CONTEMPLATING LAWSUITS FOR THE RECOVERY OF SLAVE PROPERTY: THE CASE OF SLAVE ART

I. INTRODUCTION

In recent years, courts have become a popular site for people seeking restitution for property stolen during the Nazi era. Particularly, owners and descendants of owners are bringing claims to recover art stolen by the Nazis during World War II (hereinafter "WWII"). While these claims face many legal obstacles, courts have demonstrated a willingness to facilitate the recovery of stolen or lost art and cultural property.[1] Courts have evidenced an increased desire to protect the theft victims and their rights to recovery and have even gone so far as to modify traditional legal doctrines like the statute of limitations. The proliferation of cases involving art and property stolen during WWII stems from the widespread looting and unprecedented thievery, especially of art, that took place by the Nazis during this period.[2]

In the United States, we are beginning to hear claims for the return of property taken many decades before WWII. The plight of African-American slaves was not unlike that of Jews in WWII Europe in terms of the confiscation of their basic human rights, including the right to possess and own property. One can logically conclude that any property slaves possessed, acquired, or created was subject to taking by non-slaves.

Although African-American slaves never possessed property on the scale of that held by European Jews, slaves did nonetheless express themselves through craftsmanship and art, thus creating what is now considered folk art. Individuals and museums currently possess crafts and works of art executed by former slaves; and questions remain as to who actually owns these pieces and whether title is valid. While descendants of former slaves have yet to raise such issues, this situation is not entirely unlikely, especially considering that museums and others are potentially profiting from the possession of the property in question.

The treatment of stolen cultural property and art is a delicate and complex matter, which often involves two innocent parties: the victim of the theft (or their descendants) and a bona fide purchaser of the stolen property.[3] Claims by such owners are further complicated by the amount of time

1. Stephen A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2449 (1994).

2. HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 3 (1997).

3. Kelly Diane Walton, *Leave No Stone Unturned: The Search For Art Stolen by the Nazis and the*

that has elapsed since the actual theft. These claims by owners and their descendants brought sometimes decades after the property was initially taken raise issues regarding, not only whether the parties have standing to sue, but most importantly whether the claim is barred by the statute of limitations.[4]

The problems courts face in dealing with these claims reveal inadequacies in the law in dealing with such issues involving actions dating back, in some cases, generations and present challenges regarding the purpose of the statute of limitations and its application in art theft situations.[5] The statute of limitations, a central legal construct in Anglo-American law, plays a key factor in determining whether true owners can even bring claims to recover their stolen property. As a result, limitation periods are often detrimental to true owners' attempts to regain their stolen property.[6] Although statutes of limitation serve rational purposes in the context of the law, the burdens imposed by such limitations in the context of stolen art recovery often lead to extremely unfair results.[7] Where statutes of limitations are strictly construed to run from the time the theft occurs, true owners, who are unable to locate the whereabouts of the stolen art within the specified period, are prevented from recovering their property, despite their ownership rights.[8] The thief or the subsequent purchaser of the art is able to keep their stolen treasure if the true owner fails to take appropriate action or is unable to act before the statute of limitations expires.[9]

While the statute of limitations has the potential to and sometimes does punish the victim or plaintiff in certain situations, the benefits of such statutes are believed to outweigh the unjust results.[10] Regardless of the potential for harsh outcomes, courts generally uphold and enforce statute of limitations defenses, even where doing so prevents the victim from recovering. In the context of stolen art, especially art stolen by Nazis during WWII, courts have been somewhat more lenient in their interpretations of the statute of limitations. In this context, courts have recognized the significant financial and emotional interests associated with these cases. While statutes of limitations generally serve to benefit the defendants, in cases regarding stolen art, courts have applied a modified statute of limitations rule which favors the plaintiff or rightful owner. The plaintiff-friendly treatment courts have dis-

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Legal Rules Governing Restitution of Stolen Art, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 577 (1999).

4. Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT'L & COMP. L. 23, 32 (1996).

5. Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art,* 17 CARDOZO ARTS & ENT. L.J. 447, 455 (1999).

6. *Id.* at 455-56.

7. Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 DUKE L.J. 337, 345 (1993).

8. 32 AM. JUR. 3D *Proof of Facts* § 129 (2002).

9. Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 977 (2001).

10. 32 AM. JUR. 3D *Proof of Facts* § 129 (2002).

played in art theft cases gives strength to the idea that slave descendants could successfully bring claims for recovery of their ancestors' artwork.

II. EXAMPLE OF SLAVE ART: PAINTING AND CHURCH ALTAR PIECE

While the theft of art and cultural property is not a recent phenomenon, the issue of how best to treat stolen art has been promulgated by the claims to recover from the widespread theft that occurred at the hands of the Nazis in WWII. Although such claims have revealed the inadequacies of the law in resolving issues of stolen art, these Nazi era claims are not the only instances in which such legal problems may arise. Until now, reparations for crimes committed against African-American slaves have been based on recovery in the form of compensation for lost labor. But, how would the law treat modern claims to recover property stolen from a slave almost 150 years ago?[11] Can a descendant of a slave bring a claim to recover property such as art, created by the deceased slave? And, if so, what are the chances of recovery? Because courts have allowed descendants of Holocaust victims to bring claims to recover art and other valuable property which the Nazis looted over fifty years ago, the notion of slave descendants bringing claims to recover art and artifacts created by their ancestors is not entirely inconceivable. Given the fact that slave art and artifacts exist today, and that this property is most likely held by individuals other than the slaves' descendants, the possibility of claims brought by descendants of the original owners to recover this stolen property does exist.

Let us imagine that a painting executed by a slave in Greene County, Alabama, was stolen or disappeared in 1850 and now hangs in the Smithsonian American History Museum. Assume successors of this slave artist identify the painting as having been painted by their ancestor. While such an identification by the descendants is unlikely to occur, especially with the lack of records and the more than 150 years that have elapsed, such discovery is possible if the slave signed or marked the piece in a certain manner, or perhaps his style or subject matter is identifiable based on other known examples of his work. One can assume that the painting has changed hands many times since its theft in 1850 and that chain of title records do not extend back to 1850. The museum, who is a subsequent good-faith purchaser or possessor, is undoubtedly benefiting from possession of this piece, as are museums and purchasers of art looted by the Nazis. Although the property was once stolen, the passage of time since the original theft presents substantial legal obstacles regarding the descendants' rights to recovery.

In a second example, assume an altar piece designed and executed by a slave stands in a church in Greene County, Alabama. This piece was created in 1850 and acquired by this same church at that time. The altar piece has

11. Michelle E. Lyons, *World Conference Against Racism: New Avenues for Slavery Reparations?,* 35 VAND. J. TRANSNAT'L L. 1235, 1244 (2002).

remained in the possession of the same church, which is still in existence today. One can likely imagine that the descendants of this slave continue to reside in Greene County and are aware of their ancestor's creations. Like the museum in the first scenario, the church has been undoubtedly enriched by its possession and use of the altar piece. Because the church was the original possessor/thief of the piece, it, unlike the museum, was directly involved in the original action to deprive the slave of his property. Although the altar piece is arguably a product of slave labor, for purposes of this Comment, the piece is examined in the context of stolen or lost property.

Each of the aforementioned scenarios evokes questions of ownership and the right to recover stolen property. Individuals and institutions are undoubtedly being enriched from possession of the pieces. But, do the current possessors actually own these pieces art or have the slaves' descendants retained ownership rights in the property? Should the museum and the church be allowed to profit from the misfortunes of the slaves simply because the slaves have long since died and the statutes of limitations expired? Should descendants be able to bring claims on behalf of their ancestors over 150 years later? Do the descendants have any right to the property or any claims for its recovery? These questions illustrate the complexity of the situation and the competing interests (i.e., the true owner's descendants versus the subsequent innocent purchaser/possessor) involved, which render reaching an equitable and fair result virtually impossible.

III. LEGAL ARGUMENT: HOW WOULD THE LAW TREAT CLAIMS BY THE SLAVES' DESCENDANTS?

If a descendant were to bring such an action to recover his or her ancestor's stolen or lost art, the plaintiff would face a host of obstacles inherent in our legal system, which generally bars claims for actions that occurred in the distant past.[12] The law's unwillingness to deal with old or stale actions is based on logistical concerns, such as destruction of evidence over time and death of the parties involved, as well as the judicially imposed limitations on actions.[13] With doctrines such as the statute of limitations, the law actually limits the amount of time in which a victim of theft can bring a claim to recover his or her stolen property; and after expiration of that period, recovery claims are barred. Because courts have not yet been faced with this question regarding ownership and recovery of slave art, the general treatment of stolen art, especially during the Nazi era, provides the best guidance as to the manner in which courts would handle these claims.

12. Paulina McCarter Collins, *Has "The Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 129-30 (2002).

13. DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987).

A. Establishing a Claim

Typically owners seeking recovery of stolen property bring actions under the traditional tort theory of replevin. Replevin is "[a]n action for the repossession of personal property wrongfully taken or detained by the defendant."[14] Most claims to recover stolen art are brought as actions of replevin. Because replevin is a tort claim, it is subject to statute of limitations restrictions, which present a serious obstacle for suits involving actions from the distant past.[15]

To assert a claim for replevin, the plaintiff must prove the following three elements: "(1) his or her title or right to possession, (2) that the property is unlawfully detained, and (3) that the defendant wrongfully holds possession."[16] The passage of time since the actual theft presents serious problems for this situation, not only because of the statute of limitations, but also in terms of the descendants' ability to establish the elements of a replevin claim.

After the descendants have located or discovered the piece in question and identified the piece as having been painted or created by their ancestor, they must then be able to demonstrate ownership rights in the object.[17] Because title to personal property generally does not automatically pass down from generation to generation, and because records of title dating back over 150 years are unlikely to exist, the descendants may be hard pressed to establish a right to possess the property. However, because a thief cannot pass good title, even to a good faith purchaser for value, the possessor of the stolen property cannot have valid title to the property.[18] Furthermore, a piece of cultural property such as a painting which was taken from the original artist under unusual and extreme circumstances might garner preferential treatment by the courts, as evidenced by heirs of Holocaust victims who brought claims to recover art stolen from their families during WWII.[19] Courts have generally allowed such heirs and descendants of Holocaust victims to bring claims to recover art stolen from their families by the Nazis. Courts have also been willing to permit suits for slave era actions against corporations that were in existence at the time the action occurred.[20]

In addition to establishing ownership rights, replevin also requires the descendants to prove that the property is "unlawfully detained" and that the defendant's possession is "wrongful."[21] Where the defendant is a subse-

14. BLACK'S LAW DICTIONARY 1302 (7th ed. 1999).
15. 54 C.J.S. *Limitations of Actions* § 211 (1987).
16. Memorandum from Eric Miller, to Professor Alfred Brophy, The University of Alabama School of Law (Mar. 11, 2003) (on file with author).
17. *Id.*
18. Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982).
19. Walton, *supra* note 3, at 579.
20. Anthony J. Sebok, *Should Claims Based on African-American Slavery be Litigated in the Courts? And if so, How?*, Find Law's Legal Commentary, *at* http://writ.news.findlaw.com/sebok/20001204.html (Dec. 4, 2000).
21. Memorandum from Miller, *supra* note 16.

quent possessor, not the thief, his possession becomes wrongful when the true owner discovers or should have discovered his possession of the stolen piece or when the defendant refuses the owner's request to return the property.[22] All claims for recovery of slave art would be against a subsequent, and likely innocent, purchaser or possessor because the actual thieves are not alive. Because an action for replevin seeks return of the stolen property, the defendant is liable only for his current unlawful possession of the stolen painting and not for the actual theft. The descendants would not have to link the defendant to the actual theft or establish successor liability because the claim is for this defendant's actions, namely his wrongful possession. "The issue litigated is the present right to the possession of the property in controversy, and the purpose of the action is to determine who shall have possession of the property sought to be replevied."[23]

In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*,[24] the church brought a replevin action to recover Byzantine mosaics which were stolen from the church when the Turks invaded and conquered the region.[25] The defendant, who was an art dealer, had purchased the mosaics and argued for her rights to their possession. The court concluded that the church satisfied the elements of replevin because it had not authorized the removal or sale of the mosaics.[26] Further, because thieves cannot pass good title in stolen property, the court held that the defendant did not acquire valid title in the mosaics.[27]

B. The Rationale of Statutes of Limitations

Irrespective of the cause of action or the rights and liabilities of successors in interest, the statute of limitations has the potential to completely bar claims after the passage of a certain period of time. Because these limitations on actions are a key factor in the ability of a slave or descendant to bring a claim to recover stolen property, determining the manner in which the statute of limitations applies to this issue is a necessary step in the analytical process. Since this issue has yet to be decided in the courts, contemplating the effect of the statute of limitations on these situations requires exploring the rationale and framework behind these time bars, as well as examining courts' interpretations and applications of the doctrine to cases involving recovery of stolen art and cultural property.[28]

The statute of limitations is "[a] statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the

22. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 432-33 (N.Y. 1991).
23. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 290 (7th Cir. 1990).
24. *Goldberg*, 917 F.2d at 278.
25. *Id*. at 282.
26. *Id*. at 291.
27. *Id.* at 292.
28. Cuba, *supra* note 5, at 455.

injury occurred or was discovered)."[29] When the cause of action accrues, the victim has a right to bring suit and the statute of limitations begins to run.[30] Thus, the crucial inquiry is determining the point at which the cause of action accrues. "In an action of replevin, or other action for the recovery of personality, the statute of limitations generally begins to run at the time of the wrongful taking, and not from the time when plaintiff first had knowledge thereof, if there was no fraud or attempt at concealment."[31]

The statute of limitations is intended to compel victims to bring claims in a timely manner, "thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."[32] The statute of limitations serves two broad purposes, the first of which is to protect defendants and courts from "false or fraudulent claims that might be difficult to disprove if not brought until after relevant evidence has been lost or destroyed and witnesses have become unavailable."[33] Secondly, "entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time."[34] These limitations on actions were not designed to protect criminals from subsequent liability, but rather to bar stale claims.[35] In theory, the older the claim, the more difficulty courts have in deciding the matter due to lack of sufficient and reliable evidence. "Timely adjudication is intended to ensure that fresh evidence is used to decide questions of fact and that witnesses are available to testify."[36]

Despite the legitimate rationale behind the statute of limitations, courts have strayed from these time bars in certain art theft cases.[37] Specifically, courts have suspended the running of the statute of limitations on claims by plaintiffs whose art and property was stolen by Nazis in WWII, in part because of the specific circumstances of the theft and the difficulties the true owners faced in their attempts to recover their stolen property. That is, compliance with the statute of limitations rule for bringing timely actions would have been utterly impossible for Holocaust victims and their descendants. In situations such as this, the statute of limitations is interpreted differently by different courts in an effort to reach a more equitable result.[38] One problem with courts adopting various interpretations and applications

29. BLACK'S LAW DICTIONARY 1422 (7th ed. 1999).
30. C. Clifford Allen & Patricia Jean Lamkin, Annotation, *When Statute of Limitations Begins to Run Against Action for Conversion of Property by Theft,* 79 A.L.R.3d 847 (1977).
31. 54 C.J.S. *Limitations of Actions* § 211 (1987).
32. BLACK'S LAW DICTIONARY 1422 (7th ed. 1999).
33. Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975).
34. *Id*.
35. Cuba, *supra* note 5, at 460.
36. *Id.*
37. *See generally* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991); O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).
38. Walton, *supra* note 3, at 579.

of the statute of limitations is that the law regarding the recovery of stolen property becomes less clear and less certain.

C. Statute of Limitations and Actions to Recover Stolen Art

The statute of limitations on claims to recover stolen property in actions of conversion and replevin generally begins to run from the time the action accrues, which in most cases of stolen property is the point at which the theft occurs.[39] Despite this general rule, the application of the statute of limitations in cases involving stolen property depends on the jurisdiction and the doctrine/rules which a particular court adopts for such actions. In certain situations, such as those involving stolen art, courts have modified the traditional statute of limitations rule in order to reach a more equitable result.

1. Adverse Possession

Due to the unique circumstances and interests involved in stolen art cases, especially those resulting from WWII and other such cultural atrocities, courts have looked beyond traditional property doctrines in efforts to reach the most appropriate result to dilemmas which often involve two innocent parties: the true owner and the subsequent good-faith purchaser. In *O'Keefe v. Snyder*,[40] the New Jersey Supreme Court recognized that the doctrine of adverse possession, which courts typically use to determine conflicts involving stolen property, is not suitable in situations involving stolen art.[41]

The problem with adverse possession is the doctrine's "open and notorious" element, which mandates running of the statute of limitations if the possession of the stolen item is "open, visible, and notorious."[42] The definition of "open and notorious" is particularly obscure for objects of personal property, such as stolen art, which can be displayed in remote, hidden locations undetectable by the true owner. Art on display in a person's private home could potentially meet the open and notorious requirement, while at the same time remaining hidden from the true owner.[43] The statute of limitations standard under the doctrine of adverse possession makes recovery by true owners, who have no knowledge of the thief's identity or the location of the stolen art, virtually impossible because these owners can do little or nothing to toll the statute of limitations.[44] In its dismissal of adverse possession as a viable approach to handling such stolen art cases, the New Jersey

39. Allen & Lamkin, *supra* note 30.
40. 416 A.2d 862.
41. *Id.* at 872.
42. *Id.* at 871.
43. *Id.* at 871-72.
44. Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225, 228 (1997).

Supreme Court held that in cases involving personal property, such as objects of art, the "equitable considerations" of the discovery rule afford "a more satisfactory response than the doctrine of adverse possession."[45]

2. The Discovery Rule

The discovery rule, which the majority of states including New Jersey have adopted, is applied to determine when the cause of action accrues, which in turn triggers the statute of limitations.[46] The discovery rule mandates that the statute of limitations on actions to recover stolen property begins to run when the true owner discovers or should have reasonably discovered "his cause of action and identity of the possessor of the chattel. Subsequent transfers . . . are part of the continuous dispossession of the chattel from the original owner . . . subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule."[47]

The owner's due diligence and actions to locate the stolen property determine whether and when the statute of limitations begins to run.[48] While the discovery rule places the burden of proving due diligence on the owner seeking recovery of his property, the rule also rewards diligent efforts of the owner by tolling the running of the statute of limitations until the diligent owner has or should have located the stolen property.[49] The consideration of diligence has "gained prominence as a means to circumvent the time bar to actions after expiration of the statute of limitations."[50] The duty of due diligence has also been widely used in art theft cases, "particularly for recovery cases of World War II vintage and others relating to political upheavals, wars and civil disruptions."[51] In these situations, due diligence serves as a means of allowing diligent owners to bring claims that would otherwise have been barred by the statute of limitations.

One reason courts have adopted a more lenient, plaintiff-friendly, sympathetic statute of limitations standard for these situations is due to the fact that "[t]racing and tracking personal property, and particularly art, can be difficult under ordinary conditions, and impractical when the dispossessed have more pressing concerns and needs."[52] Courts appear to be moving toward a more equitable analysis of art theft cases and in doing so have made concessions for victims of theft in certain situations. Because courts have disregarded or modified statute of limitations in cases involving theft during war and other such extreme circumstances, one could argue that claims regarding theft of slave property should receive similar treatment. The fact

45. *O'Keefe,* 416 A.2d 872.
46. *Id*. at 874.
47. *Id.* at 874-45.
48. *Id.* at 870.
49. *Id.* at 872.
50. 1 JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 2:69 (2002).
51. *Id.* at § 6:130.
52. *Id.*

that courts have allowed such victims and their heirs to bring claims that otherwise would be barred by the statute of limitations implies that courts believe these victims deserve recovery, irrespective of legal restrictions, like the statute of limitations.

The *O'Keefe* court believed that the discovery rule would "fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen."[53] This statement reveals the tension between the two fundamental challenges courts face in such situations: struggling to accurately and consistently use the law to reach decisions, while at the same time achieving fair results. With the discovery rule, courts have not completely abandoned the requirement of a statute of limitations for stolen art claims, but merely altered its application to provide the owner with a greater likelihood of recovering the stolen property.

3. The Demand and Refusal Rule

While New Jersey and a number of other states continue to use the discovery rule, New York, which is the center of the art world in America, uses the demand and refusal rule to determine the point at which the cause of action accrues in art theft cases. Simply stated, the demand and refusal rule, like the discovery rule, is "a judicial doctrine reinterpreting the statute of limitations."[54] Where the true owner brings an action to recover property from a subsequent innocent possessor, the demand and refusal rule dictates that "the relevant statute of limitations begins to run upon the owner's demand for return of the art work and the possessor's refusal."[55] Thus, this rule enables a good-faith innocent purchaser or possessor of stolen property to lawfully retain the property until the point at which the possessor refuses the owner's request to return the property.[56] Conversely, when the claim is against the thief, who possesses the property, the statute of limitations "runs from the time of the theft, even if the property owner was unaware of the theft at the time that it occurred."[57] Unlike the discovery rule, which requires some due diligence on the part of the owner to toll the statute of limitations, the demand and refusal rule tolls the statute of limitations irrespective of the owner's diligence in actions to recover lost or stolen art.[58] The timing of the owner's demand for stolen artwork and the good-faith purchaser's refusal to return it are the sole factors in determining the merits of a statute of limitations defense.[59]

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53. *O'Keefe,* 416 A.2d at 873.
54. Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 360 (1993).
55. Hoelzer v. City of Stamford, 933 F.2d 1131, 1138 (2d Cir. 1991).
56. *See id.*
57. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991).
58. *Hoelzer*, 933 F.2d 1131.
59. *See Lubell*, 569 N.E.2d at 429.

New York did not implement the demand and refusal rule in direct response to stolen art cases; rather the demand and refusal rule was and still is New York's law governing the statute of limitations for claims regarding stolen chattels of any kind.[60] As New York courts began to face decisions involving recovery of stolen art, in particular art stolen by the Nazis during WWII, the application of the demand and refusal rule to determine the point of accrual of the cause of action produced results which satisfied both the state and federal courts which have ruled on this law.[61] As the case law on this issue evolved, the demand and refusal rule has been clarified and solidified as the means by which New York evaluates the statute of limitations for claims involving stolen art.[62]

Menzel v. List[63] was one of the first significant cases in which New York courts applied the demand and refusal rule to a claim for a painting stolen during WWII.[64] By allowing the statute of limitations to remain tolled until the point at which the demand and subsequent refusal occur, this rule preserves the true owner's claim for recovery for a potentially infinite amount of time until the owner discovers the location of the stolen art. In *Menzel*, the plaintiff's claim to recover a painting stolen twenty years prior to the adjudication was not barred by the statute of limitations because the manner in which the demand and refusal rule determines accrual of the cause of action rendered this temporal limitation on actions a virtual non-issue.[65] In a sense, the use of the demand and refusal rule allows courts to preserve the integrity of the statute of limitations by altering the point at which the cause of action accrues, rather than completely disregarding the statute of limitations. The effect of this tinkering with "when" an owner has a right to a claim appears to create the type of situation which the statute of limitations was enacted to prevent, i.e., the plaintiff bringing claim for recovery of an item which has long since been out of the owner's possession.[66] This tolling of the statute of limitations serves to aid victims of theft in the recovery of their property.

Following *Menzel*, the Second Circuit in *DeWeerth v. Baldinger*[67] construed New York's demand and refusal rule to include an obligation of diligence on the part of the owner in his or her efforts to locate and demand return of the stolen property.[68] If the owner fails to meet this "reasonable diligence" requirement, the elements of which were not clearly specified by

60. *Id*.
61. Robert Schwartz, *The Limits of the Law: A Call For a New Attitude Toward Artwork Stolen During World War II,* 32 COLUM. J.L. & SOC. PROBS. 1, 9-10 (1998).
62. *Lubell,* 569 N.E.2d at 429; Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1158 (2d Cir. 1982).
63. 267 N.Y.S.2d 804 (N.Y. 1966).
64. *Id.* at 806.
65. *Id.* at 809.
66. United States v. Kubrick, 444 U.S. 111, 114 (1979).
67. 836 F.2d 103 (2d Cir.1987).
68. *Id.* at 108-109.

the court, his or her action is barred by the statute of limitations.[69] Under this interpretation of New York's law, which resembles the discovery rule, the statute of limitations is tolled only if the owner diligently attempts to locate the stolen chattel.[70] The due diligence requirement creates a middle-ground between the almost unconditional, indefinite tolling of the limitations period allowed by the demand and refusal rule,[71] and the more rigid, traditional rule for replevin, under which the "statute of limitations generally begins to run at the time of the wrongful taking."[72]

Subsequent to the *DeWeerth* decision, the New York Court of Appeals in *Solomon R. Guggenheim Foundation v. Lubell*[73] flatly rejected the Second Circuit's imposition of a due diligence requirement and specifically stated that diligence on the part of the owner had no effect on the statute of limitations.[74] The rationale behind New York's refusal to adopt a due diligence requirement stems from the fear that additional restraints on art theft victims' ability to bring claims to recover the stolen art would "encourage illicit trafficking in stolen art."[75] As New York observes, a diligence obligation could make art theft more rewarding because "[t]hree years after the theft, any purchaser, good faith or not, would be able to hold onto stolen art work unless the true owner was able to establish that it had undertaken a reasonable search for the missing art."[76] New York recognizes "that lost art is extremely difficult to recover, and a policy determination that the burden of proving ownership should not be shifted onto the 'wronged owner' who has already suffered the theft of valuable property."[77]

The reluctance of New York to impose any prerequisites on the tolling of the statute of limitations for owners' recovery claims demonstrates that New York is primarily concerned with protecting the true owners and facilitating the recovery of their property. In embracing a rule which allows the owner to recover from almost any person, including good-faith purchasers, at virtually any time after the theft, New York has replaced the defendants' protection afforded by the statute of limitations, with an overwhelmingly pro-plaintiff approach. Where the purpose of the statute of limitations is to provide defendants with assurance that they will not face charges on an action after a certain amount of time has elapsed, the demand and refusal rule almost completely abandons this protection for defendants in art theft cases, regardless of whether the defendant has innocently purchased the stolen art. As the *Lubell* court held, "[w]hile the demand and refusal rule is not the

69. *Id.* at 108-10.
70. *Id.* at 108-09.
71. *See* Ashton Hawkins et al., *A Tale of Two Innocents: Creating An Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art,* 64 FORDHAM L. REV. 49, 51 (1995).
72. 54 C.J.S. *Limitations on Actions* § 211 (1987).
73. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991).
74. *Id.*
75. *Id.* at 431.
76. *Id*.
77. Hoelzer v. City of Stamford, 933 F.2d 1131, 1137 (2d Cir. 1991).

only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property."[78] This support of the demand and refusal rule suggests a belief that the benefits of removing the temporal limits on bringing actions in art theft cases merit eliminating the certainty and formal stability provided by such limitations on actions.

Although the demand and refusal rule provides virtually no protection to the innocent good-faith purchaser of stolen art, this result is in keeping with the underlying principle of property law that a thief cannot pass good title in the stolen property, even to an innocent good-faith purchaser.[79] While the *Lubell* court practically eliminated the statute of limitations as a viable defense for good-faith purchasers of stolen art, the court did note that the defense of laches is available to good-faith purchasers who performed a diligent investigation into the status of the art prior to their purchase.[80]

As demonstrated in the cases, the courts' strong sympathy for the victims of stolen art and their willingness to bend or amend the traditional notion that claims should be time-barred suggests that claims by slave descendants might not be dismissed by the statute of limitations. The fact that courts have modified the law to allow victims of WWII theft to recover their looted art, suggests that courts are considering the situation of the theft victim and the circumstances under which the theft occurred when determining whether to allow a recovery claim to be brought. Because the slaves, like the Jews in WWII, lived in conditions of extreme oppression and thus had no resources or avenues to pursue in locating their property, these factors tend to imply that slave claims might also receive sympathetic treatment from the courts.

IV. ALTERNATIVE CAUSE OF ACTION: UNJUST ENRICHMENT AND RESTITUTION

While recovery of personal property is generally brought under the theory of replevin, the descendants seeking recovery of their ancestor's property could also bring a claim under the equitable doctrine of unjust enrichment. Unjust enrichment, which has traditionally served as an equitable remedy, has been gaining prominence as an independent cause of action. Because unjust enrichment is an equitable action, it is at times more flexible and forgiving than are the standard tort claims. An unjust enrichment claim "merely asks the court to do justice, or 'equity,' by returning lost property to its rightful owner" and as such, "it is not affected by statute of limitations in exactly the same way as claims for damages in tort might be."[81]

78. *Lubell,* 560 N.E.2d at 430.
79. Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1160 (2d Cir. 1982).
80. *Lubell*, 569 N.E.2d at 431.
81. Sebok, *supra* note 20.

A claim of unjust enrichment arises when "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."[82] In connection with unjust enrichment, the duty of restitution arises when an individual "has tortiously obtained, retained, used, or disposed of the chattels of another[.]"[83] A person whose chattel is stolen or wrongfully taken has a right to restitution from the thief and from any subsequent purchasers or possessors.[84]

Although state laws may differ slightly as to the elements of unjust enrichment, this claim generally requires the plaintiff to demonstrate that the "defendant was enriched; the enrichment was at plaintiff's expense; and circumstances were such that equity and good conscience require defendant to make restitution."[85] Where the plaintiff states a valid claim for unjust enrichment, courts generally require the defendant to return "the unjust enrichment, including gains later made from it.[86] Unjust enrichment claims can be brought against any person who has benefited from the possession or use of a stolen item, regardless of the person's involvement in the initial taking. In the case of a stolen or wrongfully taken chattel, each and every person who subsequently possesses the chattel is arguably unjustly enriched. Unjust enrichment claims do not expire with time and can be passed down to heirs. "For example, U.S. law does not generally permit a thief's children to benefit from the father's theft."[87]

In recent years, actions against participants of slave labor and other such crimes against humanity have been brought under theories of ". . . property and restitution law. The legal claim they make against banks, insurance companies, and corporations that assisted genocide and slavery is not that the firms committed those acts, but that they didn't return the property . . . of the victims of genocide and slavery."[88] The lost property in question is the hypothetical wages that slaves should have earned for their labor. While reparations for slaves and their descendants have been framed as claims for lost wages, lost labor, and human abuse and mistreatment, these approaches have not been successful in courts because of the legal constraints and difficulties inherent in such claims. Reparations have yet to be sought for lost or stolen personal property, other than the lost wages argument. A claim for unjust enrichment regarding possession of a piece of slave art might be more capable of satisfying the elements necessary to support a successful

82. RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937).
83. *Id*. at § 128.
84. *Id*.
85. 2 JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 11:33 (2003).
86. Joe E. Feagin, Inclusion in Asset Building: Research and Policy Symposium: Documenting the Costs of Slavery, Segregation, and Contemporary Discrimination: Are Reparations in Order for African Americans? 1 (2000) (unpublished working paper commissioned by the Center for Social Development) (on file with author).
87. *Id.*
88. Anthony Sebok, *In America, Legal Advocates for Slavery Reparations Are Relying on the Cold Logic of Property Law, Not the Moral Force of Human Rights. It Might Well Work, But at What Cost?*, 2002-OCT Legal Aff. 51 (Sept. 2002).

claim. In the more general claims for reparations, because the victims of the injuries in question have long since died, it is questionable as to whether the current descendants really have a claim for the injuries suffered by their ancestors. However, in claims to recover stolen or lost property, like the painting and the altar piece, the descendants have a better claim because they are seeking return of property or enrichment from that property, in which they have potential rights of ownership.

A plaintiff may also have a better claim against a defendant today for unjust enrichment resulting from the benefits of having possessed the stolen art. Because unjust enrichment claims for lost wages and slave labor require the plaintiff to locate a defendant who can be held liable for receiving a benefit from money taken 150 years ago, recovery from this type of claim are difficult if not impossible to support. Alternatively, claims of unjust enrichment stemming from possession of a painting are bought against defendants whose unjust enrichment is apparent from their current possession of the property.

Claims for actions that are more current and more specific are generally stronger and more likely to succeed than old claims for general and speculative actions. The Reparations Assessment Group of legal experts "advocate bringing claims for unjust enrichment against anyone who currently possesses property, or the fruits of property, that resulted from torts inflicted on African American Slaves."[89] The possessors of the stolen painting and altar piece appear to fall into this category. Despite the potential strength of an unjust enrichment claim for recovery of the stolen art, this claim is not intended to serve as reparations for the injustices suffered by slaves. This claim is merely for the recovery of a piece of art and any benefits derived from its possession.

V. CONCLUSION

While a claim by a former slave's descendants to recover a piece of art will undoubtedly face a host of legal obstacles, the pro-plaintiff, pro-recovery mentality exhibited by courts in their treatment of actions to recover Nazi-era and other such stolen art and cultural property lends support to claims to recover slave property. Although the likelihood of a descendant locating and identifying his ancestor's property might appear remote, the fact remains that slave art does exist and its possessors are undoubtedly benefiting from its possession. Furthermore, because a thief cannot pass good title, serious questions arise regarding whether the possessor has valid title or the right to possess the property in question.

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89. Lyons, *supra* note 11, at 1260.