé à Vetheuil,’ is one of a series of similar impressionistic landscapes painted by the artist near the town of Vetheuil, located on the Seine in Northern France. The oil painting, measuring 65 by 81 centimeters, shows a wheat field, a village, and trees. It is signed and dated “Claude Monet ’79.” The painting is estimated to be worth in excess of $500,000.

Id.


Id. at 690. Mrs. DeWeerth’s father, Karl von der Heydt, purchased the Monet around 1908 and kept it on display in his house in Bad Godesberg, West Germany until the time of his death in 1922. Id.

With the exception of the years 1927 to 1929, when the Monet was kept in her mother’s house, plaintiff kept the Monet in her residence in Wuppertal-Elberfeld from 1922 until August 1943, where it was on display on a wall next to a sculpture by Auguste Rodin, also inherited from her father. In August 1943, Mrs. DeWeerth sent the Monet, the Rodin sculpture, and other valuables to the home of her sister Gisela von Palm (deceased at the time of the lawsuit) in Oberbalzheim in Southern Germany.

Id. at 690.

Id. The court noted that United States soldiers were quartered in the house following the end of the war in 1945. DeWeerth, 968 F. Supp. at 690. Noting that it was after the American soldiers left that the Monet’s disappearance was discovered, the court inferred “that either one of the soldiers, or someone else, stole the painting . . . .” Id.

Id.

Id. at 691.
time. In 1948, she hired an attorney to aid in her recovery efforts, and in 1955, she made inquiries of Dr. Alfred Stange, a renowned art expert. Finally, in 1957, Mrs. DeWeerth reported the Monet missing to the Bundeskriminalamt in Bonn. After a decade of unsuccessful attempts at recovery, Mrs. DeWeerth believed that she had exhausted all remedies.

Meanwhile, unbeknownst to Mrs. DeWeerth, the Monet had found its way into the Swiss art market by 1956, where it was purchased by Wildenstein & Co., Inc., an art gallery in New York City. In 1957, the defendant, Mrs. Baldinger, purchased the Monet from the Wildenstein Gallery. Over the next two decades, the Monet was exhibited only twice and referenced in only four publications. In July 1981, Mrs. DeWeerth's nephew discovered that the Monet had been exhibited at the Wildenstein Gallery in 1970. The following year, Mrs.

132. DeWeerth, 836 F.2d at 105. “The report is no longer extant, but DeWeerth testified that it was a standard government form in which she briefly described items she had lost during the war.” Id.

133. “In 1948, in a letter to her lawyer, Dr. Heinz Frowein, regarding insurance claims on property she had lost, DeWeerth expressed regret about the missing Monet and inquired whether it was ‘possible to do anything about it,’ Frowein wrote back that the Monet would not be covered by insurance; he did not initiate an investigation.” Id.

134. Id.

135. The Bundeskriminalamt was the West German equivalent of the federal bureau of investigation. Id.


137. Id. Records indicate that Wildenstein & Co., Inc. purchased the Monet from a Swiss art dealer, Francois Reichenbach, in December 1956. DeWeerth, 836 F.2d at 105. Records further indicate that the Wildenstein Gallery acquired the Monet on consignment. DeWeerth, 658 F. Supp. at 691. Between December 1956 and June 1957, the Wildenstein Gallery had possession of the Monet in New York. Id.

138. Id. Mrs. Baldinger purchased the Monet in June 1957 for $30,900. DeWeerth, 836 F.2d at 105. A 1962 record kept by the Wildenstein Gallery shows a credit made to the Swiss art dealer from whom the Monet was originally acquired. DeWeerth, 658 F. Supp. at 691. At the time of the trial, the Monet was estimated to be worth over $500,000. DeWeerth, 836 F.2d at 104.

139. Id. The Monet was exhibited from October 29 until November 1, 1957 at a benefit held at the Waldorf-Astoria Hotel in New York City, and again from April 2 until May 9, 1970 at an exhibition entitled “One Hundred Years of Impressionism” held at the Wildenstein Gallery. DeWeerth, 658 F. Supp. at 691. Published references to the Monet included two in catalogues published in connection with the two above-mentioned exhibitions and two in publications to which the Wildenstein Gallery was connected. Id.

140. Id. at 691.

DeWeerth learned of Baldinger's possession of the Monet through the efforts of her nephew, Peter von der Heydt. In 1981, a cousin told von der Heydt that DeWeerth had
DeWeerth retained an attorney, and after receiving a court order requiring the Wildenstein Gallery to reveal the name of the painting's current possessor, Mrs. DeWeerth sent a letter dated December 1982 to Mrs. Baldinger demanding that she return the Monet. In a letter dated February 1983, Mrs. Baldinger refused to return the painting and the legal action subsequently ensued.

At trial, the United States District Court for the Southern District of New York combined the defendant's affirmative defenses into one issue: whether the plaintiff's claim to recover the Monet was timely and not unreasonably delayed. In holding that Mrs. DeWeerth did not unreasonably delay her demand for the return of the painting, the court discussed the doctrines of due diligence and demand and refusal. First, the court applied the demand and refusal rule, stating that the statute of limitations does not begin to run until a demand is made to return the property and the demand is refused. The court held that because demand was made in 1982 and refused in 1983, the action that was instituted in 1983 was well within the three-year statute of limitations.

The court went on to discuss the doctrine of due diligence, stating that a party may not unreasonably delay making a demand and that

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2. *DeWeerth*, 685 F.2d at 105.
4. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
5. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
6. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
7. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
8. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
9. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
10. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
11. *DeWeerth*, 685 F.2d at 105-106. When the Wildenstein Gallery refused to provide Mrs. DeWeerth with the owner's name, she commenced an action against the gallery in the Supreme Court of New York. *Id.* The court subsequently ordered the Wildenstein Gallery to reveal the identity of the Monet's current possessor in December 1982. *Id.*
under *Eliofon*, the question of the amount of time that may be considered reasonable depends upon the circumstances of each case.\(^{149}\) Here, because the plaintiff made a "diligent although fruitless effort"\(^{150}\) to locate and recover the Monet for the ten years following its disappearance, her failure to make subsequent efforts between 1957 and her nephew’s fortuitous discovery in 1981 was reasonable, based on the small number of published references to the painting and Mrs. DeWeerth’s elderly age.\(^{151}\) Consequently, the court held that the claim was not barred on timeliness grounds.\(^{152}\)

The court stated that in order to establish a cause of action in replevin,\(^{153}\) a plaintiff must show that she has an immediate and superior right to possession by proving ownership.\(^{154}\) Mrs. DeWeerth’s testimony and other documentary evidence\(^{155}\) established that she was the owner of the painting by inheritance from her father and she had neither sold nor entrusted it to anyone else to sell; therefore, the court held that she had a superior right to possession over Mrs. Baldinger who was a subsequent good faith purchaser who could not trace the title back to the original owner.\(^{156}\) Furthermore, because the painting was a unique chattel, or unique personal property, Mrs. Baldinger was directed to deliver the painting to Mrs. DeWeerth, the original owner.\(^{157}\)

149. *Id.*
150. *Id.* The court stated, that (1) in 1946, she reported its loss to the military government then administering the Bonn-Cologne area after the end of the war; (2) in 1948, she solicited the assistance of her lawyer in endeavoring to find it; (3) in 1955, she made inquiries to an art expert she knew of; and (4) in 1957, she reported it as missing to the *Bundeskriminalamt*. Thus plaintiff made a ‘diligent although fruitless effort’ to find the Monet through 1957.

*Id.*
151. *Id.* The court stated, that upon the circumstances of this case the plaintiff’s failure to pursue the Monet after 1957 until her nephew discovered in 1981 that the Monet had been exhibited in New York was reasonable. Mrs. DeWeerth was an elderly woman during that period, and the only published references to the Monet were not generally circulated.

*Id.*
152. *Id.* at 695.
153. See infra notes 284-295 and accompanying text (explaining the elements of replevin).
154. *DeWeerth*, 658 F. Supp. at 695. The court stated that “[t]o establish a cause of action in an action sounding in replevin under New York law, Mrs. DeWeerth must show that she has an immediate and superior right to possession of the Monet.” *Id.*
155. Mrs. DeWeerth provided a 1943 photograph which showed the Monet on display in her residence. *Id.*
156. *Id.* at 688-89. The court stated that “Mrs. Baldinger, who indisputably purchased the Monet in good faith and for value from Wildenstein in 1957, would prevail only if she could trace her title back to Mrs. DeWeerth. This she cannot do. The trail back from Mrs. Baldinger leads through Wildenstein to Reichenbach, and stops there.” *Id.* at 695-96.
157. *Id.* at 688-89.
The United States Court of Appeals for the Second Circuit reversed the district court's opinion. At issue on appeal was whether New York law required an individual claiming ownership of stolen personal property to exercise due diligence in trying to locate the property so as not to postpone the running of the statute of limitations in a suit against a good faith purchaser. In reaching its conclusion, the court reviewed the rationale behind New York's demand and refusal rule.

The court recognized that where an owner pursues an action directly against the party who took his property, the statute of limitations period begins to run as soon as the property is taken. In contrast, when an owner pursues an action against a subsequent good faith purchaser, the statute of limitations period begins to run only after the return of the property is demanded and refused. The court stated that in these situations, an owner might not unreasonably delay his demand. Furthermore, the owner's efforts to locate the stolen property must be reasonably diligent.

By imposing these two duties on an owner who seeks to bring an action against a subsequent good faith purchaser, the court reasoned that the subsequent purchaser's rights were protected. The court also stated that without these two duties, "[state] policies would be frustrated if plaintiffs were free to delay actions... until the [stolen] property's location fortuitously came to their attention." For these reasons, the court held that "under New York law an owner's obliga-

158. DeWeerth, 836 F.2d at 103.
159. Id. at 104.
160. Id. at 109-10.
161. Id. at 106. "The date of accrual depends upon the identity of the party from whom recovery is sought. Where an owner pursues the party who took his property, the three-year period begins to run when the property was taken." Id.
162. Id. "In contrast, where the owner proceeds against one who innocently purchases the property in good faith, the limitations period begins to run only when the owner demands return of the property and the purchaser refuses." DeWeerth, 836 F.2d at 106.
163. Id. at 106-07.

Under New York law, even though the three-year limitations period begins to run only once a demand for return of the property is refused, a plaintiff may not delay the action simply by postponing his demand. Where demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed. Id. at 107.
164. DeWeerth, 836 F.2d at 109. "In light of New York's policy of favoring the good faith purchaser and discouraging stale claims... we hold that under New York law an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property." Id. at 109-10.
165. Id. at 109. "The purpose of the rule... is to protect the innocent party by assuring him notice before he is held liable in tort...." Id. at 108.
166. Id. at 109.
tion to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property.'\(^\text{167}\)

The court distinguished the plaintiff's efforts from the reasonably diligent efforts of the plaintiff in *Elicofon*.\(^\text{168}\) The court emphasized the lack of detail contained in the reports that Mrs. DeWeerth filed and listed steps that she did not take to locate the missing painting.\(^\text{169}\) Most notably, the court emphasized her failure to consult Monet's *Catalogue Raisonné*, a definitive listing and accounting of the works by the artist, where both exhibitions of the Monet were listed.\(^\text{170}\) In sum, the court stated that "[t]o require a good-faith purchaser who has owned a painting for thirty years to defend under these circumstances would be unjust. New York law avoids this injustice by requiring a property owner to use reasonable diligence in locating his property."\(^\text{171}\) Consequently, the court held that Mrs. DeWeerth filed her action in an untimely manner because she failed to exercise reasonable diligence to locate the painting after its disappearance.\(^\text{172}\)

4. *Soloman R. Guggenheim Foundation v. Lubell*\(^\text{173}\)

More recently, the doctrines of due diligence and demand and refusal were examined in *Guggenheim Foundation v. Lubell*.\(^\text{174}\) In that case, the Guggenheim Museum brought an action against a good faith

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167. *Id.* at 110.
168. *DeWeerth*, 836 F.2d at 111.
169. *Id.* at 111-12. The court noted that Mrs. DeWeerth had failed to publicize the loss of the painting in the available listings designed to keep museums, galleries, and others abreast of stolen art. *Id.* at 111. The court also took notice of the fact that Mrs. DeWeerth had more or less abandoned her search efforts between the years of 1957 and 1981. *Id.* at 112. Finally, the court noted Mrs. DeWeerth's failure to take advantage of any of the post-war mechanisms that were set up to locate art lost during World War II. *Id.* Though Mrs. DeWeerth defended herself by arguing that the post-war mechanisms were only concerned with art that had been looted by Nazi troops, the court rejected her argument, reasoning that the post-war mechanisms were potentially fruitful sources and should have been contacted. *Id.* at 111 n.6.
170. *DeWeerth*, 836 F.2d at 112. The court further pointed out that, under number 595 in Monet's *Catalogue Raisonné*, it is noted that Wildenstein sold the painting in 1957 in the United States and that the painting was exhibited in 1970. *Id.*
171. *Id.*
172. *Id.* at 104. The court stated, "This case illustrates the problems associated with the prosecution of stale claims . . . . Memories have faded. To require a good-faith purchaser who has owned a painting for 30 years to defend under these circumstances would be unjust. New York law avoids this injustice by requiring a property owner to use reasonable diligence in locating his property. In this case, DeWeerth failed to meet that burden. Accordingly, the judgment of the District Court is reversed." *Id.* at 112. See *infra* notes 199-203 and accompanying text (discussing the post-*Guggenheim*, 1992 *DeWeerth* decision).
174. *Id.*
purchaser to recover a painting\textsuperscript{175} that was stolen by a former museum employee.\textsuperscript{176} The facts of the case revealed that although the museum discovered that the painting was stolen when it conducted the 1969-1970 inventory of its collection,\textsuperscript{177} it did not inform any other museums or the police.\textsuperscript{178} The museum claimed that publishing the theft would have only driven the painting further underground.\textsuperscript{179} In 1974, the museum’s Board of Trustees concluded that all efforts to recover the painting were exhausted, and it voted to remove the painting from its records.\textsuperscript{180} Meanwhile, the Lubells purchased the painting from a gallery in May 1967\textsuperscript{181} and exhibited it twice, once in 1967 and again in 1981.\textsuperscript{182} In 1985, a Sotheby’s employee who formerly worked for the museum recognized the painting when a private art dealer brought a transparency to the auction house.\textsuperscript{183} The Sotheby’s employee notified the museum and, in 1986, the museum director, Thomas Messer, sent a letter to the Lubells demanding the return of the painting.\textsuperscript{184} Mrs. Lubell refused to return the painting and this action was commenced by the museum in 1987.\textsuperscript{185}

At trial, the Supreme Court of the State of New York held that because the museum did nothing for twenty years other than search its own premises, its conduct was unreasonable as a matter of law and,

\textsuperscript{175} The painting at issue was a gouache painted by Marc Chagall in 1912. \textit{Guggenheim}, 569 N.E.2d at 428. The gouache, called “Menageries” and also known as “Le Marchand de Bastaueil,” was worth an estimated $200,000 at the time of the lawsuit. \textit{Id.} at 427. The gouache was donated to the museum in 1937. \textit{Id.} at 428. The action was technically brought by the Soloman R. Guggenheim Foundation which operates the Guggenheim Museum. \textit{Id.} at 427.

\textsuperscript{176} \textit{Guggenheim}, 569 N.E.2d at 427.

\textsuperscript{177} Although the museum discovered that the painting was misplaced sometime in the late 1960s, it did not become aware that the painting was stolen until completing its inventory of the entire museum collection in 1970. \textit{Id.} at 428.

\textsuperscript{178} \textit{Id.} The court noted that the museum failed to inform other museums, galleries, organizations, the New York City Police Department, the F.B.I., Interpol, or any other law enforcement authority of the theft. \textit{Id.}

\textsuperscript{179} \textit{Id.} “The museum asserts that this was a tactical decision based upon its belief that to publicize the theft would succeed only in driving the gouache further underground and greatly diminishing the possibility that it would ever be recovered.” \textit{Id.}

\textsuperscript{180} \textit{Guggenheim}, 569 N.E.2d at 315-16.

\textsuperscript{181} The Lubells purchased the painting from the Robert Elkon Gallery, located in New York City, in May 1967 for $17 million. \textit{Guggenheim}, 569 N.E.2d at 428. The invoice and receipt indicated that the painting had been in the private collection of the same former museum employee who came to be suspected of the theft. \textit{Id.}

\textsuperscript{182} \textit{Id.} The Lubells twice exhibited the painting at the Elkon Gallery. \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Guggenheim}, 569 N.E.2d at 428. At the time the museum made its demand for the return of the painting, the painting had been on display in the Lubells’ home for twenty years. \textit{Id.} at 427.

\textsuperscript{185} \textit{Id.} at 428. The action was commenced by the museum on September 28, 1987 for either recovery of the painting or, in the alternative, for $200,000. \textit{Id.}
therefore, its action was time-barred. However, the Appellate Division of the Supreme Court of New York found that the trial court had erred in its conclusion that “delay alone can make a replevin action untimely.” In reaching its decision, the court relied on the DeWeerth case, which predicted that the New York Court of Appeals “would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified.” In other words, in Guggenheim, the court agreed that simply bringing an action within the statute of limitations period after demand and refusal did not end the inquiry. Instead, the court went on to consider “whether a reasonably diligent search could have enabled the plaintiff to make an earlier demand.” The court concluded that the defendant’s lack of due diligence argument had more to do with a defense of laches than with the statute of limitations, and therefore, the defendant had to show prejudice in addition to mere delay on remand.

The issue on appeal was whether the museum’s failure to take steps to locate the painting was relevant to the Lubells’ statute of limitations defense. The New York Court of Appeals agreed with the Appellate Division of the Supreme Court of New York that the timing of the museum’s demand for the return of the painting and the defendant’s refusal to comply were the only factors relevant to assessing the statute of limitations defense. In rejecting the rule established by DeWeerth, the court held that “there is no reason to obscure [the de-
mand and refusal rule's] straightforward protection of true owners by creating a duty of reasonable diligence." The court reasoned that not only is reasonable diligence difficult to measure but placing the burden of locating stolen artwork on the true owner is unduly burdensome because the owner's chances of recovering what is rightfully his are foreclosed if the burden is not met. For these reasons, the court held that the current possessor, and not the claimant, must prove that a particular work of art is not stolen.

5. DeWeerth v. Baldinger II

The DeWeerth case returned to court in 1992 in response to Guggenheim Foundation v. Lubell. In DeWeerth II, the United States District Court for the Southern District of New York noted that the court in Guggenheim rejected the due diligence requirement for owners attempting to recover stolen property from subsequent good faith purchasers. The court emphasized that the Guggenheim decision

museum's demand for the gouache and the appellant's refusal to return it are the only relevant factors is assessing the merits of the Statute of Limitations defense.

Id. at 430.

Id. at 430-431.

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

Id. at 431.

Id. at 431. "In our opinion, the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser." Id. Indeed, the trial court noted that in this case, the "defendant's vigilance is as much in issue as plaintiff's diligence." Guggenheim, 550 N.Y.S.2d at 623.


199. DeWeerth, 804 F. Supp. 539 (S.D.N.Y. 1992); Guggenheim, 569 N.E.2d 426 (N.Y. 1991) (Mrs. DeWeerth initiated a second action following the 1991 Guggenheim decision holding that the burden for proving an artwork is not stolen is on the current possessor).

200. DeWeerth, 804 F. Supp. at 544. The court stated,

"[T]he New York Court of Appeals in Guggenheim explicitly held that the due diligence requirement announced in DeWeerth was contrary to state law: 'We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen artwork for purposes of the Statute of Limitations . . . . The history of [proposed legislation seeking to establish a discovery rule for the recovery of stolen artworks] when considered together with the abundant case law spelling out the demand and refusal rule, convinces us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.'"

Id. (quoting Guggenheim, 569 N.E.2d at 429-430).
was based on the rationale that "[t]o place the burden of locating stolen artwork on the true owner . . . would, we believe, encourage illicit trafficking in stolen art." The court then concluded that the Guggenheim decision constituted a new development justifying relief from judgment.

On the second appeal, the United States Court of Appeals for the Second Circuit held in a split decision that the district court abused its discretion in granting relief from judgment based either on the state court's decision as extraordinary circumstances or the finding that the state court's judgment had prospective application.

6. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.

The next case to give a detailed consideration to which legal doctrines apply to the recovery of stolen art is Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg. In this case, the Republic of Cyprus and the Autocephalous Greek-Orthodox Church of Cyprus brought an action against an Indiana art dealer for the recovery of four stolen mosaics. The issue was whether the art dealer, an allegedly good faith purchaser, or the Church from which the mosaics were stolen was entitled to the right to possess the mosaics. The sixth century mosaics, which remained for centuries in a church in Cyprus, were removed sometime during the 1970s following the Turkish invasion.
Meanwhile, in 1988, the defendant, Peg Goldberg, who was President of Feldman Fine Arts, Inc., an Indiana art gallery and dealer, purchased the mosaics from a Dutch art dealer. She testified that she purchased the mosaics in good faith and without reasonable notice that they were stolen and that Turkish Cypriot officials authorized the transaction. In the fall of 1988, upon returning to the United States, Goldberg contacted various art dealers in an attempt to find a buyer for the mosaics. Eventually, word that the mosaics were for sale reached Dr. Marion True at the Getty Museum in California who, because of their close working relationship, contacted Cypriot officials. Upon learning of the existence of the mosaics from Dr. True, the plaintiffs soon discovered that they were located in Indianapolis.

regular religious services continued to be conducted at the Kanakaria Church by the pastor, Father Antonis Christopher, until July 1976 when he was forced to flee the region. Id. When Father Christopher fled to Southern Cyprus in July 1976, the mosaics were still affixed to the church. Id. Based on reports from people who remained in the occupied area, sometime between August of 1976 and October of 1979, the interior of the church was vandalized and the mosaics were forcibly removed. Id.

209. Autocephalous, 717 F. Supp. at 1381-83. In 1988, Goldberg flew to Amsterdam where she met up with an Indianapolis art dealer and a casual acquaintance of hers, Robert Fitzgerald. Id. at 1381. Fitzgerald informed Goldberg that he knew of four mosaics that were for sale and then put her in touch with a Dutch art dealer, Michel Van Rijn, and the California attorney representing Van Rijn and Fitzgerald, Ronald Faulk. Id. Van Rijn showed Goldberg pictures of the mosaics and told her he could arrange the sale. Id. at 1381. Van Rijn identified the seller as Aydin Dikman who he said had “found” the mosaics in the rubble of a church. Id. Goldberg next enlisted attorney Faulk and sent him to see Dikman and to tell him that she was interested in buying. Id. at 1382. Faulk returned with documents which purported to show that export of the mosaics would be proper. Autocephalous, 717 F. Supp. at 1382. Goldberg purchased the mosaics for $1,080,000. Id.

210. Id. at 1376. Goldberg testified that she contacted the International Foundation for Art Research in New York and UNESCO’s Geneva office as well as customs offices in the United States, Germany, Switzerland, and Turkey to inquire as to whether the mosaics were reported stolen or missing and whether any treaties might prevent their importation to the United States. Id. at 1382.

211. Id. at 1384. Among others, Goldberg contacted a New York and Geneva art dealer, Dr. Geza von Habsburg, who in turn contacted Dr. Marion True at the Getty Museum. Id.

212. Autocephalous, 717 F. Supp. at 1384. When von Habsburg contacted her, Dr. True explained that the Getty Museum did not collect Byzantine art. Id. She also told von Habsburg that, because of her close working relationship with Cyprus, it would be necessary for her to contact her friend Dr. Vassos Karageorghis about the mosaics. Dr. True had developed a working relationship with Dr. Karageorghis, and he had often spoken to her of Cyprus’s attempts to recover the mosaics. Dr. True then called Dr. Karageorghis, who told her that export of the mosaics was not authorized by Cyprus and that the mosaics she described were the mosaics which Cyprus had been so interested in recovering. Dr. True gave Dr. Karageorghis the name of Geza von Habsburg and how to contact him.

Id.

213. The court stated,

In November 1988, Dr. Karageorghis and Papageorghiou, in conjunction with Cyprus’s Director General of the Ministry of Foreign Affairs, contacted the Ambassador of Cy-
and wrote a letter to Goldberg demanding their return.\textsuperscript{214} Goldberg refused to return the mosaics and the ensuing lawsuit was commenced.\textsuperscript{215}

The United States District Court for the Southern District of Indiana found that a thief does not have title to or the right to possession of stolen items; therefore, a thief cannot pass title or the right to possession of stolen items to subsequent purchasers like Goldberg.\textsuperscript{216} Indiana law also utilizes the discovery rule, which states that the statute of limitations period begins to run when the damage is first discovered or, when through the use of due diligence, the damage could have been discovered.\textsuperscript{217} In this way, the discovery rule qualifies the due diligence rule in that the discovery rule prevents the statute of limitations from beginning to run in situations where a plaintiff using due diligence cannot bring suit because she cannot determine a cause of action.\textsuperscript{218} In other words, in order to bring a successful replevin action, a plaintiff must know who is in possession of the specific property; however, if the plaintiff is unable to determine the identity of the possessor of the property, she cannot maintain a cause of action in replevin.\textsuperscript{219}

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prus in Washington, D.C. They informed the Ambassador of the mosaics' existence in the United States and suggested that immediate and discreet action be taken to recover the mosaics. The embassy then began working with its . . . Washington law firm . . . to determine the location and possessor of the mosaics.

\textit{Id.} Meanwhile, by January 1989, Goldberg had also contacted her friend, New York art dealer Barbara Divver, about the Getty Museum's possible acquisition of the mosaics. \textit{Id.} Divver then contacted the Director of the Getty Museum, John Walsh, who in turn put Divver into contact with Dr. True. \textit{Id.} Subsequently, "Dr. True told Divver that Dr. True would report this contact to the plaintiffs' Washington law firm and to U.S. Customs, which she did." \textit{Id.} Soon after, the plaintiffs discovered that the mosaics were in Goldberg's possession in Indianapolis. \textit{Id.} at 1385.
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\textit{Autocephalous,} 717 F. Supp. at 1384.

\textit{Id.} at 1385.

\textit{Id.} at 1376. The court stated that "[t]here are long established rules of law in Indiana that a thief never obtains title to stolen items, and that one can pass no greater title than one has. Therefore, one who obtains stolen items from a thief never obtains title to or right to possession of the item." \textit{Id.} at 1398 (citations omitted).

\textit{Id.} at 1386. "Indiana recognizes a discovery rule as it may affect the running of a statute of limitations." \textit{Id.}

\textit{Autocephalous,} 717 F. Supp. at 1389. "The discovery rule prevents the statute from beginning to run in situations where a plaintiff, using due diligence, cannot bring suit because he is unable to determine a cause of action." \textit{Id.}

\textit{Id.} The court stated,

In a replevin action, a plaintiff sues a defendant for the recovery of specific property. An element of the cause of action is the defendant's wrongful detaining or wrongful possession of the property sought to be recovered. In order to maintain a replevin action, the plaintiff must know who is in possession of the property at issue. If a plaintiff is unable to determine the possessor of stolen items, the plaintiff cannot maintain a cause of action in replevin.

\textit{Id.}
Here, the Republic of Cyprus' Department of Antiquities first learned of the mosaics' disappearance in the fall of 1979. The Republic immediately contacted the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Council of Museums, the International Council of Museums and Sites, and Europa Nostra, as well as officials at major museums and auction houses throughout the world. Despite its efforts, the Republic did not discover the whereabouts of the mosaics for nearly a decade, when Dr. True of the Getty Museum contacted them in 1988. The court held that the action did not accrue until 1988 when the plaintiff discovered the location and identity of the possessor of the mosaics and, therefore, the action was timely.

220. Id. at 1380. See supra notes 208, 211-212 and accompanying text (describing the theft of the mosaics and their subsequent discovery in the United States).

221. Autocephalous, 717 F. Supp. at 1380.

In response to the widespread theft and destruction of cultural property during World War II, the United Nations Educational, Scientific and Cultural Organization (UNESCO) convened an international conference at The Hague in 1954. The conference was held for the purpose of drawing up and adopting a Convention for the Protection of Cultural Property in the Event of Armed Conflict. In the early 1970s, the Sixteenth General Conference of UNESCO adopted 'The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.' In 1983, the United States ratified the UNESCO Convention with the passage of 'The Convention on Cultural Property Implementation Act.' This act provided in part: 'No article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution may be imported into the United States.'

Id. at 1379 n.2. However, the court noted that the above-mentioned conventions were not controlling in this case. Id.

222. The International Council of Museums is "an organization that coordinates and develops measures and security for museums throughout the world." Id. at 1380.

223. The International Council of Museums and Sites is "an organization that works with restorers and specialists in the preservation of ancient monuments." Id.

224. The court described Europa Nostra's involvement as follows:

The Republic of Cyprus introduced a resolution concerning the missing mosaics to Europa Nostra, a European organization interested in the conservation of the architectural heritage of Europe. The Republic of Cyprus sent the Europa Nostra resolution to the Council of Europe, which it believed would give wide publicity to the problem.

Id.

225. Autocephalous, 717 F. Supp. at 1380. The Department of Antiquities also contacted individuals at the British Museum, the Louvre, Christie's, Sotheby's, and Harvard University's Dumbarton Oaks Institute for Byzantine Studies. Id. Additionally, colleagues, scholars, journalists, political leaders, and departments of antiquities throughout the world were contacted. Id.

226. Id. at 1384. See supra notes 211-213 and accompanying text (describing the discovery of the mosaics in the United States).

227. Id. at 1389, 1391. "[T]he Court concludes that the plaintiffs did not know and were not reasonably on notice of the identity of the possessor of the mosaics until late 1988." Id. at 1389. Furthermore, "[t]he plaintiffs exercised due diligence but were unable to determine who pos-
The court also held that the action would be considered timely under the doctrines of fraudulent concealment and equitable estoppel. Under Indiana law, an action for fraudulent concealment may be brought where the location of missing property is actively and intentionally concealed in such a way that the plaintiff's inquiry or investigation is misled or hindered. As long as a plaintiff is duly diligent in her search, the statute of limitations period does not begin to toll until the location of the property is finally discovered. The court held that the mosaics' location had been fraudulently concealed; therefore, the statute of limitations did not begin to toll until 1988 when the Republic of Cyprus first became aware that the mosaics were in Goldberg's possession.

Equitable estoppel, on the other hand, forecloses the use of the statute of limitations by a defendant who, through fraud or misrepresentation, prevents a plaintiff from commencing an action within the
statute of limitations’ time frame. Here, the court similarly held that because the Republic and Church of Cyprus had been prevented from commencing their action until the 1988 discovery of the mosaics, their action was timely under the doctrine of equitable estoppel.

Although the court held that the plaintiffs’ action was timely under a number of legal theories, it nevertheless concluded that under Indiana law, replevin was the proper legal theory for the recovery of the mosaics. The court continued its analysis by explaining that in order for a plaintiff to succeed in a replevin action, she must prove three elements: 1) that she has title or right to possession, 2) that the property has been unlawfully detained, and 3) that the defendant is in wrongful possession of the property. The court held that because the owners had not authorized the removal or sale of the mosaics and because Goldberg did not obtain good title or the right to possession of the mosaics, the plaintiffs satisfied the elements of replevin. Finally, because the mosaics were part of the religious, artistic, and cultural heritage of the Republic and Church, the court held that the Church was entitled to possession of the mosaics.

235. Autocephalous, 717 F. Supp. at 1388, 1393. “[U]nder equitable estoppel, ‘[a] defendant may be prevented from relying upon a statute of limitations by his own misrepresentations or fraud, even though he has not concealed the cause of action.’” Id. at 1388 (quoting Marcum v. Richmond Auto Parts Co., 270 N.E.2d 884, 886 (Ind. Ct. App. 1971)).

236. Id. at 1393.

237. Id. at 1395. The court found that “[u]nder Indiana law, replevin is the proper legal theory for the recovery of personal property.” Id. The court also determined that “[b]ecause the plaintiffs have requested the return of their uniquely valuable mosaics, the Court considers replevin as the more appropriate characterization of this case . . . . Therefore the Court will analyze the plaintiffs’ claims under the elements of a cause of action for replevin.” Id. at 1396.

238. Id. at 1396-97. “In Indiana to prove a claim for replevin, a plaintiff must prove that he has title or right to ownership, that the property has been unlawfully detained, and that the defendant is in wrongful possession of the property.” Id.

239. Id. at 1379. “Neither the Republic of Cyprus nor the Church of Cyprus has ever authorized the removal or sale of the Kanakaria mosaics.” Id.

240. Id. at 1399. “The evidence of theft and chain of possession under the facts of this case lead only to the conclusion that Goldberg came into possession of stolen property. Under Indiana law, she never obtained any title or right to possession.” Id.

241. Autocephalous, 717 F. Supp. at 1399. “Under Indiana law, the Court concludes that the plaintiffs have made credible and persuasive showings of the elements necessary for the replevin of personal property.” Id.

242. Id. at 1376.

The mosaics are unique. The paramount significance of their existence is as part of the religious, artistic, and cultural heritage of the Church and the government of Cyprus, and as part of the national unity of the Republic of Cyprus. Therefore, the Court orders that possession of the mosaics is awarded to the plaintiff, the Autocephalous Greek-Orthodox Church of Cyprus.
On appeal, the United States Court of Appeals for the Seventh Circuit considered when the statute of limitations began to toll.\textsuperscript{243} The court agreed with the district court's general rule of due diligence: "a cause of action accrues when the plaintiff ascertains, or by due diligence, could ascertain, actionable damages."\textsuperscript{244} As a corollary to the due diligence rule, the court recognized the discovery rule,\textsuperscript{245} which states that the statute of limitations begins to run on the day a plaintiff knows or discovers that an injury has been suffered and that it was caused by the act of another.\textsuperscript{246}

Thus, the court found that Cyprus had been duly diligent in its search for the missing mosaics because Cyprus had taken "substantial and meaningful steps from the time it first learned of the disappearance of the mosaics to locate and recover them."\textsuperscript{247} Further, the court found that under the discovery rule, Cyprus' cause of action did not accrue until 1988 when it learned from Dr. True of the Getty Museum that the mosaics were in Goldberg's possession in Indiana.\textsuperscript{248} Because Cyprus was not reasonably on notice of the location and possessor of the mosaics until 1988, the court held that Cyprus' action was timely.\textsuperscript{249} Finally, the court held that because the mosaics were re-

\textsuperscript{243}. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278, 288 (7th Cir. 1990). "[T]he dispositive determination is when did Cyprus' cause of action 'accrue' within the meaning of Indiana's limitations statute." \textit{Id.}

\textsuperscript{244}. \textit{Id.}

\textsuperscript{245}. See \textit{infra} notes 315-318 and accompanying text (defining and explaining the application of the discovery rule).

\textsuperscript{246}. \textit{Autocephalous}, 917 F.2d at 288. The court recognized, as a corollary to this general [due diligence] rule, a 'discovery rule' for the accrual of a cause of action; \textit{to wit}, 'the statute of limitations commences to run from the date plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another.' \textit{Id.} (quoting Burks v. Rushmore, 534 N.E.2d 1101, 1104 (Ind. 1989)) (quoting Barnes v. A.H. Robins Co., Inc., 476 N.E.2d 84, 87-88 (Ind. 1985)).

\textsuperscript{247}. \textit{Id.} at 289. The court found that "[t]he record evidence . . . makes it clear that . . . the Republic of Cyprus . . . took substantial and meaningful steps, from the time it first learned of the disappearance of the mosaics, to locate and recover them." \textit{Id.} The court concluded by stating: "[I]n sum, then, [district court] Judge Noland's conclusion that Cyprus was duly diligent and should not have discovered its cause of action before late 1988 stands on firm factual footing." \textit{Id.}

\textsuperscript{248}. \textit{Id.} at 288-89. [District Court] Judge Noland [correctly] concluded that an Indiana court would find that Cyprus' action was timely filed. His primary ground for so concluding was his determination that, under a discovery rule, Cyprus' cause of action did not accrue until Cyprus learned from Dr. True that the mosaics were in Goldberg's possession in Indiana.

\textsuperscript{249}. \textit{Autocephalous}, 917 F.2d at 288-289. "[District court] Judge Noland [correctly] ruled that Cyprus was not, nor reasonably should have been, on notice as to the possessor or location of the mosaics until late 1988." \textit{Id.} at 289.
moved from the church without the authority of the Republic or the Church and because Goldberg had no valid title or right to possession of the mosaics, Cyprus was entitled to possession of the mosaics. For these reasons, the court affirmed the holding of the district court.

7. Rosenberg v. Seattle Art Museum

The most recent case to address the problem of art stolen during World War II is *Rosenberg v. Seattle Art Museum*. Rosenberg involved an action brought by the daughter and daughter-in-law of French art dealer Paul Rosenberg to recover a painting that had been looted by the Nazis but was later found to be in the possession of the Seattle Art Museum (SAM). The painting, a 1928 Matisse entitled “L’Odalisque,” was left to the museum by the Bloedel family. Mrs. Bloedel and her husband, Prentice Bloedel, had purchased the painting from the Knoedler Gallery in New York City in 1954. Just after purchasing the painting, Mrs. Bloedel “must have expressed some concern,” because a Knoedler employee wrote her a letter detailing

250. *Id.* at 291. See *supra* note 242 and accompanying text.

251. *Autocephalous*, 917 F.2d at 278. Specifically, the court reviewed and affirmed the three elements applied by the district court judge. *Id.* at 291. First, the court held that the “Kanakaria Church was and is owned by the Holy Archbishopric of the Church of Cyprus, a self-headed church associated with the Greek-Orthodox faith.” *Id.* Second, the court held that “the mosaics were removed from the Kanakaria Church without the authority of the Church of Cyprus or the Republic [of Cyprus].” *Id.* Finally, the court held that “Goldberg, as an ultimate purchaser from a thief, has no valid claim of title or right to possession of the mosaics.” *Id.*


253. *Id.*


255. *Id.* at 1031-1032.

SAM took possession of L’Odalisque in 1991 through a bequest in the will of Mrs. Virginia Bloedel (Jimmy) and a trust established by her husband, Mr. Prentice Bloedel (Bing). SAM obtained full ownership of the painting upon Bing’s death in 1996. The Bloedels, in turn, had purchased L’Odalisque from third-party defendant Knoedler-Modarco, Inc. (or its corporate predecessor) in 1954.

*Id.* at 1032.

256. *Id.* at 1032.

In August and September of 1954, the Bloedels were in New York to be with [their daughter] Virginia when she gave birth to twins. The twins were late, and, according to Virginia, her parents spent their time “shopping” at Knoedler’s gallery, where they found L’Odalisque and reached an agreement to have it sent to their home on Bainbridge Island [in Washington] . . . . On November 11, 1954, Knoedler typed up a bill of sale transferring ownership of L’Odalisque to the Bloedels in exchange for $19,000.

*Id.* at 1032. The Knoedler Gallery claimed to have purchased the painting from a Paris gallery. *Rosenberg*, 70 F. Supp. 2d at 1166 n.1.
the painting's provenance.\footnote{Rosenberg, 42 F. Supp. 2d at 1032. Knoedler employee, Lelia Wittler, wrote a letter to Mrs. Bloedel in December 1954, "detailing the artist's ownership and exhibitions of L'Odalisque in 1937 and 1938." \textit{Id.} The letter read as follows:}

I am sorry there was any question left unanswered in your mind, but . . . we do not know the name of the former owner. The Paris dealer from whom we bought the Matisse would not give out the name of the former owner, as they always hoped to get more pictures from the same source. This picture . . . was without doubt in [the former owner's] possession through 1938. As it was published in a Swedish publication in 1938, it may have gone to Sweden and was in some Swedish collection. However, from then on it was owned privately by this collection, from which it now comes, and whose identity we are unable to get from the Paris dealer.\footnote{Rosenberg, 70 F. Supp. 2d at 1166 n.1.}

\footnotetext{Rosenberg, 42 F. Supp. 2d at 1032. Despite what the letter said, records indicate that the Knoedler Gallery possessed information that showed that the painting belonged to Paul Rosenberg before World War II and that much of Rosenberg's collection was looted during the Nazi occupation of Paris. \textit{Rosenberg}, 70 F. Supp. 2d at 1166.}

\footnotetext{Rosenberg, 42 F. Supp. 2d at 1029, 1032.}

\footnotetext{\textit{Id.} The court held that, despite the fact that personal jurisdiction was present as to only the tort claims, and not the contract claims, the "court would exercise jurisdiction over all claims to promote justice and efficiency." \textit{Id.}}

\footnotetext{Rosenberg, 70 F. Supp. 2d at 1165.}

\footnotetext{\textit{Id.} "SAM has agreed that the Rosenberg heirs are the rightful owners of the painting and have given it to them. The question remaining is who in L'Odalisque's postwar chain of possession will suffer the loss." \textit{Id.} at 1165.}

\footnotetext{\textit{Id.} at 1165-67. "SAM presents no evidence that Knoedler defrauded the museum. In particular, there is no evidence SAM relied upon anything Knoedler ever said about L'Odalisque's title." \textit{Id.} at 1166.}

\footnotetext{Rosenberg v. Seattle Art Museum, 124 F. Supp. 2d 1207, 1207 (W.D. Wash. 2000).}

Although it appears that the gallery had accurate information regarding the painting's history, the facts set forth in the letter were false.\footnote{Rosenberg, 42 F. Supp. 2d at 1032. Despite what the letter said, records indicate that the Knoedler Gallery possessed information that showed that the painting belonged to Paul Rosenberg before World War II and that much of Rosenberg's collection was looted during the Nazi occupation of Paris. \textit{Rosenberg}, 70 F. Supp. 2d at 1166.}

For this reason, the museum brought a third party action for fraud against the gallery.\footnote{Rosenberg, 42 F. Supp. 2d at 1032. Despite what the letter said, records indicate that the Knoedler Gallery possessed information that showed that the painting belonged to Paul Rosenberg before World War II and that much of Rosenberg's collection was looted during the Nazi occupation of Paris. \textit{Rosenberg}, 70 F. Supp. 2d at 1166.}

After holding that the United States District Court for the Western District of Washington had and would exercise jurisdiction over the claims, the same court examined this action on its merits.\footnote{\textit{Id.} The court held that, despite the fact that personal jurisdiction was present as to only the tort claims, and not the contract claims, the "court would exercise jurisdiction over all claims to promote justice and efficiency." \textit{Id.}} The museum had, in the meantime, acknowledged that the Rosenberg heirs were, in fact, the rightful owners of the painting and returned the Matisse to them. Therefore, the issue at trial was whether in the painting's post-war chain of possession, the museum or the gallery should suffer the loss.\footnote{\textit{Id.} "SAM has agreed that the Rosenberg heirs are the rightful owners of the painting and have given it to them. The question remaining is who in L'Odalisque's postwar chain of possession will suffer the loss." \textit{Id.} at 1165.}

Though it appeared from the record that the gallery had defrauded the Bloedels by not informing them of the painting's true provenance, the court held that the museum did not have standing to sue the gallery for fraud committed against another party.\footnote{\textit{Id.} at 1165-67. "SAM presents no evidence that Knoedler defrauded the museum. In particular, there is no evidence SAM relied upon anything Knoedler ever said about L'Odalisque's title." \textit{Id.} at 1166.}

In 2000, the District Court for the Western District of Washington reconsidered the facts of the case when the museum filed a motion for reconsideration.\footnote{Rosenberg v. Seattle Art Museum, 124 F. Supp. 2d 1207, 1207 (W.D. Wash. 2000).} Although the court rejected all three of the errors
argued by the museum,\textsuperscript{265} it took the liberty of recognizing a fourth issue regarding assignment of the fraud claim to the museum by the Bloedel heirs after the previous judgment had been entered.\textsuperscript{266} Following the grant of the gallery's motion for summary judgment in 1999, the Bloedel heirs assigned their fraud claim against the gallery to the museum.\textsuperscript{267} Thus, although the museum did not have standing at the time summary judgment was entered, it subsequently acquired it.\textsuperscript{268} Despite the res judicata issue,\textsuperscript{269} the court held that "[n]ow that the [a]ssignment has been made, the Court finds that, as a matter of equity, SAM should be permitted its day in court so that this case may be disposed of on its merits."\textsuperscript{270} Therefore, in light of the assignment, the court acknowledged that there were new facts before the court that warranted vacating the judgment and reconsidering the case on its merits.\textsuperscript{271}

\textsuperscript{265} Id. at 1208. The museum argued that three errors warranted reconsideration by the court. First, the court failed to look at the language of the will and trust instrument, by which the Bloedels had bequeathed the painting to SAM. \textit{Id.} Second, the court misunderstood the role and enforceability of the agreement pursuant to the law of the State of Washington. \textit{Id.} Third, the museum argued that the court lacked proper jurisdiction to overrule the conclusions reached in the previous agreements. \textit{Id.} Regarding the first alleged error, the court responded simply by saying the language of the will did not say what SAM thought it did. \textit{Id.} at 1209. Regarding the second alleged error, the court held that RCW 11.96.170 was inapplicable because this dispute did not arise out of the administration of the Bloedel estate. \textit{Id.} Instead, the court noted that SAM received title to the painting only, therefore, SAM's interest in the administration of the Bloedel estate became complete when it took possession of the painting. \textit{Rosenberg,} 124 F. Supp. 2d at 1209. Finally, regarding the third alleged error, the court stated "SAM cannot argue that the agreement conclusively resolves the issue before the court, and at the same time argue that this court has no jurisdiction to assess the validity . . . of the argument." \textit{Id.} at 1209.

\textsuperscript{266} Id. at 1208.

\textsuperscript{267} Id. at 1209.

\textsuperscript{268} Id. at 1209-1210.

\textsuperscript{269} As SAM did not have standing at the time summary judgment was granted, but had since obtained standing, the court noted that a res judicata issue might arise if SAM were allowed to reassert its original claim in a new lawsuit. \textit{Id.} at 1210.

\textsuperscript{270} \textit{Rosenberg,} 124 F. Supp. 2d at 1210.

\textsuperscript{271} \textit{Id.} The court further held, however, that SAM was required to pay all of Knoedler's costs associated with this motion because SAM's failure to obtain the assignment before the summary judgment determination created unnecessary litigation costs for Knoedler. \textit{Id.} In October of 2000, SAM and the Knoedler Gallery reached an out-of-court settlement in which Knoedler agreed to reimburse the museum for the loss of the painting. \textit{See Regina Hackett, Art Museum Settles Suit Over a Stolen Matisse, Seattle Post;} Oct. 17, 2000, available at http://museum-security.org. Mimi Gates, Director of SAM, would not specify an exact dollar amount but stated: "we are being reimbursed for our legal fees, research and travel costs as well as the loss of the painting." \textit{Id.} The Knoedler Gallery was reported to be satisfied with the settlement as well. \textit{Id.}
III. Analysis

The above cases represent the types of issues and analyses currently raised to address World War II looted art claims. In general, the courts seem to favor the replevin doctrine.\textsuperscript{272} However, some courts have indicated that other legal theories might also be as applicable to claims involving looted art,\textsuperscript{273} such as the doctrines of fraudulent concealment or conversion.\textsuperscript{274} In general, these various legal doctrines have a number of strengths and shortcomings that must be addressed. Additionally, courts are split on whether the demand and refusal rule or the discovery rule should be applied to determine when the statute of limitations begins to accrue. Therefore, it is also necessary to discuss these competing rules in order to decide which rule most effectively addresses the unique problems surrounding claims for the recovery of World War II looted art in a more equitable manner.

A. Rights of a Current Possessor of Stolen Property Under the Doctrine of Adverse Possession

Traditionally, claims for the recovery of stolen personal property were brought under the doctrine of adverse possession.\textsuperscript{275} The doctrine of adverse possession allows the current possessor of a piece of property to obtain good title, despite the fact that possession was initially wrongful as against the true owner.\textsuperscript{276} In order to obtain good title under the doctrine of adverse possession, five elements must be satisfied.\textsuperscript{277} The possession must be open and notorious, exclusive, continuous, actual, and under a claim of right.\textsuperscript{278} Further, before the adverse possession of a piece of property can mature into rightful ownership, possession must continue until after the statute of limitations period has expired, effectively barring any future lawsuits.\textsuperscript{279}

As one author noted,

Before rewarding good title to a possessor of stolen property under the doctrine of adverse possession, . . . courts generally required

\textsuperscript{272} See DeWeerth, 658 F. Supp. at 688; Autocephalous Greek-Orthodox Church of Cyprus, 717 F. Supp. 1374 (S.D. Ind. 1989); Guggenheim, 569 N.E.2d at 426.
\textsuperscript{273} See Autocephalous, 717 F. Supp. 1374 (discussing the doctrines of replevin, fraudulent concealment, conversion, and equitable estoppel).
\textsuperscript{274} Id.
\textsuperscript{275} Marilyn E. Phelan, Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork, 23 SEATTLE U. L. REV. 631, 654 (2000).
\textsuperscript{276} Id.
\textsuperscript{277} DeWeerth, 658 F. Supp. at 697.
\textsuperscript{278} Id. Courts have generally held that the mere residential display of a piece of artwork does not constitute the required open and notorious elements necessary to afford to the true owner. Id.
\textsuperscript{279} See Phelan, supra note 275, at 654.
three conditions: (1) honesty on the part of the purchaser; (2) open use by him for the statutory period; and (3) failure on the part of the owner to take reasonable steps to secure his rights.\textsuperscript{280} In this way, the doctrine of adverse possession tended to favor the possessors of stolen property\textsuperscript{281} and failed to treat theft victims in an equitable manner. As one scholar noted, "[C]ourts [often] permitted the ownership rights of theft victims to be expunged, even when they lacked constructive notice of rival claims, in order to protect the reasonable commercial expectations of buyers and to provide a way for title to be made secure in the marketplace."\textsuperscript{282} Fortunately, as time passed, the courts found that by supplanting the doctrine of adverse possession with other legal doctrines, equitable considerations in stolen art cases could be considered more candidly and "results more compatible with declared public policy goals" could be achieved.\textsuperscript{283} In other words, by abandoning the doctrine of adverse possession, the courts were finally able to focus on the legitimacy of the plaintiff's claim, instead of on the good faith behavior of the current possessor.

\textbf{B. Original Owners' Burden of Proof Under the Doctrine of Replevin}

According to the common law, replevin is the proper legal theory for the recovery of personal property.\textsuperscript{284} As the United States Court of Appeals for the Seventh Circuit described it, replevin is "an action at law 'whereby the owner or person claiming the possession of personal goods may recover such personal goods where they have been wrongfully taken or unlawfully detained.'"\textsuperscript{285} In other words, "[t]he gist of the action is the defendant's unlawful detention of the plaintiff's property."\textsuperscript{286} The issue is always whether the opposing party can prevent the claimant's right to possession.\textsuperscript{287} The purpose of the action is "to determine whether or not the plaintiff is entitled to the possession of the property, and it is not the purpose to determine whether the plaintiff is the owner of the property."\textsuperscript{288}

\textsuperscript{280} Id. at 655 (quoting R.H. Helmolz, Wrongful Possession of Chattels: Hornbook Law and Case Law, 80 N.w. U. L. REV. 1221, 1236 (1986)).
\textsuperscript{281} Id. at 655.
\textsuperscript{282} Id.
\textsuperscript{283} Id. at 656.
\textsuperscript{284} Autocephalous, 717 F. Supp. at 1395.
\textsuperscript{285} Autocephalous, 917 F.2d at 290 (quoting 25 I.L.E. Replevin §1).
\textsuperscript{286} Id.
\textsuperscript{287} Autocephalous, 717 F. Supp. at 1395-96.
\textsuperscript{288} Id. at 1396 n.17.
Three elements must be satisfied in order for a plaintiff to recover property under the doctrine of replevin. First, a plaintiff must prove that she has title to or the right to possession of the property. In order to satisfy the first element, a plaintiff must show the strength of her own title; she may not simply prove the weakness of the defendant's title. Second, a plaintiff must show that the property she seeks to reclaim is being unlawfully or wrongfully detained. The second element can be satisfied by showing that the plaintiff never intended to relinquish title or possession, nor did she abandon the property, but rather the property was removed without the plaintiff's permission or authorization. In order to satisfy the third element of replevin, the plaintiff must show that the defendant is in wrongful possession of the property. According to the law of replevin, a thief does not obtain the title to or the right to possession of stolen property; therefore, a thief cannot pass good title or the right to possession of stolen property to a subsequent purchaser. In this way, the third element of replevin is satisfied merely by showing that the property was stolen.

While the doctrine of replevin may be applicable to most cases, problems can arise in the context of World War II looted art claims. The doctrine of replevin places the burden of making and proving the claim on the victim. However, due to the fact that many of today's claimants are heirs to the original owners and much time has passed since the works of art first disappeared, proof of good title or the right to possession is not easily shown in many cases. In addition, the doctrine of replevin assumes that the original owners of the property or their heirs are aware of what they own and exactly when it became missing; however, specific details such as these were often lost during the war or over the passage of time. Given the unusual nature of

289. Autocephalous, 917 F.2d at 290.
291. Id. at 1397.
292. Id. at 1397-98.
293. Id.
294. Id. at 1396-97.
295. Id. at 1376.
298. See infra notes 356-357 and accompanying text (describing the difficulties faced by heirs of the original owners in locating stolen works of art).
299. See supra notes 55-58 and accompanying text (explaining how disorganization and the absence of a uniform policy led to the disappearance of many artworks at the end of and immediately following World War II).
the World War II looted art claims, it has become necessary to search for alternative legal theories that do not place such a high burden of proof on the victims.

C. Rights of Original Owners Under the Doctrine of Fraudulent Concealment

Fraudulent concealment is another doctrine that could be applied to cases involving claims for the recovery of looted or stolen art. Fraudulent concealment occurs when a defendant has, by deceit or fraud, prevented a potential plaintiff from learning of a cause of action until after the statute of limitations period has expired. In order to apply this doctrine, the defendant must have actively and intentionally concealed the property so that the plaintiff's inquiry or investigation, although duly diligent, was hindered. As noted by Judge Richard D. Cudahy's concurrence in the Autocephalous appeal, "whenever the possessor of lost or stolen personal property commits 'fraud in the concealment,' the statute of limitations does not run against the original owner until that owner has actual knowledge of the location of the property and of the identity of the possessor." In other words, a defendant who is held to have fraudulently concealed some property from its true owner cannot benefit from the defense of the statute of limitations.

While the doctrine of fraudulent concealment may do a slightly better job of shielding victims of stolen art from the statute of limitations, like the doctrine of replevin, it assumes too much. The doctrine of fraudulent concealment assumes that original owners of looted or stolen art, or their heirs, are aware of what they once owned, know that it was missing as a result of the wrongful conduct of another party, know when it was first missing, and so on. In this way, the doctrine of fraudulent concealment places the burden on the true owner to show not only that he exercised due diligence in locating the stolen artwork and bringing the claim but also that the defendant acted fraudulently in concealing the artwork's whereabouts. Again, this is too high a burden for the true owners to bear because it does not take into account the fact that much of the information necessary to make a claim

300. Autocephalous, 917 F.2d at 288.
301. Autocephalous, 717 F. Supp. at 1387 (emphasis added).
302. Autocephalous, 917 F.2d at 294 (Cudahy, J., concurring).
303. Id. at 288.
304. See Tyler, supra note 297, at 460-61.
305. See Sherlock, infra note 322, at 498-503 (discussing how the burdens of exercising due diligence to locate the stolen artwork and proving that the artwork has been concealed are both on the plaintiff).
is unknown to the potential claimant. Sometimes, the relevant information is missing or classified. Sometimes, the details did not endure the passage of time or survive the displacement and destruction that took place during World War II. In many cases, however, artwork is purposefully concealed because the possessor's sole concern is keeping others from discovering the work's location. For these reasons, it is necessary to continue exploring alternative legal theories.

D. The Possibility of Collecting Money Damages Under the Doctrine of Conversion

Another possibility for those attempting to recover stolen art is the doctrine of conversion. The "tort of conversion" is "the wrongful invasion of a right to, and absolute dominion over property owned or controlled by the person deprived thereof, or of its use and benefit. . ." The main difference between an action in conversion and an action in replevin is that with an action in conversion, the claimant requests money damages for the value of the stolen property, whereas with an action in replevin, the claimant seeks the return of the property itself.

The elements, however, are quite similar under both doctrines: the claimant must prove that she had both valid title and the right to possession of the property before or at the time of conversion and that the current possessor wrongfully converted the property for his own use. The argument that the purchaser acted in good faith without knowledge that the transaction was "unlawful, improper, or unauthorized" is no defense to conversion; yet once again, the burden of proving rightful ownership and possession is on the victim. And again, placing the burden of making and proving the claim on the victim is too high a burden to bear.

As previously discussed in relation to the doctrines of replevin and fraudulent concealment, the doctrine of conversion assumes that the original owners of the artwork or their heirs are aware of what was

306. See infra notes 356-357 (describing the difficulties faced by heirs of the original owners in locating stolen artworks).
307. See supra notes 55-62 (describing the state of affairs at the end of World War II and during the Cold War).
308. Autocephalous, 717 F. Supp. at 1399 n.23.
309. Id.
310. Id.
311. Phelan, supra note 275, at 648.
312. Autocephalous, 717 F. Supp. at 1399 n.23 (discussing how the plaintiff has the burden of proving the elements of conversion).
THE LAST PRISONERS OF WAR

owned and when it became missing. It fails to take into account the passage of time and the fact that so many people and things were displaced during and immediately following World War II.

While the legal doctrines are all equally imperfect, none of the mechanisms used to bring the claims have proven to be as important as the statute of limitations rules to be employed to balance the equities of the parties. In making that determination, a key issue is whether and to what degree the due diligence or reasonable diligence standard applies.

E. When Should the Statute of Limitations Begin to Accrue: Two Competing Theories

When a claim is brought for the recovery of stolen art, be it through an action in replevin, fraudulent concealment, or conversion, there exists a separate issue regarding when the statute of limitations begins to run. The two rules traditionally applied by the courts are the discovery rule and the demand and refusal rule.

1. The Discovery Rule: The Statute of Limitations Does Not Begin to Run Until the Current Location and Identity of the Possessor Are “Discovered”

The discovery rule states that a plaintiff’s “cause of action accrue[s] when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings.” Stated differently, the discovery rule dictates that the statute of limitations does not begin to run until the date that a plaintiff knew or should have known, via due diligence, that she has suffered an injury and that it was caused by the specific act of another. In this way, the discovery rule prevents the statute of limitations from beginning to run in situations where a would-be plaintiff cannot bring suit because he cannot determine a cause of action or identify a specific defendant, despite duly diligent efforts. As stated by the Seventh Circuit in Autocephalous, “[I]n the context of a replevin action for particular, unique ... works of art, a plaintiff cannot be said to have ‘discovered’ his cause of action until he learns

313. See infra notes 356-357 (describing the difficulties faced by heirs of the original owners in locating stolen artworks).
314. See supra notes 55-62 (describing the state of affairs at the end of World War II and during the Cold War).
316. Id. at 1386.
317. Id. at 1389.
enough facts to form its basis, which must include the fact that the works are being held by another and who, or at least where, that ‘other’ is.\footnote{Autocephalous, 917 F.2d at 289.}

Some have argued that the discovery rule is a “good compromise in that it recognizes that original owners can be truly unaware of where their art is located, [while it] also recognizes the need for repose for the purchaser.”\footnote{Walton, supra note 19, at 597.} In theory, “[t]he discovery rule allows the court to consider all aspects of a case relevant to the determination of accrual, and to arrive at a result that is fair and consistent with the statute of limitations’ policy goals.”\footnote{Phelan, supra note 275, at 649.}

In practice, however, the discovery rule imposes much too high a burden on the true owner. In deciding whether or not discovery was unreasonably delayed, courts employ a subjective, fact-sensitive test on a case-by-case basis with results that can vary widely from case to case and court to court.\footnote{Walton, supra note 19, at 599.} The discovery rule shifts the focus from the current possessor’s conduct to the conduct of the true owner in searching for the missing property.\footnote{Meghan A. Sherlock, Comment, A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property, 8 Tul. J. Int’l & Comp. L. 483, 498 (2000).} The discovery rule focuses its inquiry on whether the true owner conducted a duly diligent search for the missing artwork, and it fails to consider whether the current possessor acted in good faith by conducting his or her own inquiry into the artwork’s legal title.\footnote{Autocephalous, 917 F.2d at 294-95.}

In this way, the discovery rule is inequitable and unfair as it applies to victims of World War II art looting. By applying the discovery rule, courts allow current possessors to quietly retain title while true owners’ search efforts are unfairly scrutinized. Further, courts often fail to take into account all of the unique circumstances surrounding World War II claims that make “discovering” an artwork’s whereabouts so difficult.\footnote{See supra notes 55-62 (describing the state of affairs at the end of World War II and during the Cold War).} Many of the original owners are no longer living and their heirs are often unaware of what is missing.\footnote{See infra notes 356-357 (describing the difficulties faced by heirs of the original owners in locating stolen artwork).} Even in cases where original owners or their heirs are actively searching for the missing artwork, they are often at a disadvantage because much of the neces-
The discovery rule purports to take into account whether or not a plaintiff has been duly diligent in his or her search efforts, the fact remains that all of the due diligence in the world cannot locate a work of art when there is no information available regarding its whereabouts. For this reason, an alternative rule is necessary.

2. The Demand and Refusal Rule: The Statute of Limitations Does Not Begin to Run Until the Original Owner Demands Its Return and the Current Possessor Refuses

The only existing alternative to the discovery rule in the stolen art context is the demand and refusal rule. The demand and refusal rule applies to cases where an owner brings a cause of action against one who innocently purchases stolen property in good faith. The demand and refusal rule states that "the limitations period begins to run only when the owner demands return of the property and the purchaser refuses." In contrast to cases where the action is against the thief himself and the statute of limitations begins to run the moment the property is stolen, the demand and refusal rule implies that an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the true owner's demand for their return. In other words, until a demand is made for the return of a piece of stolen property, the good faith purchaser is considered to be in lawful possession.

As one author noted, "[T]he demand and refusal rule . . . is the soundest policy yet applied in stolen art cases. This doctrine best balances the respective rights of the parties and delegates most equitably the obligations of both innocent purchasers and true owners." While some commentators criticize the rule, arguing that it allows true owners to "sleep on their rights" without consequence, proponents argue that it favors the true owner by not barring her claim before she has a chance to discover her artwork's whereabouts and demand that the work be returned. Further, the demand and refusal rule encourages purchasers of fine art to ask more questions and proceed

\[\text{326. See supra notes 55-62 and accompanying text.} \]
\[\text{327. Elicofon, 678 F.2d at 1161.} \]
\[\text{328. Guggenheim, 569 N.E.2d at 429.} \]
\[\text{329. Id.} \]
\[\text{330. Elicofon, 678 F.2d at 1161.} \]
\[\text{331. Id.} \]
\[\text{332. Phelan, supra note 275, at 646 (quoting Andrea E. Hayworth, Note, Stolen Artwork: Deciding Ownership is No Pretty Picture, 43 DUKE L.J. 337, 374 (1993)).} \]
\[\text{333. Walton, supra note 19, at 597.} \]
more cautiously in their transactions. In fact, some argue that while the demand and refusal rule favors the true owner of stolen art, it also benefits the current possessor in that it gives those who are in mistaken possession of stolen property an opportunity to rectify their good faith mistakes before demand is made and they incur legal liability. Though the demand and refusal rule is the superior of the two rules in terms of its treatment of the true owners of stolen art, the discussion does not end here. On the contrary, the additional question of due diligence must be addressed.

3. The Question of Due Diligence

Despite some courts' general preference for the demand and refusal rule, there exists a much-debated second issue regarding whether, and in what way, the due diligence standard applies. In addition to requiring that the true owner demand that the artwork be returned and the current possessor refuse the demand before the statute of limitations period begins to run, many courts impose an additional duty of reasonable diligence on the true owner in attempting to locate the stolen property.

Noting the "absence of controlling state authority," the DeWeerth court was the first to predict that a state court "would impose a duty of reasonable diligence in attempting to locate stolen property, in addition to the undisputed duty to make a demand for return within a reasonable time after the current possessor is identified." The basis for the DeWeerth court's prediction was that a rule requiring reasonable diligence protects the good faith purchaser. The court reasoned that while a thief would be immune to a lawsuit after three years, measured from the time of the occurrence of the theft, without the additional duty of reasonable diligence, a good faith purchaser "would remain exposed as long as his identity did not fortuitously come to the property owner's attention." By imposing a rule that prevents an owner from unreasonably delaying his demand and, therefore, stalling the running of the statute of limitations, DeWeerth endeavored to mitigate the inequity . . . by extending the unreasonable delay rule, heretofore held applicable only in situations where the plaintiff ha[d] actual knowledge of the facts necessary to make a demand.

334. Id. at 598.
335. See Phelan, supra note 275, at 641.
336. DeWeerth, 836 F.2d at 108.
337. Guggenheim, 569 N.E.2d at 429.
339. Id. at 108-09.
Stated differently, "[t]he theory is that if delay in making a demand with knowledge of the whereabouts of stolen property is relevant in determining the timeliness of a replevin action, delay should also be relevant if the whereabouts of stolen property could have been known with a reasonably diligent search." In sum, many courts now require not only that the return of property be demanded and refused, but also consider whether the demand could have been made earlier if the true owner had conducted a reasonably diligent search.

Despite the stated justifications for the additional duty of reasonable diligence, many courts have rejected it based on policy considerations. As one court stated, "[I]t would not be prudent to extend th[e] case law and impose the additional duty of [reasonable] diligence before the true owner has reason to know where its missing chattel is to be found." Courts have noted the difficulty of designing a reasonable diligence requirement that would not place an undue burden on the true owner of stolen art and have further stated that "[t]o place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in stolen art." These courts agree that the demand and refusal rule by itself is "the better rule [because it] gives the owner relatively greater protection [by] plac[ing] the burden of investigating the provenance of a work of art on the potential purchaser." Nevertheless, courts have failed to apply the demand and refusal rule, or any of the legal doctrines, in a uniform manner to all World War II looted art cases.

F. Judicial Solutions Have Failed to Create a Uniform Common Law

Courts need to develop a common law that creates "an environment more protective of original owners." Better rules need to be created and applied consistently in order to eliminate confusion and
to aid in making those involved in the art world more aware of their rights and responsibilities. As one author noted, "[B]ecause of the myriad impediments art theft victims confront in seeking to locate and recover their stolen property [and also because of] the greater resources and access to information that collectors of valuable art objects typically enjoy," courts should continue to make honesty and good faith on the part of the current possessor of art a pivotal consideration.3

Despite these noble goals, the fact remains that courts have largely failed the true owners who have brought claims for the recovery of their World War II looted art. Beyond the fact that some individual plaintiffs have been victorious in their claims while others have been wrongfully denied recovery, the larger problem, and the one faced by all true owners, is the fact that the courts have not developed a clear rule for handling these claims. Plaintiffs are left to gamble with their rights when seeking legal redress for the indisputably wrongful acts of wartime looting. For this reason, alternative solutions must be explored.

IV. IMPACT

As discussed above, the courts have mainly relied on the doctrine of replevin in deciding claims for the return of looted or stolen art. Nonetheless, other theories, such as the doctrines of fraudulent concealment and conversion, are applicable. The courts are also divided over whether the discovery rule or the demand and refusal rule should apply to claims involving stolen art and to what degree due (or reasonable) diligence should apply. Regardless of which doctrines or standards apply, however, the courts have taken for granted that the triple burden of locating the stolen artwork, bringing suit to recover it, and proving title or right to possession rests squarely on the shoulders of the claimants. This burden seems particularly unreasonable where claims involve art that was looted during or immediately following World War II.

A. The Burdens on True, Prewar Owners Are Too High to Bear

As one author noted, "[I]f the law takes into account who has a stronger moral claim... few would argue against a conception that all victims of art theft, but especially Holocaust victims and their heirs, have the stronger moral claim."352 The seizing of Jewish art was part

351. Phelan, supra note 275, at 656-57.
352. Walton, supra note 19, at 600.
of a “process of persecution, dehumanization, and eventual annihilation” on the part of Hitler and the Nazis. As one scholar noted,


Indeed, while the lives that were lost at the hands of the Nazis are irrevocably lost, with some effort, looted art could still be returned to its original owners or their heirs.

Today, most of the original owners of World War II looted art are either deceased or extremely elderly. Consequently, the burden of locating the missing artworks is often placed on their heirs, many of who have no firsthand knowledge of either the artwork itself or their relative’s wartime experience. Indeed, it is reasonable to believe that many second and third generation heirs are entirely unaware of what their ancestors once owned and the legal rights and responsibilities that are attached to it. Though, as one author noted, “[T]he law . . . is highly favorable towards any original owner who can demonstrate ownership”; this author ignores the fact that demonstrating ownership after locating the missing artwork and filing a legal claim to recover it is one of the factors that makes recovery such an impossible task in the first place.

Another burden facing true owners is the staggering cost of litigation. Experts estimate that it may cost as much as $100,000 just to initiate litigation. Indeed, it has been suggested that if the artwork in question is worth less than $3 million, it is often more economical to simply give the piece up than it is to pursue litigation because it is

353. Cuba, supra note 1, at 470 (quoting JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 123 (1996)). Put differently, “[t]he Nazis’ policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritages.” Id. at 469 (quoting Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 17 (1998)).

354. Cuba, supra note 1, at 469.

355. See Falconer, supra note 18, at 396. This author suggests that “[t]he restitution of this art . . . might bring about a long-delayed symbolic victory for the victims of the Holocaust.” Id.

356. Turner, supra note 23, at 1548 (emphasis added).

357. “After an artwork is stolen, theft victims frequently encounter severe obstacles in trying to locate and reclaim their property.” Phelan, supra note 275, at 671. See also Tyler, supra note 297, at 455 (noting that most problems for the recovery of art looted by the Nazis arise in attempting to prove true ownership).

358. One author noted that plaintiffs “face huge litigation costs and severe evidentiary burdens in proving that they own the artworks they claim to own, and many valid claims will never be litigated simply because of these burdens.” Turner, supra note 23, at 1547.

359. Tyler, supra note 297, at 444-45.
likely that the costs of litigation will outweigh the value of the artwork itself.\footnote{Id.}{360} When you compare the position of the current possessor, often large institutions, successful art dealers, or wealthy private collectors, to the financial situations of World War II survivors or their second and third generation heirs, it seems even more unfair to place the full burden of litigating and proving the claim on the true owners.\footnote{Id. at 671.}{361}

Moreover, potential plaintiffs face many other obstacles in their quest to recover World War II looted art. First, by their unique nature, artworks “are easy to transport and easy to conceal.”\footnote{Id. at 671.}{362} Art, by virtue of the way the art market operates, is very difficult to trace.\footnote{See Tyler, supra note 297, at 466 n.185 (quoting Ronald Lauder, Chairman of the Commission for Art Recovery of the World Jewish Congress, testifying before the Holocaust Assets Commission, Dec. 12, 1998). Lauder stated,} Art moves in ways that are often very difficult to trace. It is bought and sold privately or transferred between multiple generations via inheritance as often as it is put up for public sale or display. In this way, it travels easily across borders. As one author put it, “[I]n light of [the] hypermobility [of artworks], it is unsurprising that theft victims often cannot even imagine where to begin looking for their missing property.”\footnote{Id. See also Tyler, supra note 297, at 460 n.138 (arguing that the difficulty is not in discovering the existence of the property but in pinpointing the existence of the property in the hands of another).}{364}

Further, true owners of artworks that were looted during World War II face the daunting task of “searching a global market that trades in commodities with histories about which many of the traders are willfully ignorant.”\footnote{Phelan, supra note 275, at 671 (referring to the “ask no questions” commercial conventions of the international art market).}{365} Because the Nazis highly undervalued modern and impressionist art, they sometimes exchanged several valuable paintings by Picasso or Monet for a single mediocre painting by a German or Germanic artist.\footnote{Turner, supra note 23, at 1517.}{366} As a result, for “those with art to sell or with money to spend . . . the Nazi art market provided incredible opportunities.”\footnote{Id. at 1517-18.}{367} Many art dealers were eager to profit from the Nazi
sales of "degenerate art" and most knew exactly where the art was coming from. As one author explained,

"Disreputable and reputable characters alike figure in the massive amount of trading that occurred during and after the war. Dealers from many countries, eager to buy works at low prices, cared little for provenance information. Those sympathetic or indifferent to the Nazis did not think twice about accepting or buying art known to be stolen from Jews and others."

Even today, those involved in the art trade are notoriously negligent in checking the provenance and title of artworks. Museums, auction houses, and art dealers admit that "the ordinary custom in the art business is not to inquire as to title [because] a duty of inquiry would cripple the art business . . . ." In general, auction houses and art dealers neither inquire into an artwork's provenance nor reveal the information that is known regarding a work's provenance or title to potential buyers. Likewise, it is a common practice among museums to ignore the origins of donated works. As one expert involved in the quest to prevent trade in stolen art commented, "[T]his is the only business enterprise in the world where people spend tens of thousands to millions of dollars without doing any proper investigation." However, until there is an incentive or legal duty to do otherwise, those involved in the art industry will continue to ignore title information.

An additional impediment to the recovery of stolen or looted art is the fact that no clear procedure exists by which true owners may conduct an investigation. As one author noted, "[T]he fragmentary and little known mechanisms by which an original owner could report

368. Walton, supra note 19, at 563.
369. Id. at 567.
370. "Provenance is a technical art world term meaning documentation of origin or history of ownership. It is not exactly interchangeable with legal title, but if properly determined, should reveal . . . who owned the art . . . and where the art has been." Walton, supra note 19, at 551-552.
371. Cuba, supra note 1, at 465.
372. Id. (quoting Porter v. Wertz, 421 N.E.2d 500, 502 (N.Y. 1981)).
373. See Walton, supra note 19, at 567. It has been noted that auction houses do not bother to inquire into the provenance or title of artworks that have been consigned to them because they see themselves as mere middlemen in art transactions. Cuba, supra note 1, at 466.
374. See Cuba, supra note 1, at 466.
376. See Cuba, supra note 1, at 468.
377. See Walton, supra note 19, at 599. The author states that there is no "unified process or checklist of steps" regarding the manner in which a valid owner can or should notify the art world that an artwork is missing. Id.
and search for stolen art are inadequate to provide a standard."  

Further, even if a clear standard did exist, many works of art are displayed only privately in the homes of current possessors and therefore these works continue to be shielded from public scrutiny. As a result, the establishment of a clear standard or international system is not the answer. Instead, the responsibility for clearing title and establishing right to possession should rest with the current or potential purchasers of valuable artworks.

B. Placing the Burden of Proving Good Title on Current and Potential Possessors Is a More Equitable Solution

As one author noted, those who purchase and collect valuable art acquire materials voluntarily. They are either tax-exempt institutions with an abundance of art world expertise and access to information and sophistication or they are private collectors who are sufficiently wealthy to afford these resources. They have time to consider their prospective acquisitions and to conduct investigations before making decisions. The wealth and resources that buyers of expensive works necessarily enjoy recommend that courts impose an investigative standard upon buyers and collectors.

In comparing the status of the involuntary art theft victim to the status of the wealthy and sophisticated voluntary buyer and collector of valuable art, the legal burden for establishing good title and right to possession by the showing of a due diligence investigation is most just when it rests on the latter's shoulders.

Further, requiring current and potential possessors of art to conduct due diligence investigations has public policy benefits beyond putting true owners of art looted during World War II in a more equitable position. Not only does a due diligence investigation safeguard the rights of theft victims, it also discourages trafficking in stolen art, encourages the development of resources and tools for locating stolen art, creates a title-clearing mechanism for the United States art market, and protects the moral and ethical positions and reputations of buyers and collectors of valuable art.

"[P]ersons who have acquired stolen artworks without first investigating their backgrounds are, at a minimum, reckless." This is because those involved in the art industry know, or should know, that

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379. See Phelan, supra note 275, at 672.
380. Id. at 696.
381. Id. at 728-30.
382. Id. at 653.
the market is flooded with stolen works of art and subsequent claims for recovery. Indeed, anyone involved in the art market knows that, regardless of whether suspicious circumstances surround a particular piece of art, without taking documented due diligence “precautions, persons found in mistaken possession of stolen art cannot be assured of defeating, under the ‘balance of equities’ judicial criterion, future potential lawsuits that former owners may bring to recover the art.”

Further, the fact that courts have generally held that those who have not been duly diligent should continue to be exposed to potential claims indefinitely should serve as an incentive for being prepared to show that a documented due diligence investigation into the artwork’s title and provenance was conducted. As a result, due diligence investigation is as much a necessity for current and potential purchasers to protect their own interests, as it is a balancing of the equities in favor of the true owners.

Finally, “[d]ue to their intimate knowledge and extensive resources, entities and individuals in the art industry should be held to a higher standard of good faith in their dealings and investigations of title.” Indeed, when one considers the fact that current and potential owners of valuable art have at their fingertips the resources necessary to conduct due diligence investigations, “[p]ossessors of stolen materials who have not . . . conducted [due diligence] investigations cannot be considered ‘innocent’ or ‘good-faith’ [in the eyes of the court].” Moreover, in a market where thousands of works of art are still missing and waiting to be claimed, it is in the best interest of current and potential possessors to establish good title for artworks already in their possession and to refuse to take possession of works of art unless and until the seller can provide good title. As is the case with all other major purchases, especially those involving real property, it is customary for purchasers to protect themselves either by conducting their own search and establishing good title or by insisting that the

383. Id. at 658.
384. See Phelan, supra note 275, at 657.
385. Id. at 727 (stating that all due diligence investigations should be documented to be effective).
386. Walton, supra note 19, at 600.
388. Phelan, supra note 275, at 657.
389. Cuba, supra note 1, at 468. As one author noted, current and potential purchasers of fine art must “realize that the short-term benefit of ignoring questionable title is outweighed by the long-term repercussions of legal hassles and poor publicity.” Id.
seller provide proof of good title upon purchase. Likewise, owners of art should be required "to assure themselves and others that their possession is legitimate and lawful.

In sum, it is more equitable to place the burden of proving good title and right to possession on the shoulders of those who purchase and possess valuable art, for these institutions and individuals, by virtue of the fact that they are dealing in the art market, have the necessary connections, resources, and wealth to conduct due diligent searches. On the contrary, true owners and their heirs are at a complete disadvantage for a myriad of reasons, not the least of which is that these people have already had to survive the ravages of World War II. It is for this reason, as well as for those reasons discussed above, that both legal and moral justice require shifting the burden onto the shoulders of those who purchase and possess art.

C. Existing Solutions and Resolutions Are Unworkable as Applied to the Victims of World War II Art Looting

Because the problems related to claims for the recovery of World War II looted art are vast, a number of solutions have already been offered. One author has suggested the creation of an official, international website on the Internet for documenting all lost artworks and cultural property "where stolen artworks are arranged by type (i.e., masks, paintings, sculpture, religious icons, etc.); [and] within each type . . . the pieces [are arranged] by geographic location, culture and collection." This author argued that good faith purchasers have a duty to insist that legitimate sellers provide them with an Internet report detailing a work of art's provenance. However, the due diligence burden of immediately reporting the missing art to the police and, in turn, to the Internet website, remains on the true owner.

This solution is unworkable as applied to the victims of World War II art theft because the initial burden of discovering that the artwork is missing, as well as the burden of reporting the loss to the authorities, remains on the true owners or their heirs. As previously discussed in the context of art that was looted during World War II, placing the burden on true owners assumes that potential claimants, or their heirs, are aware of not only what is missing and when it was
stolen, but in cases where a detailed report for an international web-
site must be created, the details surrounding the theft. This is simply
too high a burden to bear for those who lost works of art during
World War II and who are now advanced in age. Further, their heirs
are in a worse position because they were often not present or, in
some cases, not even born when these artworks were stolen.

Some suggest that sellers and buyers should be obligated to conduct
title and provenance searches. However, to require “that the parties
take it upon themselves, without a claim by an original owner, to
inquire into the title and provenance or works they already hold”
would place “too high a burden on the good faith purchaser.” Instead,
it is argued that only “a new would-be purchaser should . . .
take it upon herself to conduct a duly diligent inquiry into authenticity
and provenance verification . . .”

In effect, this argument, which places the burden of conducting a
duly diligent investigation into an artwork’s title on potential purchas-
ers only, allows the current possessor to quietly continue to retain title
wrongfully. Indeed, requiring both current and potential possessors of
valuable artworks to conduct due diligence investigations in order to
establish good title and right to possession is as much for the benefit
of the possessor as it is for the true owner. If current possessors have
no obligation to investigate the provenance of artworks, not only are
they left exposed to any claims that may arise, but also once a claim is
made, the burden of proving good title and right to possession rests
inequitably on the shoulders of the plaintiff. This is too high of a bur-
den to bear for either party. As a result, the duty to conduct a due
diligence investigation that establishes good title should rest with both
potential and current possessors of valuable art.

D. Federal Legislation Can Provide the Necessary Solution

As one author noted, “[A]s an institution, it is Congress, not the
Judiciary, which is far better equipped to ‘amass and evaluate the vast
amounts of data’ bearing upon the complicated issues presented in
these cases.” Indeed, Congress has at its disposal large staffs,
budget offices, committees and subcommittees, and the power to hold

395. Walton, supra note 19, at 604.
396. Id. at 612.
397. Id.
398. Id.
399. Cuba, supra note 1, at 451 (quoting Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 665-
(1985)).
hearings and collect testimony on issues of legislative importance. In this way, "Congress has both a superior institutional capacity to collect the necessary evidence and the fact-finding abilities to recognize the exceptional circumstances of cases involving Nazi-looted art." Further, where a court can only decide a dispute as it effects the two involved parties, Congress can pass legislation that applies broadly to all citizens. Finally, because Congress is politically accountable for its actions, it is the more appropriate branch of government to decide questions of public policy.

Congress is constitutionally authorized to enact legislation that addresses problems surrounding the recovery of World War II looted art. The Commerce Clause of the United States Constitution states, "Congress shall have the Power ... To regulate Commerce with foreign Nations, and among the several States ... ." The Commerce Clause vests in Congress the authority to regulate state activities as long as the particular activity being regulated "substantially affects" interstate or international commerce. In this way, the art industry is indisputably "commerce" within the meaning of the Constitution in that million-dollar transactions frequently result in the transportation of art across interstate and international borders.

Some would argue that federal legislation, which commands courts to decide cases involving Nazi-looted art in a particular manner, violates the Separation of Powers doctrine. However, it has already been demonstrated that the Judiciary has failed to create a uniform common law and, in so doing, has failed to adequately address the unique problems surrounding the recovery of World War II looted art. Consequently, the Separation of Powers argument can easily be defeated.

The United States Congress is familiar with the problems surrounding claims for the recovery of art looted during World War II. On February 12, 1998, the House Banking Committee held a hearing to discuss what to do about the problem of World War II looted art.

400. See Cuba, supra note 1, at 451.
401. Id. at 452.
402. Id.
403. U.S. CONST. art. I, § 8, cl. 3.
405. Cuba, supra note 1, at 482.
406. Walton, supra note 19, at 605. Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs, 105th CONG. (1998). Most of those who testified represented museums and none of them felt that federal
On February 13, 1998, the Holocaust Victims Redress Act was signed into law.\(^4^{07}\) Sponsored by Senator Alphonse D’Amato of New York,\(^4^{08}\) the purpose of the Act was “[t]o provide a measure of justice to survivors of the Holocaust all around the world . . . .”\(^4^{09}\) The Holocaust Victims Redress Act authorized the President to appropriate up to $25 million for distribution to charitable organizations that assist Holocaust survivors and authorized appropriations of $5 million for archival and translation services to assist in the restitution of assets that belonged to Holocaust victims.\(^4^{10}\) Further, the Act’s findings suggested that the restitution efforts should focus on stolen art.\(^4^{11}\)

On June 23, 1998, the United States Holocaust Assets Commission Act was signed into law.\(^4^{12}\) The United States Holocaust Assets Commission Act created a Commission on Holocaust Assets to examine and evaluate claims made for the recovery of art currently held in the United States.\(^4^{13}\) The Commission was given broad powers to investigate claims by way of holding hearings, requesting information from federal departments and agencies, examining research conducted by private individuals and entities, and locating documents found in foreign governments.\(^4^{14}\) The Commission was charged with the responsibility of reporting their findings to the President who, in turn, made recommendations to Congress.\(^4^{15}\)

\(^4^{07}\) Id.

\(^4^{08}\) Id.


\(^4^{10}\) See Walton, supra note 19, at 605-606.

\(^4^{11}\) Id. at 606. The Act states that

[the Nazis’] policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust . . . must be considered a fundamental aspect of the world war unleashed on the continent . . . . It is the sense of the Congress that . . . all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

\(^4^{12}\) See Tyler, supra note 297, at 467. One author writing at the time the Holocaust Assets Redress Act was passed noted that the solution to the problems involving World War II looted art rested on the shoulders of the Holocaust Assets Commission because private and voluntary efforts up to that time had been “too little too late.” Id. at 470.

\(^4^{13}\) Id. at 467-68.

\(^4^{14}\) See Walton, supra note 19, at 606.
On January 16, 2001, the Holocaust Assets Commission issued its final report to President Clinton.\(^{416}\) The Commission reported that the United States made crucial mistakes in their efforts to return looted art to its rightful owners immediately following World War II.\(^{417}\) The report explained that for logistical reasons, and in accordance with international law, artworks were returned to the countries where they had been looted.\(^{418}\) However, failure to adequately monitor the European governments prevented the United States and the Allied forces from ensuring that the works were returned to the individual victims.\(^{419}\) In sum, the report recommended that Congress continue working on the issue of World War II looted art by resuming efforts to declassify and publish World War II-era documents.\(^{420}\)

**E. A Burden-Shifting Amendment to the Holocaust Victims Redress Act is Necessary to Transform Moral Obligations into a Legal Duty**

Federal legislation that shifts the burden of proving good title and right to possession from the true owner-claimant to the current possessor-defendant in suits for the recovery of World War II looted art is necessary to transform society's moral obligation to survivors of the Holocaust into a legal duty.\(^{421}\) The most logical form for such legislation is an amendment to the Holocaust Victims Redress Act. The

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\(^{416}\) Ron Grossman & William Neikirk, "U.S. Mishandled Nazi Loot of Holocaust, Panel Says," Chi. Trib., Jan. 17, 2001, §1 at 1. This report is final because the Commission's mandate was set to expire with the change of administrations that took place on Saturday, January 20, 2001. \(^{417}\) Id.\(^{418}\) Id. at 16. \(^{419}\) Id.\(^{420}\) Id.\(^{421}\) It should be noted that in February 1998, Representative Charles E. Schumer of Brooklyn told the House Banking Committee that he, along with Representative Nita M. Lowey, planned to introduce legislation that would require those who acquire art to do full title searches to ensure that the art is not stolen. See Walton, supra note 19, at 606. The Stolen Artwork Restitution Act was introduced on June 25, 1998. Stolen Artwork Restitution Act, H.R. 4138, 105th Cong. (1998). The Act stated,

[If] a request is made . . . the seller or the purchaser of artwork with a sales price of $5,000 or more, that at any time has been shipped in interstate or foreign commerce, shall before the sale undertake a documented, reasonable inquiry into the ownership history of the artwork . . . An individual may request an inquiry . . . if the individual produces sufficient evidence . . . that the artwork for which the individual requests an inquiry was stolen from the individual or from a member of the individual's family. Stolen Artwork Restitution Act, H.R. 4138, 105th Cong. § 3 (1998). The Act also stated that [i]t is the sense of the Congress that a purchaser or seller of artwork who fails to undertake an inquiry . . . should not be permitted to assert in a court in the United States a claim, under Federal, State, or otherwise applicable law, to ownership or former ownership of the artwork.
Act's stated purpose is “[t]o provide a measure of justice to survivors of the Holocaust all around the world while they are still alive.” 422 The Act also recognizes “the enormous administrative difficulties and cost involved in proving legal ownership of . . . assets” and states that “good conscience warrants the recognition that the victims of the Holocaust have a compelling moral claim to . . . unrestituted . . . assets.” 423 Finally, the Act states that

[it] is the sense of Congress that all . . . governments should undertake good faith efforts to facilitate the return of . . . works of art, to the rightful owners in cases where assets were confiscated from the claimants during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner. 424

By requiring only “reasonable proof” on the part of the claimant, the Holocaust Victims Redress Act leaves open the door to legislation that places a higher burden of proof on the current possessor.

As one author noted, “[T]he current legal landscape makes these cases neither predictable nor just, and fails to protect the rights of Holocaust victims and their heirs seeking recovery of what is rightfully theirs.” 425 Consequently, federal legislation that applies broadly to all citizens is necessary. Once the true owner-claimant has met the first two burdens, first, by locating the stolen work, and second, by bringing a suit to recover it, 426 the legislation should shift the burden of proving good title and right to possession to the current possessor-defendant. If the defendant fails to meet the burden, the artwork should be returned to the claimant. In this way, claims for the recovery of World War II looted art could be handled in a much more equitable manner and society’s moral obligations to Holocaust survivors could be translated into an affirmative legal duty on the part of those who collect valuable art.


423. Id. at 15-16. The Act further found that “the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.” Id. at 17. See also supra note 411 and accompanying text.


425. Cuba, supra note 1, at 489.

426. Based on the terms of the Holocaust Victims Redress Act, the claimant need only provide “reasonable proof” that he or she is the rightful owner when making the claim. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15, 18 (1998).
Because of the unique and tragic history surrounding claims for the return of World War II looted art, federal legislation that commands courts to shift the burden of proving good title and right to possession from the true owner-claimant to the current possessor-defendant is necessary to ensure that these unique claims are restituted. The moral atrocity that was the Holocaust created a moral obligation that can only be remedied by the creation of a legal duty that places the burden of establishing good title on those who have the opportunity to conduct such an inquiry. Because the courts have failed to create a uniform common law that is capable of resolving these claims in a predictable and equitable manner, federal legislation with broad application is now necessary. In placing the burden of proving good title and rightful possession on current and potential owners, society's moral obligation to the victims of Nazi aggression can be translated into an affirmative and equitable legal duty.

It will not be possible to track down every asset, but complete success is not required. What is required is that everyone who had a role in this tragedy does their best to right the wrongs that have been committed, and that they understand that much more than money is at stake.427

Emily J. Henson

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