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THE GOOD FAITH ACQUISITION OF STOLEN ART

John Henry Merryman¹

Abstract

Good faith purchasers of stolen goods fare differently in Western legal systems. American rules favor the owner, while the civil law world protects the good faith purchaser. Oddly, this striking difference is misunderstood or denied or both by American scholars. American lawyer-economists who have considered which is the better rule differ in their perceptions and conclusions, as do the positions taken by non-economists. A related difference exists in the application of statutes of limitation in good faith purchaser cases. Proposals that it would be fairer to split the loss seem bound to fail. A solution involving the Art Loss Register and the New York courts' use of the laches doctrine is more promising.

*The radical defense of ownership is one of the less satisfactory aspects of Roman law. Modern legal systems, and also some ancient ones, have striven to arrive at more equitable solutions, . . .*²

*Whereas most continental legal systems protect the bona fide purchaser, English and American law only exceptionally grant him such protection.*³

Comparative lawyers know that substantive private law rules in Western legal systems are much alike. Most of the really interesting differences between the civil law and common law appear in the law of procedure. I here consider one

1. My colleague Richard Craswell guided me to obscure sources, discussed ideas, made suggestions and criticized drafts of this article and probably should be listed as a co-author. I am also indebted to Lawrence Friedman, Paul Goldstein, Marina Schneider, Kurt Siehr, Stephen Urice and Luis A. Anguita Villanueva for their suggestions and criticisms and to Susan Cameron for noteworthy research assistance.

2. Yaron, "Reflections on Usucapio," 35 *Tijdschrift voor Rechtsgeschiedenis* 191, 223 (1967).

3. Sauveplanne, "The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law," 29 *Rebels Z.* 651 (1965).

of the rare substantive law examples of direct opposition,⁴ with particular attention to the world of art.

The glamor of art insures that the theft of a valuable work, if publicly revealed, will be widely reported in the media. It is also likely to be recorded in the Art Loss Register, of which more below. Such publicity significantly contracts the thief's market. Indeed, in many cases the owner (or the owner's insurer) is the thief's best market, and much stolen art is held for ransom. Still, stolen art sometimes enters the marketplace and is acquired in good faith by innocent purchasers. This article reconsiders the law applicable to such cases.⁵ Our category includes losses during war and occupation: the many thousands of works of art that were seized by the Nazis or otherwise displaced in the disorder and opportunism created by World War II⁶ and subsequent conflicts.⁷

The radical defense of ownership

4. I know of only two situations in which substantive civil law and common law private law rules are directly opposed: forced inheritance in the civil law, as contrasted with the freedom to disinherit children and other blood relatives in the common law; and protection of the good faith purchaser against the owner in the civil law, contrasted with "radical protection of ownership" in the common law.

5. Antiquities stolen from private collections and museums are treated as "works of art" for the purposes of this article. Antiquities "stolen" from illegally excavated sites in source nations, however, raise a rich group of quite different issues that are not discussed here. For a collection of materials see Chapters 3 and 4 of John Henry Merryman, Albert E. Elsen & Stephen K. Urice, *Law, Ethics and the Visual Arts* (5th ed. 2007).

6. In 1994, Lynn Nicholas published *The Rape of Europa*, a systematic historical account of the Nazi looting machine. In 1995, Hector Feliciano published *Le musée disparu*, which appeared in English as *The Lost Museum* in 1997, tracing the whereabouts of works looted in France. Feliciano revealed that nearly 1,000 such works were held in French museums (and a handful were in the collections of American and other museums). In January, 1995, the first international academic symposium on the displacement of art during World War II was held in New York. The publication of the symposium papers appears in Elizabeth Simpson, ed., *The Spoils of War* (1997).

7. See Patty Gerstenblith, "From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century," 37 *Georgetown J. Of Int'l. L.* 245 (2006).

In 1946, Edward Elicofon, a Brooklyn lawyer, bought a pair of paintings from “an American serviceman” returning from Germany. The paintings, which Mr. Elicofon later learned were valuable works by Albrecht Dürer, belonged to the *Kunstsammlungen zu Weimar* (KZW), a Weimar museum. They had been stolen in 1945 from storage in a German castle. In 1969 the West German government, later succeeded as plaintiff by KZW, sued Elicofon in the federal district court to recover the paintings, and the Grand Duchess of Saxony-Weimar, whose family had once owned the paintings, intervened as plaintiff.

Although rich in character, incident and arcane legal issues, the case ultimately became a classic dispute between the foreign owner of stolen property and the American good-faith purchaser. The court, applying the standard American rule concerning the sale of stolen movables to a good faith purchaser, held for the owner, and the paintings returned to Weimar.⁸

Such cases present the Eternal Triangle of movable property law: A owns something valuable that B steals, and C eventually buys it in good faith. B, having played his brief part, has left the stage, and only A and C remain. Can A recover the valuable object from C? In American law the prevailing rule (to which the exceptions need not detain us here) is that A can recover the stolen object and need not compensate C. Even though the good faith purchaser is by definition blameless, he is left to his remedy against B, if he can find him and if B can be made to pay, as to which the odds are not good. A similar rule prevails in some other common-law countries.

In the civil-law world the precise rules vary from nation to nation, but in general the law is significantly kinder to the good faith purchaser and less so to the owner.⁹ That is why, in the *Elicofon* case, the American defendant sought to

8. *Kunstsammlungen zu Weimar v. Elicofon*, 678 F. 2d 1150 (2d Cir. 1982). There is a comment on the decision in 23 *Harv. Int'l L.J.* 466 (1983). For an interesting attempt by an investigative reporter to reconstruct the theft, see Leslie Maitland, “From Schwarzburg to Flatbush: The Mysterious Journey of Hans and Felicitas Tucher,” *ARTnews*, September 1981, at 78. For a West German comment on the case, see Ulrich Drobniig, “Amerikanische Gerichte zum Internationalen Sachenrecht auf dem Hintergrund der Teilung Deutschlands,” 4 *IPRax*61 (1984).

9. The most thorough comparative discussion of the good faith purchaser of movable property is a study by Professor Jean-Georges Sauveplanne of Utrecht: “La protection de l’acquéreur de bonne foi

persuade the court to apply German law, while the East German plaintiff successfully argued that the American rule should apply.

In an influential article published in 1987, Professor Levmore pursued his theoretical argument that there will be variety among legal systems' treatment of the good faith purchaser of stolen movables because "Reasonable people can disagree over whether [the owner or the bfp] is the second-best target of the law-enforcement system." Levmore briefly examined the solutions in ancient near eastern law, post-biblical Jewish law, Roman and modern French law, American law and Mongolian tribal law and found that the extreme variety of solutions they displayed was consistent with his theory.¹⁰ That article appears to have been misread by Professor Landes and Judge Posner,¹¹ who, as we shall see below, cite it to support their statement that providing "complete legal protection of the original owner vis-a-vis the good faith purchaser" is "the standard legal position in most countries."¹²

In fact, complete legal protection of the owner is the standard legal position only in the United States and perhaps a few other relics of the British Empire. In a far greater number of countries the good faith purchaser receives significantly kinder treatment. As Professor Sauveplanne observed: "Whereas most continental legal systems protect the bona fide purchaser, English and American law only

d'objets mobiliers corporels: Etude de droit comparé préparée par M. Jean Georges Sauveplanne, Secrétaire général adjoint de l'Institut," *U.D.P. 1961 - Etudes: XLV. Acquereur de bonne foi - Doc. 1* (1961). The study was prepared for a project of the International Institute for the Unification of Private Law ("Unidroit") in Rome to prepare a proposed uniform law on the topic and is published in the *UNIDROIT Yearbook* 1961, 43ff.. The project is described below. A briefer English language version of his study, covering fewer legal systems, was published by Professor Sauveplanne as "The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law," 29 *Rabels Zeitschrift* 651 (1965).

10. Levmore, "Variety and Uniformity in the Treatment of the Good-Faith Purchaser," 16 *J. of Legal Studies* 43-65 (1987).

11. William M. Landes and Richard A. Posner, "The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles," in V.A. Ginsburgh and P.M. Menger (eds.), *Essays in the Economics of the Arts* 177 (1996).

12. *Id.* at 208, citing only Levmore, *supra*.

exceptionally grant him such protection....” 13

Italy provides the sharpest contrast to the American rule: in Italy the good faith purchaser becomes the owner. Italian Civil Code Art. 1153 provides:

He to whom movable property is conveyed by one who is not the owner acquires ownership of it through possession, provided that he be in good faith at the moment of consignment and there be an instrument or transaction capable of transferring ownership. Ownership is acquired free of rights of others in the thing, if they do not appear in the instrument or transaction and the acquirer is in good faith.¹⁴

The way the Italian statute works is nicely illustrated in the *Winkworth* case,¹⁵ in which Japanese works of art stolen from a private collection in England were taken to Italy, where they were bought in good faith by an Italian collector. The Italian collector later sent them to Christie’s in London for sale, and the British collector from whom they had been stolen brought an action to have the works declared his property. The British court held that the legal effects of the sale in Italy were determined by Italian law, under which the good faith purchaser became the owner, and accordingly held for the Italian collector.

The Italian statute was also applied in *Stato francese v. Ministero per i beni culturali ed ambientali e De Contessini*,¹⁶ concerning two tapestries that were stolen from a French state museum, taken to Italy and eventually bought in good faith by the defendant De Contessini. In a civil action for recovery brought by the French government, the *Tribunale* (trial court of general jurisdiction) of Rome held, as did the British court in the *Winkworth* case, that Italian law determined the legal effect of the sale to De Contessini and that under Italian law the good faith

13. Sauveplanne, “The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law,” 29 *Rabels Z.* 651 (1965).

14. Mario Beltramo, Giovanni Longo & John Henry Merryman, *The Italian Civil Code*, Art. 1153 (1969--).

15. *Winkworth v. Christie Manson and Woods Ltd.*, [1980] All ER 1121.

16. *LXI Diritto di autore* 263 (April-June 1990).

purchaser became the owner—this even though under French law the tapestries were classified as objects of artistic importance and were “inalienable.”

More typically, many civil law nations deal separately with the owner’s right to recover the object and the right of the good faith purchaser to compensation. Thus Sweden gives the owner the option to recover the object on reimbursing the good faith purchaser, and Finland has a comparable rule.¹⁷ France also permits the owner to recover the stolen work but requires him to compensate the good faith purchaser, as does Belgium.

In Chile, Civil Code article 890 provides that the owner may not recover the object from one who bought it at a fair, a shop, a store or other business establishment in which such things are sold unless he reimburses the possessor for the price he paid for it and for his expense in repairing and improving it. The Civil Code of the Federal District of Mexico, art. 799, provides that the owner may not recover a stolen object from a good faith purchaser in an auction or from a dealer in such objects unless he reimburses the possessor the price he paid for the object.

In Germany, §935 of the BGB provides that the owner may recover the stolen object, but not if the good faith purchaser acquired it at public auction. Similar rules have been adopted in Greece and Japan. In Swiss law the good faith purchaser who acquired the object at a public auction, a market or from a merchant who deals in such goods is entitled to reimbursement. A similar rule applies in Austria.

Examples of the more generous treatment of the good faith purchaser in the civil law world could easily be multiplied. It is clear that the two major Western legal traditions radically differ on this question. In addition, it is important to note that the two international conventions governing trade in art adopt the civil law position in protecting the good faith purchaser. Thus art. 7(b) of the 1970 *UNESCO Convention*¹⁸ requires the state party requesting the return of stolen

17. Sauveplanne, *cit supra* n. 6, at p. 13

18. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970*. On May 30, 2006, Zimbabwe became the 110th State Party to the Convention.

property to pay “just compensation” to a good faith purchaser,¹⁹ and art. 4 of the 1995 *UNIDROIT Convention on Stolen or Illegally Exported cultural Objects*²⁰ provides that:

The possessor of a stolen object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.

Finally we should note the fate of a serious international effort to reconcile the irreconcilable. In 1961, UNIDROIT enlisted a Working Committee to draft a proposed uniform law on “The Protection of the Bona Fide Purchaser of Corporeal Movable” in international trade. As the title suggests, the purpose was to “protect” the good faith purchaser. The basic working document was a comparative study by Professor Sauveplanne, cited above.²¹ In it he had optimistically concluded that: 1) a general rule protecting the good faith purchaser was consistent with the majority of existing laws and “not contrary to trends in systems that are not based on such a general rule;” 2) The majority of laws stating that general rule contained an exception allowing recovery from the good faith purchaser if the goods were stolen from the owner; and 3) that exception was

19. Apparently in reaction to this alien position, when the US ratified the Convention in 1972 it attached the “understanding” that:

The United States understands that Article 7(b) is without prejudice to other remedies, civil or penal, available under the laws of the states parties for the recovery of stolen cultural property without payment of compensation.

As a result, plaintiffs in American litigation seeking the recovery of stolen cultural property never rely on the Convention. They sue under state law, which does not require compensation of good faith purchasers.

20. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Property* (1995). Nigeria became the 27th State Party when it ratified this Convention on December 10, 2005. The United States has not acceded to the UNIDROIT Convention.

21. Sauveplanne, “La protection de l’acquéreur de bonne foi d’objets mobiliers corporels, *cit supra* n. 9.

limited in a number of such laws by the requirement of compensation if the good faith purchaser had acquired the object at a public auction or from a dealer.²²

In 1968 the UNIDROIT Working Committee produced a *Draft Uniform Law on the Protection of the Bona Fide Purchaser of Corporeal Movable*s incorporating those principles. When the draft was submitted to member governments for their observations, however, some of them (prominently including the U.S.) strongly objected to it. UNIDROIT then convened a Committee of Governmental Experts to consider and recommend appropriate changes in the draft. The resulting revision was published in 1975 with the significantly altered title: *A Uniform Law on the Acquisition in Good Faith of Corporeal Movable*s.²³ It provided, in Article 11, that “The transferee of stolen movables cannot invoke his good faith,” thus totally reversing the position taken in the original draft.

It is hardly surprising that no government could be found willing to organize a diplomatic conference to attempt to turn this proposed Uniform Law into an international convention. Eventually, “consensus on some of the solutions put forward in the draft having proved elusive, the subject was dropped from the UNIDROIT work program in 1985...”²⁴ And so, in its 25th year, Professor Sauveplanne’s project joined legal history’s catalog of lost causes.

WHICH IS BETTER?

Since the US rule is less favorable to good faith purchasers, it has been suggested by an influential Italian scholar that civil law nations should adopt the

22. Sauveplanne, *ibid*, p. 120.

23. The “Draft Convention Providing a Uniform Law on the Acquisition in Good Faith of Corporeal Movable” is published in 1975 (I) *Uniform Law Review* 66, together with an “Explanatory Report” by Professor Sauveplanne .in which he noted that this new draft “received a new orientation which detaches it from the principles which formed the basis of the initial draft.” *Id.* at p. 87.

24. Walter Rodinó, “Malcolm Evans and UNIDROIT: A Chronology,”
<<http://www.UNIDROIT.org/english/publications/review/articles/1998-2&3b.htm>>

US rule as a way of discouraging theft of cultural property.²⁵ A similar suggestion was made to the European Economic Community Commission in 1976 by Professor Jean Chatelain of France.²⁶ Were Professors Rodotá and Chatelain right? Would the legal change they recommend deter art theft? More generally, in a legal world divided on the effect of sale to a good faith purchaser, which is the better (better in what sense?) position? Should the same rule apply to all kinds of movable property, or do works of art call for different treatment? Here are a few ways of dealing with these questions:

Protection of ownership. This characterization obviously favors the owner. Its bias—"the radical protection of ownership"--is built into the common law and is often justified by the maxim "*Nemo plus juris transferre ad alium potest quam ipse habet*," or more succinctly "*Nemo dat quod non habet*," usually translated as "No one can transfer better title than he himself has." In effect, the maxim's legal logic reifies the owner's title, treating it as something separate from the owned object, a thing that the "holder" can "pass" or "transfer" to a donee or purchaser. When the thief steals the painting he acquires the work of art but not the owner's title, which remains with the owner. Accordingly, all the thief is able to "pass" to the good faith purchaser is possession of the painting itself. Arcane, and mildly interesting, but more a way of stating a conclusion than a reason supporting it.

The protection of ownership argument is also myopic, focused only on the owner and a subsequent good faith purchaser. A rule protecting the good faith purchaser would, however, provide a different kind of "protection of ownership."²⁷ If the owner had acquired the artwork in good faith, her title would be good against prior claimants. This title cleansing effect would both comfort the owner and produce the benign social effects attributed to settled titles to goods.

25. Stefano Rodotá, *The Civil Law Aspects of the International Protection of Cultural Property*, Report presented to the Council of Europe's XIII Colloquy on European Law (date?).

26. Jean Chatelain, *Means of Combating the Theft and Illegal Traffic in Works of Art in the Nine Countries of the EEC*, Doc. No. XII/757/76 (1976).

27. Richard Craswell contributed this insight, which the writer did not think of and none of the authors cited in this article mention.

Thus the two aspects of “protection of ownership” work in different directions. Which is the more powerful one? Would a buyer in good faith from a dealer or at an art auction prefer to get a title good against existing claims (but not against a subsequent good faith purchaser from an eventual thief) or a title subject to existing claims (but good against subsequent good faith purchasers from such a thief)? The question is complicated by art market facts, since major American dealers and auction houses generally guarantee the buyer’s title against existing claims.

Commercial necessity. Professor Sauveplanne argued that the needs of commerce require protection of the good faith purchaser because the rapid circulation of movables makes it difficult to trace their legal origin:

If every purchaser were compelled to investigate his predecessor’s title, the circulation of movable property would be seriously impaired. Therefore, as the economic importance of movables increased, the need to protect the purchaser became more urgent, and commercial interests finally outweighed concepts of legal logic.²⁸

This argument, which may be persuasive for traffic in other kinds of movable goods, seems unconvincing when applied to works of art, each of which is unique and has its own history. In art transactions, condition, provenance and authenticity often are prominent concerns. The work must be inspected for condition, and research to investigate the seller’s title and/or to establish authenticity is not unusual. Buyers and sellers willingly adopt a slower transactional pace in art transactions. Speed may still be desirable, but it ranks low on the list of considerations affecting art transactions.

Deterring theft. Here the objective is to adopt the rule that more effectively deters theft. Thus Professors Rodotá and Chatelain, as mentioned above, argued that the US rule favoring the owner more effectively deterred theft than rules like that in Italy, which favor the good faith purchaser.²⁹ Were they right? Would

28. Sauveplanne, ‘The Protection of the Bona Fide Purchaser of Corporeal Movables in Comparative Law,’ 29 *Rabels Zeitschrift* 651, 652 (1965).

29. In an article critical of statutes of limitation for stolen art, Professor Bibas makes a similar assumption: “Because statutes of limitation promote maximum marketability rather than optimum

placing the loss on the good faith purchaser, rather than the owner, discourage art theft?

It actually might do the opposite. One effective way to deter theft is for the owner to take precautions against it. A rule protecting the good faith purchaser would appear to provide incentive for the owner to increase his precautions against theft, and it would also increase the owner's inclination to insure valuable works of art against theft. Indeed, if theft deterrence were the primary objective, protecting the good faith purchaser rather than the owner would arguably be the better principle. As Professor Levmore put it: "...the more an owner is unable to recover his stolen goods, the more he may guard against theft"³⁰

Economic Analysis. Professor Harold Weinberg³¹ also recognized that shifting the loss to owners would lead to "efficiency gains," since owners are better positioned to prevent theft and may be superior insurers against risk. He suggested, however, that these increased deterrent effects might be offset by an increase in the demand for stolen art among "non-innocent shady purchasers"—people who know or suspect that the goods are stolen "but have a colorable claim of legal innocence resulting from the circumstances of their purchase." Perhaps so, though it seems more likely that a rule favoring good faith purchasers would in practice lead to a stricter and more rigorously applied definition of good faith. In the end, Professor Weinberg abandoned economics and punted to history:

Consequently, one cannot conclude that any efficiency gained by shifting the innocent purchaser risk to owners would outweigh the increase in theft-related costs that could result from this shift. One fact suggests that the existing rule of stolen-goods nonnegotiability is efficient; it has survived in

marketability, they increase the profitability of art theft and thus encourage more thefts." Bibas, *The Case against Statutes of Limitation for Stolen Art*, 103 *Yale L. J.* 2437, 2452 (1994).

30. Levmore, *supra*, at p. 46

31. Harold R. Weinberg, *Sales Law, Economics, and the Negotiability of Goods*, 9 *J. Legal Studies* 569 (1980).

the United States for over two hundred years.³²

This reference to American history, however, actually may cut the other way. Professor Weinberg does not appear to consider, and may have been unaware, that the contrasting civil law position is hardly a modern invention. Rules favoring the good faith purchaser over the owner date back to the revival of commerce in the Mediterranean in the early Renaissance and have long survived in many national legal systems.³³ If survival were the appropriate measure, should those rules displace the U.S. rule?

In an interesting article Professor Landes and Judge Posner³⁴ specifically address works of art, which “share several characteristics that make ownership disputes both more likely to arise than in the case of other goods and more difficult to resolve when they do arise.” Their approach to the stolen art problem is summarized in the following way:

[T]he more rights that the original owner has against a purchaser of a stolen work (even though many transactions may separate the purchaser from the thief), the lower will be the price at which a thief can sell a work of art, thus reducing the incentive for art theft. But the less will be the incentive of the owner to protect his property against theft, which will reduce the cost of stealing to the thief. Analysis of the optimal legal regime is complicated....³⁵

The authors describe and pursue the complications, employing an economic model expressed in formidable equations with Greek-letter terms, as well as more familiar forms of argument. They conclude that:

32. *Id.* at 586

33. See Sauveplanne, *cit supra* n.10 at 652ff.

34. William M. Landes and Richard A. Posner, “The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles,” in *Essays in the Economics of the Arts* (V.A.Ginsburgh and P.-M. Menger (Eds.) (1996).

35. *Id.* at 184. This statement appears to be inconsistent with the authors’ later statement that “the social benefits of deterring theft strengthen the economic argument for returning the work to the owner.” *Id.* at p. 215.

If our analysis is correct, the costs of favoring original owners...are probably small, implying that the benefits, which we have no reason to believe are small, outweigh them. This implies in turn that the rule that maximizes social welfare is...complete legal protection of the original owner vis-a-vis the good faith purchaser. This is the standard legal position in most countries [citing only Levmore, *supra*]. A purchaser, even though he honestly and reasonably believes that he has acquired a good title, does not acquire a good title from a thief; and there is no exception for art.³⁶

As we have seen above, Professor Levmore's article does not support the statement that complete protection of the owner is "the standard legal position in most countries." On the contrary, Levmore demonstrated the existence of a variety of legal positions, most of which did not provide complete protection of the owner. It is not clear why Landes and Posner sought support in the "standard position" generalization for their conclusion, which seemed to be independently based on their elaborate economic argument, that the American rule was the better one. Nor do they explain the basis for their statement that "there is no exception for art." These omissions will be considered below.

Professors Alan Schwartz and Robert Scott also offer an economic analysis of the owner/good faith purchaser problem.³⁷ They first observe that the present American rule appears to be inefficient, but they then inquire whether an economic justification for it can be "constructed." They construct one by comparing "the costs of reducing the risk of theft with the value of the risk." They assume that the value of recovered goods to the owner is likely to be low (because the goods have been used, and possibly abused, and because the owner may already have replaced them) while the purchasers will place a relatively higher value on the same goods. In a footnote, however, the authors recognize that their constructed argument would not apply to "goods such as jewels or paintings, which do not depreciate and are not used in the conventional sense."³⁸

36. *Id.* at 208.

37. Alan Schwartz and Robert E. Scott, *Sales Law and the Contracting Process* (2d ed. 1991) pp. 508-10.

38. "This statement appears in *id.* At fn. 10, p.509.

Corrective Justice. Professors Schwartz and Scott also consider a “corrective justice” analysis of the owner/good faith purchaser puzzle: “A corrective justice theory provides that a plaintiff cannot prevail against a defendant unless the defendant has wrongfully harmed some interest of the plaintiff.” The good faith purchaser, by definition, neither knew nor had reason to know of the theft: “he merely did what anyone would do—buy goods at a fair price.” The thief was a wrongdoer, but the good faith purchaser was not. Schwartz and Scott conclude:

Thus, the theft rule is troubling because it seems incorrect on corrective justice notions and at best weakly explicable and justifiable on economic grounds.

And, as they stated in the cited footnote, the US rule would not be even “weakly explicable and justifiable” on economic grounds if the stolen object were a work of art.

At this point it appears that the case for the American rule favoring the owner of stolen art over the good faith purchaser is, at best, uneasy. “Protection of ownership” is less a reasoned argument than a statement of a conclusion that the owner wins. Commercial necessity would actually favor the good faith purchaser of many other kinds of traded goods, although it seems less applicable to the art trade. As to theft prevention, protecting the good faith purchaser may encourage more and better protection against theft than protecting the owner. Among the economic analyses, Professors Weinberg and Landes and Judge Posner labor to justify the American rule. But Professors Schwartz and Scott find that rule to be “at best weakly explicable and justifiable on economic grounds” as to some goods and neither explicable nor justifiable on economic grounds when applied to works of art. And when Professors Schwartz and Scott turn to “corrective justice,” they find the American rule to be “incorrect.”

Art-specific considerations. We have seen that a rule favoring the good faith purchaser of stolen movable property may, on theft deterrence, economic and corrective justice grounds, be preferable to one favoring the owner. Are there additional considerations peculiar to works of art that would favor one or the other party?

Elsewhere I have described the special kind and degree of public importance of and interest in works of art and other cultural property³⁹ and have proposed an ordered triad of art policy objectives that can be summarized as “preservation, truth and access.”⁴⁰ Preservation is of course fundamental; destruction of the work of art destroys the possibility of further study and enjoyment; damage limits it; modification misdirects it. Next comes truth in the broad sense: i.e., the valid learning and enjoyment the work of art can provide. Finally, we want the work to be optimally accessible for study and enjoyment.

As to preservation, it is clear that theft is not good for works of art. Reports of the theft of paintings often state that the canvases were “cut from their frames” by the thieves. The quoted phrase merely illustrates the probability that a stolen work will be damaged in any of a number of ways during its theft and clandestine possession by the thieves. Theft for ransom, a major motive for art theft, may actually contemplate deliberate damage to the work in order to hasten lagging response to ransom demands. Thus the rule that more effectively deters theft more effectively deters possible damage to the work of art. We have seen that the rule favoring the good faith purchaser may more effectively deter theft.

These considerations also argue against the Landes and Posner statement that “the costs of favoring original owners...are probably small”⁴¹ On the contrary, where works of art are concerned the social costs of favoring owners may be demonstrably high. Society’s interest in the preservation of, the truth derivable from, and access to works of art, all of which are threatened by theft, would be advanced by the rule that better deters theft, which appears to be the rule that protects the good faith purchaser.

SPLIT THE LOSS?

39. Merryman, “The Public Interest in Cultural Property,” 77 *Calif. L. Rev.* 339 (1989); *id.*, “The Nation and the Object,” 3 *International Journal of Cultural Property* 81 (1994), both reprinted in John Henry Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* 94 and 158 (1999), referred to herein as *Critical Essays*.

40. *id.*, “The Public Interest in Cultural Property,” 77 *Calif. L. Rev.* 339 (1989), *Critical Essays* 94.

41. Note xx and related text, *supra*.

If neither the bereft owner nor the good faith purchaser of the stolen work of art is at fault, why should the law allocate the entire loss to one or the other? An action to recover a work of art is, in the words of Jeremy Epstein, a leading New York litigator:

the classic zero-sum game. At the end of the litigation, one party emerges with the artwork, and the other party leaves with nothing. Although settlements can “split the baby,” I have seen no judicial decision that apportiones the value of a work between the claimants. The harshness of this result does push parties toward a settlement, but there are always cases that cannot be settled.⁴²

Right. If both are innocent victims of the theft, why should one emerge whole and the other bear the entire loss? Would it not be fairer to divide the loss between them? Loss sharing certainly is not unknown in the law. Comparative negligence is an obvious example,⁴³ and there is growing doctrinal and judicial support for loss sharing as a contract remedy.⁴⁴ The long-established institution of general average in maritime law provides an additional example.⁴⁵ A little reflection quickly produces others.⁴⁶

In their elegant paper-in-progress on windfalls, Professors Parchomovsky, Siegelman and Thel make a general case for loss-splitting in a variety of

42. Epstein, “The Hazards of Common Law Adjudication” in Kate Fitz Gibbon (ed.), *Who Owns the Past? Cultural Property, Cultural Policy, and the Law* 123, 127 (2005).

43. Giuseppe Dari-Matteucci & Gerrit De Geest, “The Filtering Effect of Sharing Rules,” *34 J. Legal St.* 207 (2005).

44. See Trakman, “Winner Take Some: Loss sharing and Commercial Impracticability,” *69 Minn. L. Rev.* 471 (1985); Polinsky, “Risk Sharing through Breach of Contract Remedies,” *12 J. Legal Stud.* 427 (1983).

45. The leading work on general average is Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules* (11th ed. By D.J.Wilson & J.H.S.Cooke 1990)

46. For example, both judicially encouraged settlements and alternative dispute resolutions often have loss-splitting effects.

situations.⁴⁷ With specific reference to the good faith purchaser problem they state:

Saul Levmore's comparison of the treatment of the Bona Fide Purchaser problem across various legal systems provides a kind of anthropological support for our argument. . . . The fact that different legal systems offer quite different doctrinal responses to the same problem suggests that no single solution is obviously optimal. It further suggests that nobody should be aggrieved if our judicial system formally comes to this conclusion as well.⁴⁸

To date, however, our judicial system has shown no disposition to soften its radical protection of ownership or weigh it against splitting the loss between the equally innocent owner and good faith purchaser. Should it do so?

Epstein argues that "there is no insuperable impediment to a more flexible judicial approach. Many cases would benefit from a court-ordered compromise," and he provides a persuasive illustrative example that would, however, require determination of the artwork's value at two widely separated dates.⁴⁹ And there's the rub: establishing the value of a work of art on which plaintiff and defendant will often disagree will itself be a litigious enterprise.

Thus Professor Levmore, in his brief discussion of loss-sharing between the owner and the innocent purchaser,⁵⁰ states that one reason it has not been widely adopted in stolen property cases is that a sharing rule generates significant valuation problems for the fact finder (and attendant legal costs) that all-or-nothing rules typically do not incur. That would certainly be true in art theft cases, where every work of art is unique and there is no convenient, authoritative

47. Parchomovsky, Siegelman and Thel, *Of Equal Wrongs and Half Rights*, U. Penn. L. Sch. Public Law and Legal Theory Research Paper, Series No. #06-34.

48. *Id.* at p. 40. Levmore describes loss-sharing under a Mongolian rule of 1640 that awarded the better part of a sheep (the head) to the owner and the inferior part (the rump) to the good faith purchaser.

49. Epstein, "The Hazards of Common Law Adjudication," in Kate Fitz Gibbon (ed.), *Who Owns the Past? Cultural Policy, Cultural Property, and the Law* 127 (2005).

50. Levmore, *supra*, at 63-65

schedule of art values. Whether the social value of fairness in splitting the loss would outweigh such administrative costs, as Levmore suggests, is an unresolved question.

AS TIME GOES BY...

We must remember this, as time goes by the good faith purchaser and others come to rely on settled appearances in arranging their lives, and it seems increasingly unfair to upset their expectations. One purpose of the statute of limitations (or in civil law nations “prescription”) is to protect the expectations that grow out of that sort of reliance. If the good faith purchaser acquired the object in the ordinary course of trade there is a distinct but related social interest in promoting the dependability of commercial transactions. Further, as time passes, memories fade, witnesses and principals die or disappear, and evidence grows stale. Another purpose of the statute of limitations is to avoid the resulting opportunities for fraud and injustice. Finally, economists tell us that it is socially undesirable for wealth to be immobilized by uncertainty.

Each of these concerns grows stronger with the passage of time, and the gravity of each is independent of the owner's state of knowledge about the circumstances of the theft or about the identity or whereabouts of the stolen object or its possessor.⁵¹ Following this line of thought, it would appear that the statutory period should run from the date of theft.

In the United States, however, consistently with our legal system's radical protection of ownership bias, a strong tendency has grown up to think of statutes

51. As one might expect in nations that favor the innocent purchaser, time is more likely to begin running sooner than in the U.S. There are an extensive description of the British and briefer descriptions of other European applications of time limits in Redmond-Cooper, “Time Limits in Art and Antiquity Cases,” 4 *Art, Antiquity and Law* 323 (1999) and 5 *id.* 185 (2000). As to the French situation, see Le Bars, “La computation des délais de prescription et de procédure,” *Sem. Jur. ed. gen.* 27 Sept. 2000, page 1747; Bandrac, “Les tendances récentes de la prescription extinctive en droit Français, 46 *Rev. Intl. Droit Comparé* 359 (1994). *Cf.* Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription* (2002).

of limitations almost as though they were crystallizations of the owner's obligation of due diligence: one who fails to exercise her cause of action within the statutory period loses it for lack of diligence. Following that line of thought, it seems unfair to penalize an owner for lack of diligence in pursuing a cause of action she does not know she has. As a result, in most American states the limitation period does not begin to run until the owner knows, or should with reasonable diligence have known, that her Matisse has been stolen or until she discovers who possesses it. This is the so-called "discovery" rule, which in practice has tended to become become a "discoverability" rule.

In New York, the center of the art world, which has a "demand and refusal" rule, the situation is complicated, as is illustrated in the interplay of two cases: *DeWeerth v. Baldinger*⁵² and *Solomon R. Guggenheim Foundation v. Lubell*.⁵³ *DeWeerth* was a diversity action to recover a Monet painting stolen in Germany during World War II. In 1985 DeWeerth discovered that Baldinger, a good faith purchaser, had the painting and demanded its return. Baldinger refused, and DeWeerth sued in the U.S. district court to recover the painting. Applying what it thought to be New York law, the court found (1) that the action was instituted within the statutory period of three years from the demand and refusal and (2) that DeWeerth had met New York's requirement of reasonable diligence in seeking to find and recover the Monet between the time it was stolen and her discovery that Baldinger possessed it. On appeal the Second Circuit reversed, finding that on the facts that DeWeerth had not shown the reasonable diligence required by New York law.⁵⁴

In *Solomon R. Guggenheim Foundation v. Lubell*, a Chagall gouache was found missing from the Guggenheim Museum's collection in the late 1960s, but the Museum did not inform the police or take any other action to publicize the loss. Lubell bought the gouache in good faith from a New York gallery in 1967. In 1985 the Museum learned that Lubell had the work, demanded its return, Lubell refused, and the Museum sued in a New York state court. The trial court found for Lubell, reasoning that by failing to report the theft or take other appropriate

52. 658 F. Supp. 688 (S.D.N.Y. 1987).

53. 77 N.Y.2d 311, 567 N.Y.S.2d 623 (1991).

54. 836 F.2d 103 (2d Cir. 1987).

measures to find and recover the Chagall the Museum had been insufficiently diligent to postpone the running of the statute of limitations. On appeal, the decision was reversed. The New York Court of Appeals held that, in applying the statute of limitations, the owner had no duty of reasonable diligence (thus also holding that the federal district court in *DeWeerth* had incorrectly stated and applied New York law). The Court, however, added that the defendant could raise the defense of laches on remand.

In 1983, California enacted a form of the discovery rule specifically applicable to art cases: Code of Civil Procedure § 338(c) provides that the three-year limitation period does not begin to run “until the discovery of the whereabouts of the article by the aggrieved party.” The California statute was applied in *The Society of California Pioneers v. Baker*⁵⁵ and *Naftzger v. American Numismatic Society*,⁵⁶ in both of which the defendants were found to be good faith purchasers. Still, the owners prevailed in these cases, as in most art law cases involving the statute of limitations, which for obvious reasons seldom runs against the owner in the U.S.

Thus in the current American climate, concern for the owner dominates, and courts embrace "notice" and "demand and refusal" preconditions for the running of the statute of limitations.⁵⁷ At the extreme one arrives at Governor Mario Cuomo's statement, when he vetoed a bill that would have tilted application of New York's statute of limitations slightly less strongly against the good faith purchaser, that he would not permit New York to become "a haven for stolen art." Thus the substantive vulnerability of the good faith purchaser under our property rules is compounded by the observable fact that the statute of limitations seldom

55. 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865 (1996).

56. 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784 (1996),

57. For a full discussion and citation of authorities see John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics and the Visual Arts* 992-999 (5th ed. 2007). For a fervid argument opposing the application of statutes of limitation in art cases see Bibas, “The Case Against Statutes of Limitation for Stolen Art,” 103 Yale L.J. 2437 (1994), and *cf.* Eisen, “The Missing Piece: A discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World,” 81 J. Crim. L. & Criminology 1067 (1991).

runs against the owner in American art theft cases: a sort of double whammy.⁵⁸

Since the *Lubell* case, however, New York courts have applied the laches doctrine in favor of good faith purchasers in two cultural property cases. In *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*,⁵⁹ the plaintiff sought recovery of a 10th century palimpsest manuscript of works by Archimedes, and in *Hutchinson v. Horowitz*⁶⁰ the plaintiff claimed a painting by Theodore Robinson. In both cases, citing *Guggenheim*, the court dismissed plaintiffs' actions on laches grounds. Such cases raise the possibility that the *Guggenheim* doctrine may actually work to protect good faith purchasers by requiring plaintiffs to demonstrate due diligence. This is, of course, a two-edged sword; defendants will also be held to a demanding standard of due diligence, as Epstein explains:

Since *Guggenheim* the strongest defense available to an owner is often based on the doctrine of *laches*; that is, did the claimant delay unreasonably in asserting his claim, and did that delay prejudice the owner? The lawsuit thus evolves into a diligence contest: if a plaintiff is to overcome a *laches* defense, he must demonstrate that he and/or his ancestor undertook a continuous and diligent search for the work in question. The owner, in turn, must demonstrate that she too was diligent in her scrutiny of the work's provenance at the time of acquisition, and that she did not overlook any title flaws that a careful search would have uncovered. Each side strains in a race to find fault with the other....⁶¹

58. Accord: Landes & Posner cit. supra n. 8 at p. 202, speaking of American law: "The longer the statute of limitations is, the greater the rights of the original owner are....this would argue for setting no deadline for suing a purchaser of art from a thief. In substance though not in form, this is the tendency of the case law."

59. *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 98 Civ. 7664 (KMW), 1999 U.S. Dist. LEXIS 13257, 1999 WL 673347 (S.D.N.Y. 1999).

60. No. 604942/97, slip opinion (S. Ct. New York County, Jan. 8, 1999).

61. Epstein, "The Hazards of Common Law Adjudication," in Kate Fitz Gibbon (ed.), *Who Owns the Past? Cultural Policy, Cultural Property, and the Law* 127 (2005).

WHAT IS TO BE DONE?

The fate of Professor Sauveplanne's project, described above, dampens any expectation that the American rule might be changed to protect the good faith purchaser of stolen art. Nor does there appear to be a bright future for loss-splitting proposals. Radical defense of ownership remains firmly entrenched in American law.

Nevertheless, the pattern for a fairer solution to the stolen art problem already exists in the familiar and widely understood system of real property title security. As all readers know, that system has three essential components:

1. An accessible, searchable record.
2. The rule that recording puts prospective acquirers on notice.
3. The rule that good faith purchasers are protected.

In adapting these components to deal with art theft, when a loss is discovered the owner lists the loss in a searchable record of stolen art or risks losing his rights to a good faith purchaser. A prospective purchaser is placed on notice by the record, is bound by it and can rely on it. There are some kinds of cultural property problems (in particular, antiquities removed from undocumented sites) that such a system could not resolve. But it can deal more cleanly, efficiently and fairly with the common run of stolen art cases.

Such a system has in fact been slowly building in the art world for decades. It had its roots in the stolen art records of the Art Dealers Association of America⁶² and the International Foundation for Art Research (IFAR)⁶³ and has

62. The Art Dealers Association of America (ADAA) began to circulate notices on art thefts to its members in 1962. This service was gradually extended to non-member dealers and auction houses, museums, police departments, insurance companies, the FBI, U.S. Customs Service, and international law-enforcement agencies. In 1986 the ADAA published its last notice, at which time it made its records available to the International Foundation for Art Research (IFAR).

63. IFAR was founded in 1969 as a not-for-profit organization. In 1976, it set up an Art Theft Archive and began to collect stolen art reports. Since 1985, the foundation has published IFAR Reports, a

grown into the computerized, digitized and widely consulted Art Loss Register (ALR).⁶⁴ The ALR includes among its shareholders the major international auction houses and a number of art trade organizations. In addition, 193 insurance companies in Europe, North America, Australia, and New Zealand subscribe to the ALR.⁶⁵

All that would appear to be needed to take the next step, under current New York law, is for the courts to rule that an owner who fails to report a theft to the Art Loss Register is chargeable with laches by a good faith purchaser. Other states could be expected to follow New York, the center of the art world, either by applying laches doctrine or by simply finding that the owner who did not register her loss had failed to be duly diligent.

The adoption of such a system would also affect the application of statutes of limitation/prescription, as shown in *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, discussed above. There the plaintiff in the action to recover the palimpsest argued for application of the New York statute of limitations, rather than prescription under French law. In response Judge Kimba Wood held that:

Even if the Court were to conclude that New York law applied to determine the rights of the parties, defendants' laches defense bars the Patriarchate's

valuable journal that provides information about recently reported catalogued stolen art, and carries articles on art theft and authentication. In 1991, IFAR licensed the newly founded International Art Loss Register (ALR) to use its records in that organization's computerized database of stolen art and antiques.

1.

64. The Art Loss Register, <<http://www.nawcc.org/headquarters/members/alr.htm>> which was established in 1991, is based in London and New York. It is a private enterprise that advertises itself as “the world’s largest database of stolen art and antiques dedicated to their recovery.”

65. <<http://icom.museum/object-id/final/08-arttrade.html>> this site also includes basic information about other sources of information concerning stolen art, including Trace magazine, established in 1988, and the Tracer database, established in 1995, and the Register of Stolen Antiquities, established by the International Association of Dealers in Ancient Art (IADAA) in 1994.

claim to the Palimpsest.

The further development of an Art Loss Register-based solution in stolen art cases faces a variety of questions. Some might wonder, for example, whether it is appropriate for a private, unregulated register of stolen art to serve as the centerpiece of a judicially applied title security system. On reflection, perhaps that is not a real problem. Since the ALR is at present the most publicly available (for a modest fee) and widely used register of lost and stolen art, how could a bereft owner who failed to use it be found to have taken appropriate measures to publish her loss?

Among other questions, who should be considered to be on notice of entries in the Register: auction houses that already routinely consult the ALR, certainly; dealers, probably; major collectors, perhaps; but what of inexperienced collectors and casual buyers with no intention to collect? What should be the “grace” period—the time within which an entry in the Register should be made in order to have the desired notice effect--and what should be the consequences of sale to a good faith purchaser during the grace period? And so on, sufficient unto the day....

CONCLUSION

The contrasting treatment of good faith purchasers in the US and in the civil law world is an oddity, a rare example of opposing substantive private law rules in the two major traditions of Western law. America’s preference for the radical defense of ownership and the civil law’s bias toward protection of the good faith purchaser are irreconcilable, as the failure of Professor Sauveplanne’s UNIDROIT project amply demonstrates. Perhaps we should not be surprised to have found that the same clash of preferences is evidenced in the rules governing the effect of the passage of time on the rights of the parties.

The difference irresistibly invites evaluation: which is the better system? It is possible that for some kinds of objects one could settle for the proposition that the American position seems to work well enough for Americans, and the civil law position suits civil lawyers. But when we focus on art theft we ask a less provincial question: which approach to the good faith purchaser problem better

supports humanity's interest in the preservation of, the truth obtainable from, and access to these unique, irreplaceable human artifacts that are, in the words of the 1954 *Hague Convention*,⁶⁶ "the cultural heritage of all mankind?"

Even as to ordinary movables, the lawyer-economists and other wise doctors whose views are described in this article appear to agree that legal protection of the good faith purchaser may more strongly deter theft than the American rule, although the differential effect may be small and there may be offsetting social costs. But where artworks are involved the public interest in theft deterrence is magnified and generalized, while the offsetting social costs diminish, and the case for protecting the good faith purchaser becomes stronger. Still, even if there were general agreement among American academics and art world actors that protection of the good faith purchaser is the better rule, the prospective effort required to promote its adoption in the American states is daunting and the probability of success limited. And the result of all that effort would still be an all-or-nothing solution to the problem.

The New York courts' recent revival of the laches doctrine and the growing influence of the Art Loss Register suggest a better, more achievable strategy: encouraging the evolution, already in progress in New York, of a loss registration-based⁶⁷ legal regime. Such a regime would more fairly deal with the parties in art theft cases and obviate the necessity of an all-or-nothing choice between the owner and the good faith purchaser of stolen art.

END

66. *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954). The quoted language appears in the Preamble. The topic is explored at length in my article "Cultural Internationalism," 12 *International Journal of Cultural Property*

67. A register of lost and stolen art is a good start, but it soon becomes apparent that a register that permitted owners of works of art to record their ownership would be a useful addition. The ALR has established such a register. This and other ALR features are described at <http://www.artloss.com/content/history-and-business> .

