Applying a Strict Discovery Rule to Art Stolen in the Past

Tarquin Preziosi
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by

TARQUIN PREZIOSI*

Introduction

There is a great deal of confusion both within and among jurisdictions as to when and how the statute of limitations for an action to recover stolen art begins to run. This Note proposes both a retrospective and a prospective solution to the inherent problems in determining when an action to recover stolen art is barred by the statute of limitations. Art that was stolen in the past would be subject to a "strict" discovery rule—one which does not focus on the true owner's "due diligence"—so that the statute of limitations will not begin to run until the owner becomes aware of the identity of the possessor of the artwork. Future victims of art theft, in accordance with both current practices in the art world and academic proposals, would be required to register their stolen works with an art theft database in order to toll the statute of limitations. Objects which are not subject to effective registration would be exempt from the registration requirement, and subject to the strict discovery rule.

In a typical scenario, an artwork is stolen and subsequently sold to a collector, the bona fide purchaser, who thinks that he or she is gaining valid title to the piece. At some point, the victim of the theft, the true owner, discovers the artwork's whereabouts, and demands its return. The court must then determine if and when the applicable statute of limitations began to run. Since courts often face unclear or conflicting precedent, owners of stolen art have no clear guidance as to how they can toll the statute of limitations and thus protect their rights to the artwork. While the problems of art theft remain a constant from jurisdiction to jurisdiction, the solutions vary both between and within jurisdictions.¹ Success or failure in an art replevin action may be dictated more by the

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choice of forum than the merits of a given case. A variety of academic\(^2\) and legislative\(^3\) solutions have been offered to deal with art theft. Recent proposals, responding to current practice in the art world, have called for the utilization of an international theft or title registry\(^4\) for art and cultural property\(^5\) in order to more equitably distribute the risks between true owners and bona fide purchasers.\(^6\) This Note focuses on dealing with the great number of objects which fall outside of the feasible scope of such a


3. See, e.g., CAL. CIV. PROC. CODE § 338(c) (West Supp. 1996) (three year statute of limitations for recovery of items of “interpretive, scientific, or artistic significance”). Responding to the problems inherent in recovering art that was lost before and during World War II, Representative Nita Lowey (D-N.Y.) plans to introduce legislation allowing American citizens to sue in federal court to recover artwork abroad that was stolen during the Holocaust. See Larry Lipman, *Jewish Group Seeks Return of Stolen Art*, ATLANTA J., Sept. 5, 1997, at A9. Most existing legislation deals with archaeological artifacts or cultural property excavated or exported in violation of United States or foreign laws. See, e.g., National Stolen Property Act, 19 U.S.C. §§ 2314, 2315 (1988); Pre-Columbian Monumental and Architectural Sculpture and Mural Statute, 19 U.S.C. §§ 2091-2095 (1972) (prohibiting importation of pre-Columbian artifacts into the United States without an export authorization certificate); Archaeological Resources Protection Act, 16 U.S.C.S. § 470 ee (West Supp. 1997) (prohibiting the trafficking in archaeological resources excavated or sold in violation of state law).

4. See discussion infra Part II.B.2.

5. The terms “art” and “cultural property” are not subject to any precise definition. For simplicity, these terms can perhaps best be used to refer to objects that “have artistic, ethnographic, archaeological, or historical value.” John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1888 (1985). The terms are neither inclusive nor exclusive; some “art” is a form of “cultural property,” and some is not. *Id.*

6. See Hawkins et al., supra note 2, at 51; McCord, supra note 2, at 1008; Bibas, supra note 2, at 2439. The idea of imposing some sort of duty on the true owner to register stolen works was discussed initially in *O’Keefe v. Snyder*, 416 A.2d 862, 494 (N.J. 1980).
registry: art that was stolen prior to the registry’s creation, and those objects (especially archaeological artifacts) that are not susceptible to effective registration. In order to deal with the significant twin problems of prospective retroactivity and non-registrability that will arise if an art theft registry becomes a required element of art replevin actions, courts should apply a “strict” discovery rule to these objects that fall outside the registry’s scope. This suggestion, while narrow in scope, will not only help to resolve some of the dilemmas faced by courts, museums, and individuals, but will provide certainty in the law as well.

This Note acknowledges the desirability of imposing an art theft registry requirement to clearly delineate what steps future art theft victims will have to take in order to toll the statute of limitations. Future victims of art theft would be required to register the stolen object with an art theft

7. One example is the art looted by the Nazis during World War II, which has only recently come to light. See Lipman, supra note 3, at A9 (noting that “thousands of pieces of artwork looted by the Nazis during the Holocaust reside in museums and private collections around the world.”). The question of the ownership of this art is becoming a troubling issue for the art world. See David Goldstein, Heirs Try to Reclaim Art Stolen by Nazis, SAN DIEGO UNION-TRIB., Sept. 5, 1997, at A2 (“More and more famous artworks are embarrassingly turning up in prominent museums and private collections. Works by Picasso, Degas and Monet recently have become the source of tension between their current owners and the heirs of Jewish collectors, many of whom perished in the Holocaust.”); see also discussion infra Part I.

8. This suggestion of course concerns archaeological artifacts that are legitimately in the possession of the true owner to begin with, not artifacts whose possession or importation into the United States is in violation of the applicable laws, such as the Archaeological Resources Protection Act, 16 U.S.C.S. § 470 ee (West Supp. 1997). The discussion of the applicability of the statute of limitations to archaeological artifacts is not an attempt to enter into the debate of the propriety of the commercialization of archaeological artifacts. See John H. Merryman, The Antiquities Problem, PUB. ARCHAEOLOGY REV., Dec., 1995, at 10-11 (discussing the often conflicting views of archaeologists on one side and antiquities collectors and museums on the other).

9. See Hawkins et al., supra note 2, at 94 (stating that there would be “decades of stolen art (and tens of thousands of valuable objects) outside the scope” of proposed legislation).

10. The current practice in the art world, at least for major galleries and museums, is to check the Art Loss Register. See infra note 153 and accompanying text. However, this practice is of uncertain value when the art was stolen in the past. For example, although the New York Metropolitan Museum of Art checked the Art Loss Register prior to acquiring a Monet, the ownership of the painting was subsequently challenged by a German citizen who claimed that the painting was taken from a bank vault in Berlin in 1945. See Jacqueline Trescott, Project Seeks to Track Works Seized by Nazis, WASH. POST, Sept. 5, 1997, at D7. Recent court opinions are beginning to discuss the parties’ use of theft registry databases, particularly the Art Loss Register. See Erisoty v. Rizik, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995) (noting that an art theft victim reported her stolen paintings to the Art Loss Register and discussing the role of the Register in helping the FBI locate the paintings).

11. I use the term “strict” to denote a discovery rule where time does not begin to accrue until the owner becomes aware of the identity of the possessor of the stolen art, regardless of the owner’s “diligence” in looking for the art. This idea is exemplified in Naftziger v. American Numismatic Society, 49 Cal. Rptr. 2d 784 (Cal. Ct. App. 1996).
registry such as the Art Loss Register\textsuperscript{12} in order to toll the statute of limitations until they become aware of the identity of the current possessor of the object.\textsuperscript{13} However, this registration requirement cannot equitably be applied to art stolen in the past or to certain objects.\textsuperscript{14} Victims of past art theft, or those who have non-registrable objects stolen, would still be at the mercy of a variety of common law solutions such as the nebulous due diligence inquiry, which have produced a variety of conflicting results, but no clear-cut guidelines for victims of art theft\textsuperscript{15} or purchasers of art\textsuperscript{16} to follow. Thus, victims of past thefts and of thefts of non-registrable objects will have the statute of limitations tolled until they become aware of the identity of the current possessor of the object, regardless of whether or not they satisfy a court’s subjective due diligence analysis. Requiring courts to apply a strict discovery rule will benefit art theft victims, will help reduce the trade in stolen artwork,\textsuperscript{17} and will provide for uniform judicial decisions in art replevin actions.

In the recent case of \textit{Naftziger v. American Numismatic Society},\textsuperscript{18} a California Court of Appeal was faced with such a situation. California
had enacted a statute of limitations designed to aid victims of art theft.\textsuperscript{19} However, the coins at issue in \textit{Naftziger} had been stolen from a museum prior to the enactment of the statute.\textsuperscript{20} The \textit{Naftziger} court reached the apparently unremarkable decision that under the prior version of the statute of limitations\textsuperscript{21} there was an implied discovery rule which meant that time began to accrue when the owner of stolen coins became aware of the identity of their current possessor, regardless of his diligence in looking for the coins.\textsuperscript{22} The decision in \textit{Naftziger} is significant and relevant to this Note for two reasons. First, it is an example of a court reaching the correct result by available methods when confronted with the theft of artifacts from a museum. Second, and perhaps more important, the decision illustrates the proper response to the national problems inherent in art and artifact replevin actions: it provides a specific retroactive discovery rule for art and artifacts stolen prior to the enactment of legislation designed to aid victims of art theft.\textsuperscript{23}

Part I of this Note discusses the problems of art and artifact theft and the dilemmas faced by both original owners of stolen artworks and by subsequent good faith purchasers. Part II discusses the courts' applications of common law stolen property doctrines to the question of when the statute of limitations begins to run for stolen art and surveys some of the academic solutions to art theft, including art theft registries. Part III demonstrates that in order to give courts clear guidelines and provide certainty to a confused area of law, a retroactive discovery rule for art stolen prior to the imposition of a registration requirement should be applied to toll the statute of limitations.

\textsuperscript{19} CAL. CIV. PROC. CODE § 338(c) (West Supp. 1996). The current version of the statute states:

\begin{quote}
The cause of action in the case of theft . . . of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft.
\end{quote}

\textit{Id.} See also discussion infra Part II.A.3.b.

\textsuperscript{20} See \textit{Naftziger}, 49 Cal. Rptr. 2d at 784.

\textsuperscript{21} CAL. CIV. PROC. CODE § 338(3) (West 1982). The prior version of the statute provided that the cause of action accrued "[w]ithin three years . . . for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." \textit{Id.}

\textsuperscript{22} See \textit{Naftziger}, 49 Cal. Rptr. 2d at 786 (concluding that "under the prior version of the statute, the cause of action accrued when the owner discovered the identity of the person in possession of the stolen property, without regard to the owner's diligence or lack thereof in ferreting out that information").

\textsuperscript{23} \textit{Id.}
I. The Cause of the Problem: Art Theft

Art and artifact theft from individuals, museums and archaeological sites in the past few decades has increased dramatically, creating a situation where collectors often unknowingly buy stolen goods in good faith. Between 1972 and 1990 the value of the illegal trade in art and antiquities rose from an estimated $1 billion to $2 billion. This is attributable to a number of factors, the greatest of which is the law of supply and demand. Not surprisingly, as the demand for art objects as a commodity rose in the 1980s, so did art theft. Art theft has been around as long as there has been art to be stolen; the archaeological record is replete with incidents of robbed graves and plundered tombs. Following closely on the heels of tomb robbing was legislation designed to prevent it. Even the Romans felt the need to pass laws protecting art from theft. Recovery by authorities is low, estimated to be between two to thirteen percent of all art stolen. While art theft ranks second behind drug trafficking as the most lucrative form of illegal trade, it receives low priority by most countries' law enforcement agencies. Complicating the problem of art theft itself is the fact that the theft is sometimes initially undetected or


28. See, e.g, DORA J. HAMBLIN, POTS AND ROBBERS 73-87 (1970). Hamblin notes that the modern-day Italian tombaroli's (grave robber's) efforts are often thwarted by the ancient Etruscans themselves, who often looted tombs soon after burial. Id.


30. See HAMBLIN, supra note 28, at 73-87 (discussing laws passed during the reigns of Vespasian in the first century A.D. and Constantine in the fourth century protecting buildings and statues from looting and dismantling).


32. See Grover, supra note 2, at 1435.

33. Only Los Angeles has a full time police detective who specializes strictly in art theft; the New York Department has a detective who investigates art theft along with other types of crimes. See Miles Corwin, Metro Desk, L.A. TIMES, Dec. 16, 1996 at A1. See also Grover, supra note 2, at 1439 (noting that London has only "two investigative officers and one computer operator" and that few museums or dealers have liaisons with the police).
unreported by the owner. Owners often fail to report thefts because they fear that they will either endanger their collections by exposing their vulnerabilities to further theft or eliminate the thief's market, thereby forcing the art underground and reducing the chances for recovery. Additionally, owners may wish to avoid taxes which would be imposed on them if the government learned of their collections and the art was subsequently recovered.

The dilemma that the rise in art theft exacerbates is how to decide ownership between two innocent parties. There are tens of thousands of stolen artworks, worth billions of dollars, not yet recovered by their true owners. The nature of art objects and the realities of the art market contribute to this problem. Courts often have to decide claims to recover stolen art, brought against innocent purchasers long after the initial theft. Because the art market is saturated with stolen objects, this situation will persist. The mere passage of time will not make the problem go away. Thus, there exists the very real problem of deciding ownership for a vast number of objects that were stolen in the past.


35. See, e.g., Solomon R. Guggenheim Found. v. Lubell, 153 A.D.2d 143, 145 (App. Div. 1990) (noting that no report of the theft of Marc Chagall's painting "The Cattle Dealer" was made to "the police, F.B.I., Interpol [or] the Art Dealer's Association").


37. See Guggenheim, 153 A.D.2d at 145-46 (the lower court reported that plaintiff believed, as was not uncommon in the 1960s and 1970s, that publicizing theft would hinder a stolen painting's recovery by "driving it further underground").

38. See Grover, supra note 2, at 1437 (citing Judd Tully, Hot Art, Cold Cash, J. ART, Nov. 1990, at 1).

39. See Hawkins et al., supra note 2, at 94.

40. See id. at 50 (stating that "unlike most forms of personal property, art is frequently nonperishable ... easily transportable (the art trade, legitimate and otherwise, is notable for its internationalism) and hence, easily concealed; readily identified, nonfungible; and often of dramatically increasing value"). The problems of art theft are often compounded by those who trade in art. "The hear-no-evil, see-no-evil dilemma is really at the heart of" the trade in stolen art, according to one gallery owner. See David Goldstein, Heirs Try to Reclaim Art Stolen by Nazis, SAN DIEGO UNION-TRIB., Sept. 5, 1997, at A2 (discussing the restitution of art to holocaust victims and their heirs). Critics focus on the failure of "curators, collectors and museum directors to investigate the origins of art." Julie Hirschfeld, Project Seeks Looted Artworks, DALLAS MORNING NEWS, Sept. 5, 1997, at 34A.

41. See, e.g., Kunststammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1161 (2d Cir. 1982) discussed infra Part II.A.2. See also Hawkins et al., supra note 2, at 49 (noting that art replevin actions are often brought long after the initial theft).

42. See supra text accompanying notes 24-27.

43. For example, the art world is just starting to come to terms with thefts that took place in Europe over 50 years ago. See Trescott, supra note 10 (discussing the Holocaust Art Restoration Project's plans to deal with art stolen during World War II).
The scenario involving the original owner and the subsequent good faith purchaser of an artwork is undoubtedly familiar to those working in museums and art galleries, as well as to students of property law. A painting, one of a series, is stolen from an artist. Some time later, she learns of its whereabouts. Whether or not she tried very hard to get it back before it surfaced is open to dispute. In the meantime, the painting changed hands several times and is now possessed by a man who bought it in good faith. The artist wants it back, and sues in replevin. Is her claim barred by the statute of limitations? This situation has met with a myriad of academic suggestions and judicial solutions, which are discussed in Part II of this Note. Now add a new wrinkle to the above scenario. Between the theft and the artist’s suit, a statute was enacted to aid victims of art theft. Under this statute, all the theft victim has to do to toll the statute of limitations indefinitely is to register her stolen work with an existing art theft database. However, she has not notified the registry that the work has been stolen. Should the artist be able to recover the painting? This question is answered in Part III of this Note.

II. Responses to the Problem

A. Common Law Solutions

Legal responses to art theft have been characterized as being “mired in horse and buggy law” and thus unsuited to the problems inherent in stolen art actions. Judicial responses to the problems of stolen art have been more of a Band-Aid than a cure: since courts have applied varying standards and rules, no clear-cut guidelines have emerged. Perhaps the biggest dilemma has arisen through the varying requirements of “due dili-

44. See Jesse Dukeminier & James E. Krier, Property 117-29 (2d ed. 1988) (discussing O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980), and the adverse possession of chattels). See also John Henry Merryman, Title Problems in the Art World, ALI-ABA COURSE STUDY, Jan. 16, 1997 (discussing a hypothetical in which a dealer buys a Morandi painting at Christie’s in 1990 and sells it to a collector, who receives a letter six years later from a lawyer in Milan, stating that the painting was stolen from an Italian private collection, and demanding its return).

45. For a somewhat more anomalous set of facts, where the plaintiffs were the “bona fide purchasers” and the defendants the “true owners,” see Erisoty v. Rizik, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995). See discussion infra note 204.

46. For an inconclusive answer to this question, see O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).

47. Perhaps, since the theft occurred some time before the creation of the database, she did not know of the legislation; or perhaps she had no photographic documentation of the piece; or the work, part of a series, was not so unique that a written description would accurately identify the painting. See infra note 185.

48. Hawkins et al., supra note 2, at 50.
gence” on the part of the owner of stolen art. Courts have alternatively required due diligence and specifically disavowed it. The requirement of due diligence has been applied whether the courts characterize their theory of accrual as a “demand and refusal rule” or a discovery rule. This lack of clear-cut directives leaves a theft victim uncertain as to what to do to toll the statute of limitations. Similarly, bona fide purchasers do not know what they must do in order to assure clear title when purchasing artwork.

This section briefly outlines the judicial responses to stolen art—adverse possession, the demand and refusal rule, and the discovery rule—and discusses the approaches courts have taken to the “due diligence” inquiry. Although this section specifically focuses on New York and California cases since New York City and Los Angeles are centers of the world art market, the problem of art theft exists nationwide. This section illustrates, among other things, the confused approaches taken by the courts, both between and within jurisdictions. Courts in different jurisdictions utilize different theories to determine when the statute of limitations begins to run, and courts within the same jurisdictions often disagree on this issue, even when ostensibly applying the same theory of accrual.

(I) Adverse Possession

The concept of adverse possession of chattels is derived from real property principals. The traditional elements of adverse possession are that the property be held in an adverse, hostile, open, notorious, visible, exclusive, and continuous manner for the statutorily prescribed time in order to bar the original owner’s replevin action. If these elements are satisfied, the property is then owned by the adverse possessor. Adverse possession thus defeats the common law rule that a thief cannot pass valid

49. See discussion infra Part II.A.2-3.
50. Id.
51. As Professor Merryman notes: “If dealer asks how he can minimize the risk of acquiring stolen works, how do you advise him? 1. Buy carefully. Check provenience. (Explain why this is useless advice).” Merryman, supra note 44.
52. See, e.g., O'Keefe, 416 A.2d at 862 (litigated in New Jersey); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (litigated in federal court in Indiana).
53. For example, California and New Jersey courts have applied a discovery rule, as has the Seventh Circuit in interpreting Illinois law, while the Second Circuit, interpreting New York law, has applied a demand and refusal rule. See discussion infra Part II.A.2-3.
54. For example, California courts disagree on the importance of the plaintiff's diligence in searching for the stolen art. See discussion infra Part II.A.3.b.
55. See Gerstenblith, supra note 2, at 120.
The traditional concept of adverse possession focused on the actions of the adverse possessor of the property, rather than the true owner. The original owner's relative diligence in searching for the object and his or her ability to bring suit are irrelevant to the application of the doctrine.

While adverse possession may work well with certain types of chattels, it is an unsatisfactory response to art theft, at least from the point of view of the original owner, given the easily concealable nature of art and artifacts. Unlike domestic animals, to which much of the early adverse possession cases apply, art is seldom open to view by the general public in the way that horses and cows are. Modern formulations of adverse possession seek to alleviate the harsh results of the doctrine using two primary methods: the demand and refusal rule and the discovery rule.

(2) The Demand and Refusal Rule and Due Diligence

The demand and refusal rule has been used in art and artifacts cases, primarily in New York, to toll the statute of limitations until the owner makes a demand, and the possessor refuses, to return the artwork. In Menzel v. List, for example, a Marc Chagall painting, "Le Paysan à L'échelle," was stolen from Mr. and Mrs. Menzel by the Nazis in 1941. In 1955, List, admittedly a bona fide purchaser, bought the painting from a gallery in New York. In 1962, Mrs. Menzel discovered that List had the painting and demanded its return. List refused, asserting that the statute of limitations had begun to run from either the time the painting was stolen in 1941, or from the time he purchased the painting in 1955. In rejecting this defense, the court stated that in "replevin, as

56. See Bibas, supra note 2, at 2442.
57. Modern formulations of adverse possession have changed this inquiry. See discussion infra Part II.A.2.
58. See Gerstenblith, supra note 2, at 131.
59. See Bibas, supra note 2, at 2442 (noting that "[t]he majority of reported cases on adverse possession of chattels between 1870 and 1930 involved horses, cattle, sheep, and mules" and that case law crafted to fit stolen animals did not work as well when used to cover more easily concealed objects).
60. The discovery rule is similar, if not equivalent, to laches. See Bibas, supra note 2, at 2448.
62. See Menzel, 267 N.Y.S.2d at 804.
63. See id.
64. See id.
65. See id.
well as 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.”

Following Menzel, the Second Circuit in Kunstammlungen zu Weimar v. Elicofon stated that a museum’s claim for return of two stolen Albrecht Duerer portraits accrued when the museum demanded their return from the bona fide purchaser. In Elicofon, the two Duerer portraits, circa 1499, were stolen in 1945 from a castle in Germany where they were being stored. Elicofon bought the pair for $450 from an ex-serviceman in 1946, and displayed them in his home, unaware that they were stolen, until 1966, when the museum demanded their return. The Second Circuit rejected Elicofon’s arguments that the museum’s claim was time barred, and held that the museum’s cause of action began to accrue when Elicofon refused to comply with the demand for the paintings’ return.

Both Menzel and Elicofon indicated that the “demand and refusal rule” does not require an analysis of the relative due diligence of the owner seeking to recover his or her property. However, five years later, the Second Circuit, again interpreting New York law, held in DeWeerth v. Baldinger that the demand and refusal rule requires an owner to exercise reasonable diligence in locating her property. DeWeerth I stated that an owner has a “duty of reasonable diligence in attempting to locate stolen property” in addition to making a demand for its return within a reasonable time. The facts in DeWeerth I are similar to both Elicofon and Menzel. A Monet was stolen in 1945 from a castle in Germany and was acquired in 1957 by Baldinger, a bona fide purchaser. In 1982, DeWeerth discovered the painting’s whereabouts and demanded its return. The court found that DeWeerth had failed to make a showing of reasonable diligence, and thus had failed to prove superior

66. Id. at 809.
67. See 678 F.2d 1150, 1161 (2d Cir. 1982).
68. In 1982, the time of the opinion, the castle was located in what was then East Germany.
69. See Elicofon, 678 F.2d at 1161.
70. See id.
71. See id.
72. In Elicofon, the court indicated that the plaintiffs had been diligent; however, the court did not indicate what effect, if any, the plaintiffs’ diligence had on the tolling of the statute of limitations. See id. In Menzel, the court made no mention of the plaintiff’s diligence. See Menzel, 267 N.Y.S.2d at 808.
74. Id. at 108.
75. See id. at 105.
76. See id. at 106.
title. In a subsequent action, DeWeerth moved to recall the mandate in light of Solomon R. Guggenheim Foundation v. Lubell, which held that the New York statute of limitations did not require a showing of reasonable diligence. The Second Circuit denied the motion, noting that "[t]here is nothing in Erie that suggests that consistency must be achieved at the expense of finality." To what extent DeWeerth I will be followed is unclear, however. For example, in Republic of Turkey v. Metropolitan Museum of Art, decided after Guggenheim and DeWeerth I, the district court found that Guggenheim was controlling. There, Turkey sought to recover artifacts from the Metropolitan Museum of Art which were illegally imported to the United States in 1966. Referring to the DeWeerth I holding as "creative," the district court did not require a showing of due diligence.

The demand and refusal rule is susceptible to criticism on a number of grounds. It benefits both the art thief and the true owner and is detrimental to the bona fide purchaser. The rule is beneficial to art thieves, since the statute of limitations does not begin to run until the demand is made. Once the demand is made, if the thief can postpone returning the object long enough, the owner's replevin action will be barred. Similarly, a true owner can postpone suit indefinitely, effectively "eviscerating" the statute of limitations, and thereby making the bona fide purchaser perpetually vulnerable to lawsuits. Since the demand and refusal rule shifts the focus of scrutiny from the possessor to the true owner, the bona fide purchaser cannot determine whether his property is safe from attack, nor can artwork be conveyed with certainty. Consequently, the demand and refusal rule prevents repose of stolen artwork, regardless of the actions of the bona fide purchaser.

(3) The Discovery Rule

The discovery rule, like the demand and refusal rule, shifts the inquiry from the conduct of the possessor to that of the true owner. The discovery rule originated in medical malpractice cases, rather than com-

77. See id. at 104.
78. See DeWeerth v. Baldinger, 38 F.3d 1266 (2d Cir. 1994) (hereinafter DeWeerth II).
80. DeWeerth I, 38 F.3d at 1274.
82. See id. at 45.
83. Id. at 45.
84. Bibas, supra note 2, at 2445-46.
85. See Gerstenblith, supra note 2, at 140.
mon law property doctrines. Conceptually, the discovery rule is simple: the statute of limitations does not begin to run until the plaintiff discovers that he or she has a cause of action. The dilemma that courts face in art replevin cases is if and how the true owner's action or inaction in searching for the art effects the running of the limitations period—the due diligence inquiry.

a. Applying Due Diligence

Under the discovery rule enunciated in the seminal case of O'Keefe v. Snyder, the cause of action does not begin to accrue until the true owner "first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor." In O'Keefe, Georgia O'Keefe sued Snyder, the possessor of three of her paintings, in replevin. O'Keefe alleged that the paintings had been stolen in 1946. Thirty years later, she learned of their whereabouts and demanded their return from Snyder. The New Jersey Supreme Court rejected the lower court's application of the adverse possession doctrine, finding adverse possession unsuitable to art objects. The court instead adopted the discovery rule, consciously shifting the inquiry to the conduct of the true owner, stating that the "focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property." O'Keefe indicated that determining what constitutes "due diligence" is a fact specific analysis which will vary depending on the facts of each case, including the "nature and value of the property."

The O'Keefe approach was followed by the Seventh Circuit in Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc. In Autocephalous, a sixth century mosaic was removed

86. See, e.g., Fernandi v. Strully, 173 A.2d 277 (N.J. 1961) (where plaintiff did not discover that a surgeon failed to remove an object from her abdomen for three years after the surgery, the court held that statute should not begin to run until plaintiff knew or had reason to know of the presence of the object).
87. See id.
89. See id. at 864.
90. See id.
91. See id. at 866.
92. See id. at 872.
93. Id.
94. Id. at 873. The question remains whether the late Melina Mercouri's efforts to retrieve the Elgin marbles from Great Britain would satisfy the "due diligence" requirements of O'Keefe. See Merryman, supra note 51 at 1883 (discussing the late Greek Minister of Culture's official impassioned requests for the marbles' return).
95. 917 F.2d 278 (7th Cir. 1990).
from a church in Northern Cyprus sometime prior to 1979, and was later sold to Goldberg for over $1 million in the Geneva airport. When Goldberg tried to resell the mosaic, Cyprus requested its return. In balancing the equities of the case, the Seventh Circuit devoted considerable attention to the somewhat clandestine nature of the sale. The court noted that in such cases, where the circumstances surrounding the art are suspicious, "dealers can (and probably should)" undertake a full background check of the item. The court found that while Cyprus might not have contacted all possible organizations in its search for the mosaic, Cyprus' actions were "sweeping and consistent with trade practices" and thus satisfied the due diligence requirement of the discovery rule. Interestingly, the Autocephalous court focused its inquiry on the actions of both the true owner and the purchaser, while the O'Keefe court was apparently concerned solely with the owner's actions.

b. Questioning Due Diligence: California's Conflicting Approach

O'Keefe is often seen as the embodiment of the discovery rule, requiring due diligence on the part of the true owner. However, two recent California decisions interpreting the statute of limitations, Naftziger v. American Numismatic Society and Society of California Pioneers v. Baker, have facilitated the recovery of stolen art by the true owner. While both of these cases were decided in the owner's favor, they differ in their approach to the due diligence element of the discovery rule.

In 1983, California amended its statute of limitations for stolen objects. The current version of the California Civil Procedure Code, section 338, subdivision (c) provides that:

[T]he cause of action in case of theft... of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the ag-

96. See id. at 281-82.
97. See id. at 283.
98. See id. at 281-84.
99. Id. at 294. The usefulness of this suggestion is debatable. See Merryman, supra note 51.
100. See Autocephalous, 917 F.2d at 290.
101. Using the term "bona fide purchaser" here may be inappropriate, given the court's seemingly dubious view of Goldberg's actions.
104. Professor Merryman indicates the different approaches of the O'Keefe, Baker, and Naftziger decisions to the due diligence inquiry. See Merryman, supra note 51.
105. See CAL. CIV. PROC. CODE § 338(3) (Deering's 1983).
106. Prior to 1988, subdivision (c) was designated as subdivision (3). The 1989 amendment to subdivision (c) substituted the words "article of historical, interpretive, scientific, or artistic significance" for "art or artifact." CAL. CIV. PROC. CODE § 338(c) (West Supp. 1997).
grieved party, his or her agent, or the law enforcement agency which
originally investigated the theft. 107

In Naftziger, the court held that under the applicable prior version of
the statute of limitations, 108 the cause of action for replevin accrued when
the owner discovered the identity of the current possessor, without regard
to the owner’s relative diligence in “ferreting out” the objects’ where-
abouts. 109 The pre-1983 version of section 338 did not answer the ques-
tion of when the cause of action accrues. 110 In Naftziger, a New York
numismatic museum operated by the American Numismatic Society had
been given 1,542 copper cents, minted between 1793 and 1857. 111 Some-
time prior to 1970, a thief substituted 129 superficially identical but infer-
ior coins. 112 The theft was not discovered until 1990. 113 After learning
of the theft, the museum discovered that Naftziger, apparently a bona fide
purchaser, was in possession of some of the authentic coins. 114 Naftziger
refused the museum’s demand for the coins. 115 The lower court granted
summary judgment for Naftziger’s quiet title action based on an adverse
possession theory, refusing to borrow New York’s demand rule. 116 At is-
sue on appeal was whether, under the pre-1983 version of section 338(c),
the cause of action accrues when the theft occurs, or when the owner dis-
covers the theft, the identity of the thief, or the whereabouts of the cur-
rent possessor of the property. 117 The court apparently declined to apply
the discovery rule of the amended statute retroactively. Instead, the court
held that the pre-1983 statute contained an implied discovery rule, so that
the cause of action accrued when the museum discovered the identity of
the possessor of the coins. 118

In Society of California Pioneers v. Baker, 119 the court held that the
amended version of the statute of limitations applied where the pre-1983
version had not run in the defendant’s favor at the time the statute was
amended. 120 Both the Baker and Naftziger courts declined to decide

107. Id. This amendment was apparently a reaction to the New Jersey decision in O'Keefe.
108. CAL. CIV. PROC. CODE § 338(3) (West 1982).
109. See Naftziger, 49 Cal. Rptr. 2d at 786.
110. Section 338(3) provided that the cause of action accrued “within three years ... for
taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of
personal property.” CAL. CIV. PROC. CODE § 338(3) (West 1982).
111. See Naftziger, 49 Cal. Rptr. 2d at 787.
112. See id.
113. See id.
114. See id. at 788.
115. See id. at 787.
116. See id. at 792.
117. See id. at 786.
118. See id. at 788.
119. 50 Cal. Rptr. 2d at 874.
120. See id.
whether the amended statute should be applied retroactively. However, the \textit{Baker} court, disagreeing with the \textit{Naftziger} court, noted that “the question of reasonable diligence has some bearing” on the statute of limitations issue. In \textit{Baker}, a gold and quartz cane handle was stolen from the Society of California Pioneers in 1978. In 1980, Kah, a bona fide donee, received the handle as a gift from his mother. Kah sold the handle to Baker in 1991. The court concluded that under California law, the statute of limitations begins to run anew when the current possessor acquires an item. Thus, the Society’s action was timely since the statute was amended before the limitations period expired against Kah. The court, citing \textit{Guggenheim}, concluded that the plaintiffs could not have been charged with actual or constructive notice of the whereabouts of the cane handle. Thus, \textit{Baker} is at odds with \textit{Naftziger}, since \textit{Baker} implies that the owner’s due diligence is a factor to be considered in applying the discovery rule.

The discovery rule, like the demand and refusal rule, is subject to criticism on the grounds that it “renders the statute of limitations virtually meaningless” and harms those who attempt to deal honestly with personal property. In addition, since the discovery rule abandons any requirements for the possessor’s use of the object, the possessor has no incentive to reveal possession of the property. Perhaps most significant, however, is the idea that the due diligence requirement of the discovery rule can gut the common law axiom that a thief cannot pass valid title. Under this due diligence requirement, a bona fide purchaser can acquire valid title to stolen art. This is of course the inevitable effect when the statute of limitations runs; however, requiring a showing of due diligence increases this possibility.

B. Academic Proposals

Like common law responses to art theft, numerous academic solutions have been offered as well. Academic solutions to the problems of

\begin{itemize}
\item \textit{See id.} at 871.
\item \textit{Id.} at 870 n.10.
\item \textit{See id.} at 866.
\item \textit{See id.} at 867.
\item \textit{See id.}
\item \textit{See id.} at 869-871 (citing Harpending v. Meyer, 55 Cal. 555 (1880)).
\item \textit{See id.} at 871.
\item \textit{See id.} at 873.
\item Gerstenblith, \textit{supra} note 2, at 145.
\item For example, there is no requirement that the property be held “open and notoriously.”
\item \textit{See Hayworth, supra} note 2, at 358.
\item \textit{See id.} at 383.
\item \textit{See authorities cited supra} note 2.
\end{itemize}
art theft can be broadly classified into two categories. First, there are proposals which suggest utilizing or modifying one of the common law doctrines, either to more effectively deal with art theft as a whole, or to more effectively balance the equities between owners and bona fide purchasers. Second, there are proposals which advocate the affirmative duty of one or both of the parties to utilize art registry systems or computerized databases to record title or report theft. Broadly speaking, this latter category is in a sense an attempt to delineate a specific due diligence requirement. Solutions that advocate the affirmative duty of future theft victims to register their stolen artworks with an international database are preferable to attempts to reform existing common law doctrines. A registration requirement would help stem the transfer of stolen art by imposing an affirmative duty on both owners of stolen artworks and prospective artwork purchasers in order to preserve their rights. However, database legislation is not the best way to deal with art that was stolen in the past.

(1) Solutions Utilizing Common Law Doctrines

Various proposals have focused on utilizing existing property doctrines to deal with the problems of stolen art. Discussing personal property generally, one author advocates utilizing a model of the adverse possession doctrine which substitutes a good faith/bad faith standard for notice and other types of qualifying conduct. Another proposal advocates adopting the demand rule of Guggenheim, noting that "art collectors are well-advised to 'buy the piece, never the story.'" A third proposal states that "[f]oreign nations should not be able to recover art and antiquities from United States purchasers merely because the removal of such works violated export laws in the foreign nation." This third proposal, recognizing that New York is a major art market, suggests harmonizing New York law with the law of other states by merely requiring a showing of reasonable diligence by owners of stolen artwork and antiquities. This requirement, the author asserts, will provide incentives both for

134. See Foutty, supra note 2, at 1860-61; Gerstenblith, supra note 2, at 160-63; Montagu, supra note 2, at 100; Hayworth, supra note 2, at 383; Webb, supra note 2, at 896-99.

135. See generally Hawkins et al., supra note 2, at 50; Bibas, supra note 2, at 2439; Margules, supra note 2, at 646; McCord, supra note 2, at 1008.

136. Advocating a particular database registration proposal is outside the scope of the Note. Rather, the point of the Note is that whatever legislation is enacted, a discovery rule should be applied to thefts that took place prior to the enactment of the legislation.

137. See discussion infra Part III.A-B.

138. See Gerstenblith, supra note 2, at 160-63.

139. Hayworth, supra note 2, at 383 (citation omitted).

140. Montagu, supra note 2, at 100.

141. See id. at 101.
owners to publicize the loss of stolen art, and for purchasers to investigate title to artworks.\textsuperscript{142} Thus, the international trade in stolen artworks will be reduced, and certainty and finality will be brought to art transactions.\textsuperscript{143} Advocating due diligence following \textit{Autocephalous}, another author suggests that, since owners of art are "uniquely situated to mount an effective search," due diligence properly allocates the costs to art owners.\textsuperscript{144} Yet another suggestion is to reform the due diligence rule, primarily by courts enunciating clear guidelines as to what constitutes due diligence.\textsuperscript{145} This proposal places burdens both on the owner to investigate by the best methods available, and on the purchaser to investigate title via current art catalogs in order to be considered a bona fide purchaser.\textsuperscript{146} These proposals are all generally susceptible to the same criticisms as the common law doctrines from which they arise.\textsuperscript{147} Perhaps the best way to deal with the problems inherent in stolen art cases is to leave these common law doctrines behind where possible, and to take advantage of current practices in the art world by utilizing an art theft database. As cogently argued by several authors,\textsuperscript{148} the technology needed for such a database, which would stem the trade in stolen art and better balance the equities between the victim of art theft and the bona fide purchaser, currently exists. As discussed below, such a solution would provide a better alternative than common law doctrines for future cases of art theft, but not for cases of past theft.

(2) \textit{Art Registry and Title Search Solutions}

A number of services are available to check title to artwork. For example, the Art Loss Register is an international computerized database, underwritten by a variety of auction houses and insurance companies.\textsuperscript{149}

\begin{enumerate}
\item[142.] \textit{See id.}
\item[143.] \textit{See id.}
\item[144.] Foutty, \textit{supra} note 2, at 1860-61.
\item[145.] \textit{See Webb, supra} note 2, at 896-99.
\item[146.] \textit{See id.}
\item[147.] \textit{See discussion supra} Part II.A.2-3.
\item[148.] \textit{See generally} Hawkins et al., \textit{supra} note 2; Bibas, \textit{supra} note 2.
\item[149.] The Art Loss Register is the United States subsidiary of a British Corporation, The International Art and Antiquities Loss Register. Shareholders of the Art Loss Register include Sotheby's, Christie's, the International Foundation for Art Research, and others. The Art Loss Register, which has been operating since 1991, has a database of approximately 100,000 items, including paintings, antiquities, and furniture. The Art Loss Register acquires information from three primary sources: victims of theft, insurance companies, and the police. In order for an item to be registered, it must have been reported as stolen to the police, and the item must be uniquely describable. The Art Loss Register is used primarily in two ways: it provides a means to screen catalogues of auction houses in order to see if any of the offered items have been reported as stolen (the Register screens 400,000 lots annually), and it offers an "art theft search service" for private individuals and museums who wish to acquire an artwork. Telephone Inter-
The Art Loss Register stores descriptions and photographs of stolen artworks worldwide. For a small fee, prospective buyers can search the register. The effectiveness of the Art Loss Register in identifying stolen art is undeniable. It is routinely used by museums and galleries to check title to artwork.

There are several proposals calling for legislation which would utilize such databases. One suggestion is to target auction houses and museums. This suggestion in a sense imposes a due diligence requirement on the "pillars of the market place." This position asserts that both museums and auction houses must report all transactions involving "suspect works of art." In addition, museums and auction houses should take responsibility for diligently searching titles of acquired and auctioned works. To ensure this, liability for warranty of title would be irrevocably placed on the museums and auction houses. However, this suggestion is subject to the same criticism as common law doctrines: it produces no clear-cut rules or guidelines for courts to follow. Additionally, it fails to address both the transfer of artwork between individuals and the issue of retroactivity.

A second suggestion is the creation of an international title system requiring the registration of all artworks and cultural property, and the re-

view with Anna Kisluk, Director of Operations of the New York Office of The Art Loss Register, (Oct. 3, 1997) [hereinafter Kisluk Interview].

150. See id.
151. Currently, there is no charge to report the first stolen item. Subsequent listings are $20 per item. The fee to search the database to see if a particular item is stolen is $50. See id.
152. See, e.g., United States v. Trupin, No. 95 Cr. 450, 1996 WL 50237, at *1 (S.D.N.Y. Feb. 8, 1996) (discussing IFAR's role in recovering a stolen Chagall painting). The Art Loss Register, since it began operating in 1991, has been involved in recovering approximately £25 million worth of stolen art since its inception. See generally Kamal Ahmed, Past ... want an old master? Unscrupulous Dealers are Encouraging a Boom in Theft, THE GUARDIAN (Manchester), Nov. 30, 1996, at 5. "The Register has lately been adding about 1,400 pieces of stolen art and antiques each month, more than triple the 1993 average, and thus far in 1997 identified nearly $20 million in stolen goods, according to operations manager Caroline Wakeford." William Montalbano, Foreign Desk, L.A. TIMES, Mar. 18, 1997, at Al.According to Ms. Kisluk, the Art Loss Register has recovered approximately 900 primary objects and 4,000 "associated objects" since 1991 and is instrumental in recovering an average of "one item per day." See Kisluk Interview, supra note 149.
154. See McCard, supra note 2, at 1008.
155. See id.
156. Id.
157. See id. .
158. See id.
ording of all transactions relating to cultural property. Registering with the system would satisfy due diligence on the part of the owner, and failure to record a transaction would create a presumption of a bad faith transfer. This suggestion, while facile in theory, may be impractical in reality. While the affirmative, prospective duty of museums, galleries and individuals to register their artworks and antiquities is laudable, actually getting people and institutions to do so is unlikely. Additionally, the proposal ignores problems of retroactivity and does not solve the problem of the failure to register.

A third suggestion is a reaction to the decision in Guggenheim. The authors of this proposal, which is a comprehensive legislative solution designed to balance the equities between the owner and bona fide purchaser, suggest that a confidential, user financed, computerized international art loss registry be utilized. In this scenario, accrual of the statute of limitations would depend upon whether the owner or the bona fide purchaser utilized the statutory procedures. An owner who "expeditiously" registers the stolen work would have the statute of limitations tolled indefinitely, so long as he or she "exercised reasonable diligence in searching for the art." Correspondingly, a purchaser who checked the registry at the time of purchase would be protected by a three-year limitations period from the date of purchase. At the very minimum, this proposal argues, the New York legislature should overrule Guggenheim and replace the demand and refusal rule with a discovery rule that incorporates due diligence. As for the problem of retroactivity, the authors suggest that owners of art stolen before the enactment of the proposal be given a "window" of two years to register the stolen art. This registration would be applicable only against subsequent possessors. The rights of current possessors would be unaffected by the owner's registration. Furthermore, in this situation, a current or subsequent possessor could bring suit to quiet title and prevail, even where the owner had registered the stolen art, on a showing that prior to registration the owner had not been diligent.

159. See Margules, supra note 2, at 646.
160. See id.
161. See Hawkins et al., supra note 2, at 53.
162. See id. at 90-93.
163. See id.
164. Id. at 54.
165. Id.
166. See id. at 96.
167. See id. at 94.
168. See id.
169. See id.
170. See id. at 94.
This proposal is certainly a laudable solution to the problems of deciding ownership between two innocent parties. However, the authors' concern for bringing commercial certainty to the New York art market may unduly prejudice true owners. Their legislative solution is an attempt to codify due diligence on the part of the owner, and may not provide a clear-cut rule that would be easy for individuals and courts to follow. The solution to the problem of retroactivity favors possessors over true owners of stolen art. Furthermore, the due diligence requirement beyond the affirmative duty to register stolen art subjects the true owner to the nebulous, retrospective requirements of due diligence, even though he complied with the "window" in the statute.

Another related proposal, based on the idea of an international computer theft registry, would automatically stay the statute of limitations for the owner of stolen art. In this scenario, owners who reported the theft to the database and to police would always win as against a bona fide purchaser. Discussing the problems of thefts that took place before the enactment of such legislation, this proposal asserts that theft victims who wish to retain their rights should be required to register their thefts within one year of enactment.

III. Dealing With Art Stolen in the Past: A Strict Discovery Rule

It is the premise of this Note that requiring theft victims to register their stolen artworks with a computerized database would effectively reduce the trade in stolen art and would provide certainty in the law for cases of future art theft. This proposal is forward looking. Its appeal primarily rests in the incentive that such an affirmative requirement would give to owners and purchasers to register their artworks. The requirement of such a registry would clarify what steps a theft victim must take to preserve his or her rights, while negating the nebulous due diligence requirements of recent decisions. However, recent legislative proposals that require theft victims to register their stolen artworks and/or re-

171. See id. at 51-52.
172. See id. at 94.
173. This proposal predates the Hawkins et al. proposal.
174. See Bibas, supra note 2, at 2439.
175. See id.
176. See id. at 2467.
177. See Bibas, supra note 2, at 2467 (stating that the impetus behind these rules "is to generate strong incentives to investigate and report thefts").
179. See discussion supra Part II.B.2.
quire prospective purchasers to perform title searches fail to adequately address the problems of retroactivity and non-registrability.

A. Registration Requirements are Inapplicable to Past Thefts and Certain Objects

Applying a registry requirement retroactively to artwork stolen in the past would be unfair for several reasons. Applying a registry requirement retroactively to artwork stolen in the past would be unfair for several reasons. First, it would be inequitable to require past theft victims to register their art within a certain period or lose their rights. In addition, such registration would serve no purpose against current possessors or future donees of stolen art, as they would have no incentive to check the registry. A related problem is that past victims of theft may have no occasion to learn of the legislation. This issue is less acute for museums and galleries, who stay abreast of current developments, than it is for individual owners. Thus, past theft victims may either face the loss of their rights, or be disadvantaged in a due diligence inquiry. Additionally, even assuming that past theft victims are aware of a theft registry, they may well lack the photographic or descriptive documentation to take advantage of the registry. Several authors have proposed a “window” whereby past theft victims would be required to register their loss within a certain period of time. However, one such proposal is potentially inequitable, since an owner who fails to register would be banned from recovery regardless of the reason for doing so, and the other proposal adds a due diligence element into the analysis, which would not provide clear-cut guidelines.

In addition to problems of retroactivity, certain art objects, by their very nature, are not susceptible to effective registration. This issue has not been dealt with by those proposing art theft or title registries. Many objects, both ancient and modern, have distinctive characteristics that can be recorded by photographic or descriptive means, but some do not.

180. Hawkins et al. notes that for retroactivity, “the easiest approach would be to make the statute non-retroactive, except to the extent of overruling Guggenheim and retroactively applying a discovery rule” which would require a showing of due diligence on the part of the owner. See Hawkins et al., supra note 2, at 94.
181. Under the Bibas proposal, supra note 2, at 2467.
182. Under the Hawkins et al. proposal, supra note 2, at 94.
183. See Bibas, supra note 2, at 2467 (“victims [of past thefts] who wish to retain their rights to recover should be required to register their thefts with the police and the database within one year of the enactment of this proposal”).
184. See Hawkins et al., supra note 2, at 94 (proposing allowing past theft victims a two-year “window” to obtain the statute’s benefits).
185. According to Ms. Kisluk, in order for an item to be registered with the Art Loss Register, the item must be “uniquely describable” either by descriptive or photographic means. Certain types of items require a photograph, such as antique furniture. The photograph requirement can be substituted by a description if the object, such as a painting, is describable and
For example, a modern painting\textsuperscript{166} or an early Byzantine mosaic\textsuperscript{187} most likely possess sufficiently unique characteristics which make their registration feasible. However, what good would a photographic reproduction or a written description of a Roman lamp or a modern, albeit rare, American coin be?\textsuperscript{188} Such objects, while undeniably valuable, were produced on a large scale. Many archeological artifacts, especially ceramics and coins, fall into this category.\textsuperscript{189} Any photograph\textsuperscript{190} or description of such objects would be equally likely to apply to other objects in the same class. In such cases, the benefit of an art theft registry—the ability of prospective purchasers to accurately determine which objects are stolen prior to acquisition—are negated.

B. Applying the Discovery Rule to Past Thefts and Non-Registrable Objects

The most equitable way to deal with the problems of thefts that occurred prior to the implementation of a registration requirement is to apply a strict discovery rule following the decision in \textit{Naftziger}. Prior to \textit{Naftziger},\textsuperscript{191} the California legislature had clearly spoken in an attempt to deal with the problems of art and artifact theft.\textsuperscript{192} However, the theft at

\begin{itemize}
\item has an identifying signature. For items such as lithographs or prints, the item must have some type of identifying mark, such as an edition number. See Kisluk Interview, supra note 149.
\item Such as “Cliffs” and “Fragments,” which were at issue in \textit{O’Keefe}. See \textit{O’Keefe} v. Snyder, 416 A.2d 862, 865 (N.J. 1980).
\item Such as the one at issue in \textit{Autocephalous}, which the court was able to describe fairly succinctly: “[t]he mosaic, made of small bits of colored glass, depicted Jesus Christ as a young boy in the lap of his mother, the Virgin Mary, who was seated on a throne. Jesus and Mary were attended by two archangels and surrounded by a frieze depicting the twelve apostles.” \textit{Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.}, 917 F.2d 278, 279 (7th Cir. 1990).
\item For example, the 129 large copper cents stolen from the collection of 1,542 were substituted by identical, but inferior, cents by the thief. The theft was not discovered until the inferior coins were examined by an expert. See \textit{Naftziger} v. American Numismatic Soc’y, 49 Cal. Rptr. 2d 784, 787 (Ct. App. 1996). In this scenario, even individual photographs of the coins would be unlikely to establish their identity. See supra note 185.
\item For example, a list prohibiting the importation of certain objects, the Archaeological and Ethnographical Material from Peru, describes a variety of pre-Columbian artifacts that cannot be imported. 62 Fed. Reg. 112 (1997) (to be codified at 19 C.F.R. pt. 12). Many of these artifacts are generic household items, whose photograph or written description would be indistinguishable from other members of its class.
\item This is assuming, of course, that the owners of the object had the foresight to photograph the item.
\item See discussion supra Part II.A.3.b.
\item The California statute of limitations states that “the cause of action in case of theft . . . of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft.”
\end{itemize}
issue in *Naftziger* occurred prior to the enactment of the statute.\textsuperscript{193} The court implied a discovery rule without a due diligence requirement into the prior statute of limitations.\textsuperscript{194} The *Naftziger* court's decision provides a solution to the problem of retroactivity: a clear-cut rule whereby the cause of action does not begin to accrue against an owner of stolen art until he or she becomes aware of the identity of the possessor of the object, regardless of his or her diligence in searching for the object. Such a rule would provide certainty and would protect the true victim of art thefts: the original owner.

While there is no perfect solution as between two innocent parties, a strict discovery rule ensures that victims of art theft will have an opportunity to recover their art. As a matter of public policy, the victim of theft should not be left without recourse.\textsuperscript{195} While the bona fide purchaser of stolen art may recover from the individual or gallery who sold him or her the artwork,\textsuperscript{196} the victim of theft has no such option. Admittedly, the bona fide purchaser may be left without recourse depending on the facts of the particular situation.\textsuperscript{197} However, the discovery rule will help reduce art theft and the trade in stolen art as a whole. Museums, galleries, and individuals will thus be much more careful in their prospective purchases of artworks. Since purchasers will know that they can be subject to successful replevin actions if they buy stolen works, pieces that are suspect will receive careful scrutiny,\textsuperscript{198} and buyers will be hesitant to buy any work for which valid title cannot be proven. Alternatively, the prospective purchaser could demand title insurance from the gallery or auction house for the piece in question. In this scenario, the loss would be allocated to the party who can most effectively investigate the artwork's...
A strict discovery rule thus provides efficiency in the art market by reducing the impetus for art theft and sales of stolen art, ultimately reducing the need for judicial involvement in art transactions.

Applying a strict discovery rule to non-registrable objects is different. If an item is stolen after the enactment of an art theft registry requirement, the true owner would be required to alert the registry of the loss. However, if the true owner can demonstrate that the object was not registrable, registration would be excused and a strict discovery rule applied to any resulting replevin action. The reason for this departure from the general rule is simple. The policy behind an art theft registry requirement is to provide certainty to art transactions by allowing prospective purchasers to rely on the database’s indication that a particular object is not stolen. However, this policy should allow for the fact that certain items are not registrable. Thus, the burden will be on the true owner to demonstrate that the object was not subject to effective registration.

Applying a strict discovery rule to art stolen in the past and to non-registrable objects is superior to the “demand and refusal” rule and to the due diligence requirement. Both the demand and refusal rule and the due diligence requirement bring uncertainty to the art market. The demand and refusal rule as applied in art replevin actions is unfair to innocent purchasers of stolen artworks, because it keeps the bona fide purchaser in a constant state of vulnerability to suit. Under the demand and refusal rule, the owner, even if aware of the identity of the current possessor, can postpone suit indefinitely and still preserve his or her rights. The rule brings uncertainty to transactions, and renders the statute of limitations virtually meaningless. While the demand and refusal rule is a laudable attempt to preserve the rights of the owners of stolen artworks, it goes too far.

199. This would thus force galleries and auction houses to confront the “hear-no-evil, see-no-evil dilemma” which has played a major role in the trade in stolen art. See supra note 40 and accompanying text. If a gallery or auction house refused to warrant title to the artwork, the purchaser would be advised to look elsewhere.

200. Of course, since the discovery rule will be applied prospectively only for non-registrable objects, much of the theft deterrence will come from the registration requirement itself. However, this distinction is not very significant, since both the discovery rule and the registration requirement will make it harder for thieves to dispose of stolen art.

201. In the Bibas scenario, a true owner who failed to notify the registry of his or her loss should lose as against a bone fide purchaser. See Bibas, supra note 2, at 2465-67. Since the rationale behind an art theft registry is to alert prospective purchasers that the art is stolen, this impetus will be lost unless the true owner has an incentive to notify the register. See id.

202. The “non-registrability” exception to the registration requirement should not be seen as a loophole to benefit “lazy” owners who fail to register and spuriously claim that their artwork was not registrable. The law should presume that all artworks are registrable. The true owner could overcome this presumption by a preponderance of the evidence.

203. See supra notes 84-85 and accompanying text.
far. By placing the costs on the bona fide purchaser, the demand and refusal rule unfairly places all the costs on one party.\textsuperscript{204}

The due diligence requirement also brings uncertainty to the art market, albeit by different means. While the demand and refusal rule brings uncertainty to transactions, the due diligence requirement brings uncertainty to case law as well. The requirement that a victim of theft be "diligent" in searching for his or her artwork in order to preserve his or her rights often seems reasonable at first. However, given the realities of the art world,\textsuperscript{205} and the general lack of judicial guidelines as to what constitutes due diligence, it is not. Additionally, public policy will often militate against a due diligence analysis for art stolen in the past.\textsuperscript{206} Cases indicate that due diligence is a fact specific analysis that varies from situation to situation.\textsuperscript{207} Due diligence requires that the court make evidentiary findings as to which party did what. Since courts have no clear guidelines to follow, results will necessarily vary. Most significantly, the common law rule that a thief cannot pass valid title is more likely to be effectuated by a strict discovery rule than by the due diligence requirement.\textsuperscript{208} The due diligence requirement and the demand and refusal rule

\textsuperscript{204} For example: a painting valued at $50 is stolen from Mr. A in 1950. In 1980, A learns that it is being held by a museum, a bona fide purchaser. At the time, Mr. A does nothing; perhaps the value of the painting does not make it worth his while to actively pursue its return. In 1990, learning that the painting is now valued at $30,000 and is about to be sold to a private party, Mr. A demands its return—perhaps so he can make the sale himself. Under the demand and refusal rule, Mr. A would prevail, even though he sat on his rights for ten years.

\textsuperscript{205} See supra notes 35-38, 40 and accompanying text.

\textsuperscript{206} For example: a painting is looted from the home of Mrs. B by the Nazis in 1939. Mrs. B is now in her 80s and living in state X which has a statute of limitations of three years for stolen property. Mrs. B. has heard rumors for the past five years that her painting is on display in a museum in state Y. Feeling that bringing suit is useless after so many years, she does nothing, until 1997 when she sees her painting in the museum's catalogue. Then, at the urging of her children, she brings suit in replevin. Should Mrs. B's suit (or that of her heirs) be barred because she was not "diligent" in searching for the whereabouts of her painting when, to paraphrase O'Keefe, she first "should have known of the identity of the possessor?" See also Tresco\textsuperscript{t}, supra note 10 (noting the reluctance of many Holocaust survivors to talk about their lost fortunes). The article reports a situation in which a family is suing the current owner for possession of a work by Degas. As one family member put it "[m]y father couldn't talk about [the loss of his family's artworks during World War II]." See id. As a matter of public policy, so long as Mrs. B (or her heirs) can prove that she was the original owner of the painting, she (or they) should win. The problems of proving ownership to art lost during and before World War II are not necessarily as daunting as they seem; the Nazis often left accurate records of what they took and where it was taken from. For example, the son of a family whose art was taken by the Nazis was able to offer as proof of ownership the shipping documents "from the truck drivers who hauled away his father's collection to Nazi offices." See Goldstein, supra note 7.

\textsuperscript{207} See O'Keefe v. Snyder, 416 F.2d 862, 873 (N.J. 1980); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg, 917 F.2d 278, 290 (7th Cir. 1990).

\textsuperscript{208} See supra note 132 and accompanying text.
are, in essence, on two opposite ends of the spectrum: the due diligence requirement unfairly punishes victims of theft who have not comported with its unclear standards, and the demand and refusal rule unfairly punishes bona fide purchasers by keeping them perpetually subject to suit.

A strict discovery rule is preferable to both the demand and refusal rule and the due diligence requirement, since it sits in the middle of the spectrum. It does not unfairly require owners to be diligent, nor does it unfairly prejudice bona fide purchasers by keeping them perpetually subject to suit. A strict discovery rule, as applied in Naftziger, is a directive which is both clear and easy to apply.209 Once the owner becomes aware of the identity of the possessor of the stolen artwork, he or she has a specified time210 to bring action. If the owner does not bring action, the title vests in the bona fide purchaser. The owner's action after discovering the possessor's identity is the dispositive factor, rather than a hindward looking analysis of whether the owner was "diligent" in searching for the artwork. The discovery rule utilized in this context will conserve judicial resources by negating a court's need to evaluate conflicting evidence as to whether the true owner was diligent. In addition, cases in which a bona fide purchaser brings suit to establish title to a painting, claiming that the true owner was not "diligent," would effectively be barred altogether.211 Furthermore, a strict discovery rule would provide certainty in the art market, even in cases in which the theft predates specific art theft legislation. Finally, a uniform rule will reduce forum shopping.

Conclusion

Art theft has been around for a long time, and it is unlikely to go away. Art theft has given rise to the dilemma of how to decide ownership

209. Thus, following Naftziger, Mrs. B gets her painting back. See supra note 206. Why should others profit from Mrs. B's misfortune when the law can easily provide a remedy? The hypothetical case of Mrs. B is of increasing relevance. The question of how to determine ownership of items looted during World War II is becoming the subject of increasing litigation in United States courts. See supra note 7.


211. Thus, situations such as that in Erisoty would be barred. See Erisoty v. Rizik, No. Civ. A. 93-6215, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995). In Erisoty, three Corrado Giaquinto paintings were stolen from Souraya Rizik's home in Washington, D.C. in 1960. See id. In 1988, a cleaning service found one of the paintings, "Winter," while cleaning out a home in Philadelphia. See id. The owner of the cleaning service, Kern, consigned the painting to the Slosberg auction house, who sold it to the Erisotys for $29,050. See id. The paintings were recovered from the Erisotys by the FBI and returned to the Riziks. See id. The Erisotys then brought an action against the Riziks seeking title to the painting. See id. The Erisotys claimed in essence that the Rizik's efforts to locate the painting were not sufficiently diligent to toll the statute of limitations. See id.
between two innocent parties: the owner, as victim of the theft, and the innocent purchaser of the stolen artwork. Common law solutions to the problem of when an art replevin action is barred by the statute of limitations have produced conflicting requirements both for true owners and bona fide purchasers. Judicial responses have been more of a Band-Aid than a cure for the problems of art theft. They do not provide clear-cut directives for parties and other courts to follow, nor do they provide incentives that will help stem the flourishing illicit art market.

Legislation that requires victims of art theft to register their stolen works and/or that requires purchasers to do a title search in order to preserve their rights is desirable. Such legislation would serve to hinder the illicit art market and would thus reduce art theft in the future. It would provide clear-cut guidelines that courts, institutions, and individuals could follow. However, legislation that imposes an affirmative duty for art theft victims to register their stolen works could not be equitably applied retroactively to the great deal of art which has already been stolen. In addition, certain objects are not registrable. What are necessary to deal with the problems of prospective retroactivity and non-registrability, which will arise after the implementation of such legislation, are clear-cut guidelines that provide certainty to art replevin actions. Applying a strict discovery rule following Naftziger, so that the cause of action for victims of art theft does not begin to accrue until the owner discovers the identity of the possessor of the artwork, is the best solution to the problem of prospective retroactivity. A strict discovery rule applied in this context is superior to other common law doctrines because it protects victims of art theft from losing their right of action to the nebulous, hindward looking analysis of due diligence. It is fairer to bona fide purchasers than the demand and refusal rule, since it does not allow owners to sit on their rights indefinitely. Thus, once an owner becomes aware of the identity of the possessor of the art, he or she would have to bring a replevin action within a prescribed period or lose his or her rights to the art. Finally, a strict discovery rule will provide certainty to an area of law which can most accurately be described as confused.

212. Such as legislation following that proposed by Bibas, supra note 2, at 2439, or Hawkins et al., supra note 2, at 90-93.