A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property

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I. THE PROBLEM

1. *The Problem and the Challenge*

It has been said that trade in stolen art and antiquities is "the second biggest international criminal activity after narcotics,"[1] and it is estimated to net from one to ten billion dollars annually.[2] Since much of this trade occurs across state borders, it is relevant to the law of conflict of laws. Conflicts scholars can neither prevent nor reduce this illicit trade. Nevertheless, they can contribute by assisting in the development of an international consensus about which law should govern the rights and obligations of the disputants once the stolen property surfaces. This Article is intended to encourage and contribute to the development of such a consensus.

2. *A Typical Case: The Stolen Angels*

The impetus for this Article and the source of the Author's interest in the subject is *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,[3] a fairly typical[4] and

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1. Sydney M. Drum, Comment, DeWeerth v. Baldinger*: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 909 (1989).

2. For other cases involving stolen artwork or antiquities, see Michele Kunitz, *Switzerland and the International Trade in Art and Antiquities*, 21 NW. J. INT'L L. & BUS. 519 n.2 (2001); Jonathan C. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 468 n.12 (1988); Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17 (1993); James Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 INT'L LAW 835 (1985) (providing various estimates). *But see* JESSICA L. DARRABY, ART, ARTIFACT, AND ARCHITECTURE LAW § 6:117 (2004) ("Illicit art is big business and makes good press; what the real numbers are in dollar terms is not known, and purported estimates are simply speculations.").

3. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). The discussion hereinafter is confined to the district court decision. The Author served as pro bono consultant to plaintiffs and their attorneys Thomas R. Kline and Thomas E. Starnes. The views expressed here do not necessarily reflect the views of the plaintiffs or their attorneys. Nevertheless, because of the Author's involvement in this case and the fact that he is a Cypriot, the Author claims no impartiality, either with regard to the intrinsic merits of the plaintiffs' case or with regard to the fundamental right of countries like Cyprus to protect their cultural heritage.

4. *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *cert. granted in part*, 539 U.S. 987 (2003), *and aff'd on other grounds*, 541 U.S. 677 (2004); Mucha v. King, 792 F.2d 602 (7th Cir. 1986); Jeanneret v. Vichey, 693 F.2d 259 (2d Cir. 1982); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.,

now well-known[5] case involving stolen antiquities. *Autocephalous*

1999 WL 673347 (S.D.N.Y. 1999); Rosenberg v. Seattle Art Museum, 42 F. Supp. 2d 1029 (W.D. Wash. 1999), *motion to dismiss granted*, 70 F. Supp. 2d 1163 (W.D. Wash. 1999); Republic of Turkey v. OKS Partners, 146 F.R.D. 24 (D. Mass. 1993); Republic of Turkey v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990); Government of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd*, 933 F.2d 1013 (9th Cir. 1991); Netherlands v. Woodner, No. 89 Civ. 7425 (S.D.N.Y. 1989); DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987); Stroganoff-Scherbatoff v. Weldon, 420 F. Supp 18 (S.D.N.Y. 1976); Republic of Lebanon v. Sotheby's, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990); Menzel v. List, 253 N.Y.S.2d 43 (N.Y. App. Div. 1964), *on remand*, 267 N.Y.S.2d 608 (1966), *modified on other grounds*, 279 N.Y.S.2d 608 (N.Y. 1967), *modification rev'd*, 246 N.E.2d 742 (1969) (involving civil actions for the recovery of stolen art work or antiquities). *See also, e.g.*, United States v. Schultz, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004); United States v. Antique Platter of Gold, 184 F.3d 131 (2d Cir. 1999), *cert. denied*, 529 U.S. 1136 (2000); United States v. McClain, 545 F.2d 988 (5th Cir. 1977), *reh'g denied*, 551 F.2d 52 (5th Cir. 1977), *rev'd in part, aff'd in part*, 593 F.2d 658 (5th Cir. 1979), *cert denied*, 444 U.S. 918 (1979); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974); United States v. Swetnam, Indictment CR 88-914 RG (C.D. Cal. Nov. 1988) (involving criminal prosecutions).

5. For writings devoted exclusively to *Autocephalous*, *see* Pamela Farrell, *Foreign Relations—Unrecognized Foreign States—Title to Church Mosaics Unimpaired by Confiscatory Decrees of Unrecognized State,* Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 15 SUFFOLK TRANSNAT'L L.J. 790 (1992); Keith Highet et al., *Cultural Property—Recovery of Stolen Art Works—Choice of Law—Recognition of Governments*, 86 AM. J. INT'L L. 128 (1992); Stephen L. Foutty, Autocephalous Greeek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stone Art,* 43 VAND. L. REV. 1839 (1990). *See also* Stephen A. Bibas, *The Case Against Statutes of Limitations for Stolen Art,* 103 YALE L.J. 2437, 2447–49 (1994); Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17, 18–19 (1993); Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225, 242 (1993); 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, 80 (1995); Joshua E. Kastenberg, *Assessing the Evolution and Available Actions for Recovery in Cultural Property Cases*, 6 DEPAUL-LCA J. ART & ENT. L. 39, 52 (1995); Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79, 82 (1998); Lawrence Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT'L & COMP. L. 23, 30 (1996); Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restituto in Integrum and Possessio animo Ferundi/Lucrandi*, 14 DICK. J. INT'L L. 31, 40 (1995); Jennifer N. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 529 (1997); Paige L. Margules, *International Art Theft and the Illegal Import and Export of Cultural Property: A Study of Relevant Values Legislation, and Solutions*, 15 SUFFOLK TRANSNAT'L L.J. 609, 637 (1992); Alexandre A. Montague, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75 (1993); William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y INT'L BUS. 123, 138 (1996); Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 18–21 (1990); Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 3 (1990); Tarquin Preziosi, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L. J. 225, 237–38 (1997); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen*

involved four sixth century mosaics depicting Jesus, the Virgin Mary, an archangel, and two apostles. These mosaics were embedded in the hallowed sanctuary of an early Christian church in the Republic of Cyprus, in a region that has been occupied by Turkey since 1974. In the late 1970s, Dikman, a Turkish national, illegally removed the mosaics from the church and transported them through Turkey to Germany, where he hid the mosaics for about a decade. In July 1988, following a sale agreement negotiated through intermediaries in a Dutch restaurant, Dikman transported the mosaics to the free-port area of the Geneva airport, and delivered them to the buyer upon receipt of $350,000 in dollar bills contained in paper bags. The buyer—Ms. Goldberg, an Indiana art dealer—promptly shipped the mosaics to Indiana and a few weeks later, offered to sell the mosaics to the Getty Museum in California for approximately $20 million. The museum's curator, who was familiar with these internationally known mosaics, declined the offer and promptly notified the Republic of Cyprus. The Republic and the Church of Cyprus offered to reimburse Ms. Goldberg for the purchase price, in exchange for her surrendering the mosaics. Following Goldberg's refusal, the Republic and the Church filed suit in federal district court in Indiana in March 1989.

During World War II, 32 COLUM. J.L. & SOC. PROBS. 1, 5 (1998); Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 458–59 (1999); Paul Tyler, *A Defendant Who Intentionally Conceals His Identity May Be Equitably Estopped From Asserting the Statute of Limitations When, as a Result of the Concealment, the Plaintiff is Unable to Discover the Defendant's Actual Identity:* Bernson v. Browning-Ferris Industries of California, Inc., 22 PEPP. L. REV. 1772, 1774–75 (1995); Geri J. Yonover, *The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot*, 29 IND. L. REV. 1201, 1210 (1996); John E. Bernstein, Note, *The Protection of Cultural Property and the Promotion of International Trade in Art*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 125 (1992); Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 400 (1995); Karen Theresa Burke, Note, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L.J. 427, 458 (1990); Judith Church, Note, *Evaluating the Effectiveness of Foreign Laws on National Ownership of Cultural Property in U.S. Courts*, 30 COLUM. J. TRANSNAT'L L. 179, 202 (1992); Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L L. 255, 257–58 (1996); Stephen F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431, 1449–50 (1992). Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 352 (1993); Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural property*, 7 EMORY INT'L L. REV. 457, 482 (1993); Oliver Metzger, Note, *Making the Doctrine of Res Extra Commercium Visible in United States Law*, 74 TEX. L. REV. 615, 636–37 (1996).

3. *The Conflict of Laws*

As is typical in cases of transborder trade in stolen property, *Autocephalous* implicated the laws of several jurisdictions: Cyprus, Switzerland, and Indiana.[6] These laws differed in significant respects.

Under the law of Cyprus, antiquities and things dedicated to worship are designated as "out of commerce" and cannot be acquired by a private person whether through sale, prescription, or otherwise. Thus, if the Church of Cyprus could establish ownership under Cypriot law, the Church could not lose that ownership under Cypriot law due to any facts or transactions the defendant invoked. The Church was able to prove such ownership.[7]

Under Swiss law, if read in the light most favorable to the defendant,[8] the defendant could prevail if she purchased the mosaics in good faith and the plaintiffs' action was filed more than five years from the date of the theft.

Under Indiana law, a thief could not acquire, and thus could not convey, ownership of the stolen property. The owner's action to recover the property, however, must be filed within "six (6) years after the action has accrued and not afterwards."[9]

4. *The Court's Choice of Law*

The court ultimately held that Indiana law should govern because Indiana had the "most significant contacts"[10] or the "more significant relationship."[11] Under Indiana law, the defendant could not acquire ownership of the mosaics. The defendant argued, however, that the plaintiffs' action to recover the mosaics was untimely because it was filed more than six years from the time of the theft, which occurred in the mid- to late 1970s. The court rejected the defendant's argument, holding that the action did not "accrue," and therefore the statute of limitations did not commence until the

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6. A fourth jurisdiction, Germany, was also involved because Dikman kept the mosaics there (albeit hidden) for about ten years before selling them to defendant. The defendant, however, did not invoke German law because it did not vest Dikman with ownership of the mosaics.

7. *See Autocephalous*, 717 F. Supp. at 1397.

8. *But see* Symeon C. Symeonides, *On the Side of the Angels: Choice of Law and Stolen Cultural Property*, *in* PRIVATE LAW IN THE INTERNATIONAL ARENA—LIBER AMICORUM KURT SIEHR, 649, 758–60 (Jurgen Basedow et al. eds., 2000) (arguing that Swiss law may not have been as favorable to the defendant as the court assumed).

9. *Autocephalous*, 717 F. Supp. at 1385.

10. *Id.* at 1394

11. *Id.* at 1376, 1394.

plaintiffs, using due diligence, knew or should have known the identity of the possessor of the mosaics (the discovery rule).[12]

After describing the plaintiffs' diligent but unsuccessful efforts to locate the mosaics as soon as they learned of the theft, the court held that the plaintiffs could not have discovered the identity of the mosaics' possessor until Ms. Goldberg attempted to sell them to the Getty Museum in late 1988.[13] Moreover, the court held that even if the statute of limitations commenced running at an earlier time, the doctrine of fraudulent concealment tolled, or suspended, the running of the statute for the ten year period when the mosaics were hidden in Germany.[14] Finally, the court held in the alternative that even if Swiss law applied, the defendant could not prevail because she clearly did not purchase the mosaics in good faith.[15] Therefore, under either Indiana or Swiss law, the plaintiffs were entitled to recover the mosaics, and the court so ordered.

5. *Right Result, Wrong Law*

In the Author's opinion,[16] the *Autocephalous* court clearly reached the right substantive result. By ordering the defendant to return the mosaics, the court reached the result dictated by the laws of all three jurisdictions involved in the case.[17] However, from a choice-of-law perspective, *Autocephalous* is problematic. As discussed below, only one of these three jurisdictions—Cyprus—had a truly legitimate claim to apply its law. Yet, the court applied the law of the *other* two jurisdictions—Indiana, in the main, and Switzerland, in the alternative. In this sense, the *Autocephalous* court reached the right substantive result under the wrong law.

Although the erroneous choice of law was harmless in *Autocephalous*, greater caution and analytical precision is necessary in cases in which the laws of the implicated jurisdictions differ in ways that would produce a different substantive result. For example, when an owner of stolen property is protected by the law of the

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12. *See id.* at 1386–87, 1388–91.

13. *See id.* at 1388–91.

14. *See id.* at 1387–88, 1391–93.

15. The court discussed pointedly and at length the suspicious circumstances under which the defendant bought the mosaics. *See id.* at 1400–03. The court concluded by quoting from the testimony of an expert witness: "The Court cannot improve on Dr. Vikan's summation of the suspicious circumstances surrounding this sale: 'All the red flags are up, all the red lights are on, all the sirens are blaring.'" *Id.* at 1402. The court also found that the defendant failed to undertake even a minimally prudent inquiry into the seller's title. *See id.* at 1403–04.

16. A biased opinion (*see supra* note 3) need not be a wrong opinion.

17. In this sense the *Autocephalous* case could be characterized as a sub-species of a false conflict—the type in which the laws of the involved states are different in content but in ways that, under the facts of the particular case, do not affect the outcome.

country in which the property was situated at the time of the theft, but not by the law of the country or countries to which the property is later removed, the resulting conflict is a veritable "true" conflict. This conflict not only implicates the private interests of the parties involved and the public interests of their respective home states, but also implicates important societal and cultural values.[18] The following discussion focuses on this hypothetical pattern of cases and proposes a succinct, elliptical, and neutral choice-of-law rule for resolving the resulting conflicts.

II. THE PROPOSED RULE

1. *Except as otherwise provided by an applicable treaty or international or interstate agreement, or statute, the rights of parties with regard to a corporeal thing of significant cultural value (hereinafter "thing") are determined as specified below.*

2. *A person who is considered the owner of the thing under the law of the state in which the thing was situated at the time of its removal to another state shall be entitled to the protection of the law of the former state (state of origin), except as specified below.*

3. *The owner's rights may not be subject to the less protective law of a state other than the state of origin,*

   (a) *unless:*

      (i) *the other state has a materially closer connection to the case than the state of origin; and*

      (ii) *application of that law is necessary in order to protect a party who dealt with the thing in good faith after its removal to that state; and*

   (b) *until the owner knew or should have known of facts that would enable a diligent owner to take effective legal action to protect those rights.*

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18. Professor Erik Jayme identifies five interests implicated in conflicts involving art works: (1) the interests of private parties, including the owner of the work and of the artist who created it; (2) the interests of the involved states; (3) the interest of the art market; (4) the global interest of the international civil society; and (5) the interests of the artwork itself. *See* Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT'L L. 927, 929 (2005).

III. ANNOTATIONS TO THE RULE

1. *The Rule's Residual Character*

As Paragraph 1 states, the proposed rule applies only to the extent that it is not displaced by a hierarchically superior rule, such as a rule contained in an applicable treaty or international or interstate agreement. Examples of such treaties, in the United States, are the UNESCO Convention of 1970[19] and certain bilateral treaties[20] and, in other countries, the Hague[21] and UNIDROIT[22] conventions. Besides being hierarchically superior, such treaties or

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19. *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232. For discussion, *see* PREVENTING THE ILLICIT TRAFFIC IN CULTURAL PROPERTY. A RESOURCE HANDBOOK FOR THE IMPLEMENTATION OF THE 1970 UNESCO CONVENTION (Pernille Askerud & Etienne Clement eds., 1997); PATRICK O'KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION ON ILLICIT TRAFFIC (2000); Maritza F. Bolano, *International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention*, 15 FORDHAM INT'L L.J. 129 (1992); Kevin F. Jowers, *International and National Legal Efforts to Protect Cultural Property: The 1970 UNESCO Convention, the United States, and Mexico*, 38 TEX. INT'L L.J. 145 (2003); Lyndel V. Prott, *UNESCO and UNIDROIT: a Partnership Against Trafficking in Cultural Objects*, *in* THE RECOVERY OF STOLEN ART 205 (Norman Palmer ed., 1998).

20. The United States has bilateral agreements involving cultural property with Bolivia, Cambodia, Canada, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua, and Peru. For citations, *see* 19 C.F.R. § 12.104(g) (2005). *See also* Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, U.S.-Ecuador, Jan. 14, 1987, 26 I.L.M. 875; Treaty for Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, U.S.-Mex., July 17, 1970, 22 U.S.T. 494.

21. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict and Regulations for the Execution of the Sard Convention, May 14, 1954, 249 U.N.T.S. 215. For discussion, see David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993).

22. *See* Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. For discussion, see Brian Bengs, *Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503 (1996); James F. Fitzpatrick, *Stealth UNIDROIT: Is USIA the Villain?*, 31 N.Y.U. J. INT'L L. & POL. 47 (1998); Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225 (1993); John H. Merryman, *The UNIDROIT Convention: Three Significant Departures from the Urtext*, 5 INT'L J. CULT. PROP. 11 (1996); Spencer A. Kinderman, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457 (1993); Marilyn E. Phelan, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects Confirms a Separate Property Status for Cultural Treasures*, 5 VILL. SPORTS & ENT. L.J. 31 (1998); Kurt Siehr, *The Protection of Cultural Property: The 1995 UNIDROIT Convention and the EEC Instruments of 1992/93 Compared*, UNIFORM L. REV. 671 (1998).

agreements provide more direct and efficacious ways of resolving or preventing these conflicts. For different reasons, rules contained in special statutes that directly regulate these matters would also prevail over the proposed rule, which is intended as the residual rule to guide the judicial choice of law.

2. *Scope*

(a) Corporeal Things

The proposed rule speaks of a "corporeal" thing, which is the civil law term for what the common law calls a "tangible" thing. Thus, the rule does not apply to "incorporeal" or "intangible" things.

The rule uses the term "thing," rather than "movable" or "immovable," because the rule is, in principle, intended to encompass both categories. As a practical matter, the rule becomes operable only when a thing is moved across state borders, and this can only occur if the thing is movable. Before movement and theft, however, the thing may well have been a part of another immovable thing, as was the case with the mosaics in *Autocephalous*.

(b) Things of Cultural Value

The rule applies to things of "significant cultural value."[23] This phrase includes, but is not limited to, things of archaeological value. An interesting question for later exploration is whether the same rule can work in cases involving stolen artworks that are not of high cultural value but may be valuable in other respects. A further question is whether the same rule could work well in cases involving ordinary things—at least noncommercial things—that are not covered by statutes or codes such as the Uniform Commercial Code.

3. *The Starting Point:* The Lex Rei Sitae Originis

Although by definition the proposed rule deals with things that are moved across state or national boundaries (*conflit mobile*), the

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23. For an expansive definition of things of "significant cultural value," see Article 2 of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, http://www.unidroit.org/english/conventions.1995cultural property/1995culturalproperty-e.htm [hereinafter UNIDROIT Convention] ("[C]ultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention."). For the meaning of the same term under the Hague Convention, *see* R. O'Keefe, *The Meaning of 'Cultural Property' under the 1954 Hague Convention*, 46 NETH. INT'L L. REV. 26 (1999).

choice of law analysis must begin from a single fixed point. The most logical choice is the state in which the thing was situated at the time of the critical event, typically the theft or other unauthorized removal. For lack of a better term, this Article will refer to such place as the "situs of origin." The starting premise of the proposed rule is that a person who, under the law of the situs of origin, is considered the owner of a thing, should not lose the protections and remedies that law accords to owners just because the thing is now situated in another state or country.[24] For the same reasons that another's unilateral act—such as a theft—should not alone negate those protections, the unilateral removal of the thing to another state should not negate them either. As the Second Restatement states, "[i]nterests in a chattel are not affected by the mere removal of the chattel to another state."[25] As in the *Autocephalous* case, the owner may be justifiably unaware of the theft and the thief's identity, as well as the removal of the thing to another state. Substantive law protects the owners who are not blameworthy, and so should conflicts law. Based on this rationale, Paragraph 2 of the proposed rule enunciates a presumption in favor of the law of the situs of origin.

4. *Why Only a Presumption?*

Agreeing that the law of situs of origin should be the starting point of any process of resolving any dispute involving conflicting claims in the stolen thing leads to the next logical question: why shouldn't that law also be the final point in the analysis? Indeed, no lesser a body than the Institut de droit international advocated precisely such a solution. During its 1991 session in Basel, the Institut adopted a resolution calling for the unqualified application of the law of the country whose cultural heritage embraces the particular thing. The resolution provides that "[t]he transfer of ownership of works of art belonging to the cultural heritage of the country of origin shall be governed by the law of that country."[26]

Similarly, the 1995 UNIDROIT Convention, which provides rules of substantive law rather than of choice of law, is based on the

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24. This protection depends on whether that person is willing and able to prove ownership under that law. Failure to prove ownership would ordinarily defeat the owner's action, even if the other party does not prove its own ownership. *See* Government of Peru v. Johnson, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd*, 933 F.2d 1013 (9th Cir. 1991) (holding that the government of Peru could not recover allegedly stolen artifacts because the uncertainty of Peruvian domestic ownership laws precluded it from proving ownership). This requirement is not anomalous because a party who is not in possession does not benefit from the presumption of ownership that the other party's possession entails.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 247 (1971)

26. Institute de droit international, *Resolution of September 1999*, 81 REV. CRITIQUE DE DROIT INT'L PRIVÉ 203 (1992).

premise that the law of the situs of origin is the controlling law. The law of the situs of origin determines whether the cultural object has been "stolen"[27] or "illegally exported."[28] If so, then the Convention mandates the return of the object to the country of the situs of origin, regardless of what the law of the current situs provides.[29]

Both of the above proposals are commendable. Indeed, in an ideal world, there should be no argument that the country of origin has the closest connection and the most legitimate claim to apply its own law in determining the ownership of objects comprising its cultural heritage. However, the fact that only twenty-three countries ratified or acceded to the UNIDROIT Convention—and none of them are "market countries"[30] (i.e., wealthy countries whose markets tend to attract stolen antiquities)—serves as a reminder, if one were needed, that we live in a world that is less than ideal. The typical argument against applying the law of the situs of origin is that it would deprive these countries of the ability to protect third parties who, in good faith, acquire rights in the stolen property after its removal to these countries.

If it is limited to third parties who have acted in good faith, this argument has merit. Even so, this simply means that these other states also have a certain interest in applying their own law—it does not mean that this interest necessarily outweighs that of the situs of origin. Which of the two interests should prevail in a given case is a difficult question that admits different answers. The proposed rule attempts to provide one such answer. It consists of a compromise that retains the *lex rei sitae originis* but reduces its role to that of a strong, but rebuttable, presumption. The presumption is rebutted when the owner's opponent satisfies all three conditions spelled out in Paragraph 3 of the rule, as discussed below.

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27. *See* UNIDROIT Convention art. 3(2) ("[A] cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.").

28. *See* UNIDROIT Convention arts. 1(b), 5(2).

29. *See* UNIDROIT Convention, arts. 3(1), 5(1). The most recent conflicts law codification—that of Belgium—adopts a modified *lex originis* rule. Article 90 of the Belgian Codification of Private International Law of July 27, 2004, provides that the recovery of an object that has been removed illegally from the country in whose cultural patrimony the thing belongs is governed by the law of that country. By way of exception, however, this Article authorizes the application of the law of the current situs in two circumstances: (1) at the choice of the claimant country; or (2) at the choice of a good faith purchaser, in those cases in which the law of the situs of origin does not protect good faith purchasers.

30. See Kurt G. Siehr, *Globalization and National Culture: Recent Trends Towards a Liberal Exchange of Cultural Objects*, 38 VAND. J. TRANSNAT'L L. 1067, 1073 (2005).

5. *A Rule for True Conflicts*

Following the terminology first introduced by Professor Brainerd Currie, modern American conflicts literature classifies conflicts cases into three major categories: (1) false conflicts, (2) true conflicts, and (3) no-interest or unprovided-for cases.[31] The classification depends on whether, in the particular case, (1) only one, (2) more than one, or (3) none of the states involved in the case have an actual interest in applying their respective laws. Because the existence of a state interest is the statement of a conclusion about which reasonable opinions can differ, this Author prefers a more objective terminology that depends on which of the two parties would benefit from the application of the laws of each involved state.[32]

Applying this criterion to cases involving conflicting claims to stolen cultural property produces three categories similar to those described above, but with different names, to wit:

> (1) *Non-Conflicts*: cases in which the law of both involved states (the state of origin and the state to which the thing was removed) favor the same party, either the owner or present possessor. Under the proposed rule, these cases would be decided under the law of the situs of origin because there would be no reason to attempt to rebut the presumption that the rule establishes in favor of that law;
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> (2) *Direct Conflicts*: cases in which the law of the situs of origin favors the party whom that law considers the owner ("owner"), whereas the law of the later situs favors the other party, usually the present possessor of the thing ("non-owner"). The proposed rule deals directly with these cases, which are discussed below; and
>
> (3) *Inverse Conflicts*: namely cases in which the law of the situs of origin does not favor the owner (and thus favors the non-owner), whereas the law of the later situs favors the non-owner (and thus disfavors the owner). The phrase "less protective," in Paragraph 3 of the rule, makes that paragraph literally inapplicable to these cases because the law of the later situs is *not* "less protective" than the law of the situs of origin. Thus, literally speaking, cases that qualify as inverse conflicts would continue being governed by the law of the situs of origin under Paragraph 2 of the rule, even if that law is less protective of the owner than the law of the later situs. The proposed rule, however, purposefully does *not* mandate this result and thus allows the court discretion,[33] in appropriate cases, to apply the law of the state with the

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31. See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171 (1959); Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 HAGUE ACADEMY RECUEIL DES COURS 1, 43–47 (2003).

32. For further discussion of these concepts and terminology, *see* Symeon C. Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 TUL. L. REV. 1247, 1258–60 (2004).

33. In contrast to the pertinent Belgian rule (Belgian Codification, *supra* note 29), which leaves this choice to the claimant country, the proposed rule leaves the choice to the court.

materially closer connection, even when that law is *more* protective of the owner than the law of the situs of origin.[34]

The proposed rule deals expressly with direct conflicts only, namely cases in which the law of the situs of origin favors the owner of the thing while the law of the other involved state, usually the last situs, favors the non-owner. The rule provides that these cases are principally governed by the law of the situs of origin (Paragraph 2), unless the owner's opponent demonstrates that the case satisfies all the conditions prescribed in Paragraph 3.

6. *The State of the "Materially Closer Connection"*

Subparagraph (a) of Paragraph 3 of the rule articulates the first condition for displacing the *lex rei sitae originis*. The displacement can only be in favor of a state that has a "materially closer connection" with the case than the state of origin. Other iterations of this concept include a "manifestly more significant relationship," or a "manifestly greater interest." The precise choice of words is less significant than the basic notion that the threshold for rebutting the presumption in favor of the *lex rei originis* should be very high indeed. As the *Autocephalous* case demonstrates,[35] a relationship such as the one claimed by the defendant with regard to Switzerland does not even come close to this threshold and should not be sufficient to displace the right of the situs of origin to apply its law. A transitory, artificial relationship that is unilaterally fabricated by the defendant (or by persons through whom the defendant claims) should never be considered more significant than the relationship of the situs of origin.

It is important, however, to stress that, under Paragraph 3(a), even Indiana's relationship should not be considered more significant than that of Cyprus, although it was clearly more significant than that of Switzerland. The *Autocephalous* court correctly concluded that, as between Indiana and Switzerland, Indiana had "the *most* significant" relationship.[36] However, to the extent that the use of the superlative "most" may encompass a juxtaposition of more than two comparables the quoted statement is less accurate.

Indeed, when one includes Cyprus in this comparison, it is readily obvious that Indiana's relationship with the case was clearly less significant than that of Cyprus. For example, there is no reason to give more weight to the defendant's domicile in Indiana than to the

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34. Obviously, since these cases fall outside the literal scope of Paragraph 3, the case need not satisfy the other conditions that paragraph prescribes for applying that law.

35. *See Autocephalous*, 717 F. Supp. at 1393–94 (describing Switzerland's "lack of significant contacts").

36. *Id.* at 1394 (emphasis added).

plaintiffs' domicile in Cyprus. Unlike the plaintiffs, who had every reason to rely on the protective law of their domicile and situs of origin, the defendant could not claim any reliance on the non-protective law of her domicile, especially since none of the acts pertaining to the purchase took place in that state. Similarly there is no reason to assign more significance to the situs of the mosaics at the time of the trial than to their situs at the time of the theft, particularly because the mosaics were not even movable before the theft. The mosaics had been lawfully and publicly kept in Cyprus for more than fourteen centuries and were unilaterally, secretly, and recently brought to Indiana. Finally, the fact that Indiana was the forum state does not, in and of itself, make Indiana's relationship any more significant. The mere fact that litigation took place there may justify the application of the forum's procedural laws, but rules pertaining to the loss and acquisition of ownership of stolen property should not be classified as procedural.[37] If the forum *qua* forum were to automatically apply its statute of limitation, then states that have short statutes of limitations would become safe havens for thieves of cultural property or their transferees. The *Autocephalous* court avoided that possibility, but only because it grafted a discovery rule onto Indiana's statute of limitations.

7. *The Good Faith Proviso*

The second prong of Paragraph 3(a) further limits the circumstances under which to apply the less protective law of the state with the materially closer connection—i.e., only when necessary to protect a party who dealt with the thing in good faith after its removal to that state, such as a purchaser or creditor who acted in good faith.[38] In the *Autocephalous* case, Ms. Goldberg clearly did not satisfy this proviso because the court found that she was not acting in good faith when she bought the mosaics in Switzerland. Thus, even if Switzerland had a materially closer connection (or, in the court's terminology, a more significant relationship) than Cyprus, the court should not apply Swiss law.

Likewise, even accepting the court's erroneous, but in this case, harmless finding that Indiana had a more significant relationship

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37. *See* SYMEON C. SYMEONIDES, WENDY C. PERDUE & ARTHUR VON MEHREN, CONFLICT OF LAWS, AMERICAN, COMPARATIVE, INTERNATIONAL 384–90, 395–98 (2d ed. 2003).

38. The term "good faith" is a term of art, the precise meaning of which may differ slightly or more than slightly from state to state. Consequently, the proposed rule should either provide a self-contained definition of good faith or designate the state whose law would provide the definition. Since the proposed rule does not provide such a definition, it leaves open the question of which state's law would provide the definition in cases of conflict. The two candidates are (1) the law of the state in which the party acted and (2) the law of the forum *qua* forum. The preferred solution is (1).

than Cyprus, the fact that Ms. Goldberg did not act in good faith would prevent her from taking advantage of Indiana law even if that law was favorable to her. A different result would be possible, for example, if the property had been situated in Indiana for a relatively long time and third parties had dealt with the property in good faith and in justifiable reliance on Indiana law. If the stolen mosaics had been publicly exhibited for some time in the Indianapolis Museum of Art and then sold at a public auction to a person who was acting in good faith, then that person's reliance on Indiana law would deserve appropriate consideration. For example, if under Indiana law that person would be entitled to reimbursement of the purchase price from the owner, such reimbursement should be due, even if it would not be available under the law of the situs of origin, provided that the case also satisfies the other conditions specified in Paragraph 3.

8. *The Time Element: The Discovery Rule*

Paragraph 3(b) of the proposed rule enunciates the third condition for displacing the law of the situs of origin. This condition parallels the discovery rule the court enunciated in *Autocephalous*,[39] except that the proposed rule has a broader scope. It not only suspends the running of a statute of limitations as in the *Autocephalous* case, but also suspends or delays the application of any other law that would cause the loss of the owner's rights as a result of the passage of time. This includes rules of acquisitive prescription or adverse possession. The effect of the proposed discovery rule is to suspend the running of time until the owner knows or, in the exercise of due diligence, should have known of facts that would allow the owner to take effective legal action to protect the owner's rights.

While there is room for disagreement on the exact phrasing of this rule, there should be little disagreement about the need for a rule like this one. In today's extremely mobile market, the discovery rule is a sensible, equitable, and indispensable vehicle for furnishing diligent owners with a fighting chance to recover their stolen property. Without such a rule, any pretense of protecting owners of

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39. For a statutory parallel, see CAL. CIV. PROC. CODE § 338(c) (West Supp. 1999) ("The cause of action in the case of theft . . . of any article of . . . artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party"). For recent discussions of the discovery rule in the context of similar cases, see Steven F. Grover, Note, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431 (1992); Tarquin Preziosi, Note, *Applying a Strict Discovery Rule to Art Stolen in the Past*, 49 HASTINGS L.J. 225 (1997); Meghan A. Sherlock, Comment, *A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property*, 8 TUL. J. INT'L & COMP. L. 483 (2000).

stolen property is truly a sham. For example, in *Autocephalous*, the owner could not know of the exact time of the theft. Even when the theft became known some years later, the owner could not ascertain the thief's identity. Thus, the plaintiffs could not sue any person, in any court, in any country. The application of the discovery rule would be the only way to avoid a result that would prevent the thief from benefiting from his own wrongdoing.

The proposed discovery rule would suspend the running of time against the owner for as long as the owner, for reasons beyond the owner's control, is unable to protect his or her ownership. The owner should not lose the protection of the law of the situs of origin (even if the law of a state with a materially closer connection denies that protection), unless and until the owner has or should have had knowledge of facts that would enable the owner to take effective legal action to protect his or her ownership. As soon as that knowledge becomes accessible, the clock starts running and the owner becomes subject to the law of the state with the materially closer connection, with all the attendant consequences. Depending on what that law provides, these consequences may range from the complete loss of ownership to anything short of that, such as recovery of the thing upon reimbursing the possessor for the purchase price.

9. *The Discovery Rule and Evenhandedness*

As discussed in Part III.8, the discovery rule has both a positive and a negative effect on the owner. The positive effect is to prevent the loss of the owner's rights before the owner is in a position to protect them. This is in keeping with the ancient equitable maxim *contra non valentem agere non currit praescriptio* (prescription does not run against a person unable to act).

The negative effect is seen in the words "diligent owner" and "should have known," which impose on the owner a duty of due diligence and impute the owner with knowledge that a diligent owner would have obtained.[40] As the *Autocephalous* case illustrates, in the case of theft, this duty means, *inter alia*, that the owner must timely report the theft to the proper authorities and launch a diligent search to discover the whereabouts of the property and the identity of the thief. In turn, the publicity caused by the owner's efforts would reduce the chances that prudent, diligent people (i.e., people of good faith) will buy the stolen thing. In turn, the discovery rule provides an incentive to those who unknowingly buy a thing that turns out to

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40. For a recent case in which this diligence was lacking, see Adler v. Taylor, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 at *12–*13 (C.D. Ca. Feb. 2, 2005) (involving a van Gogh painting that actress Elizabeth Taylor purchased at a widely publicized Sotheby's auction in London).

be stolen to publicize their possession of it so as to trigger the running of time against the true owner. In summary, the discovery rule is evenhanded to both parties and provides both parties with the proper incentives to act prudently.

10. *The Discovery Rule and the Forum's Statute of Limitation*

A discovery rule is a rule of substantive law, not of conflicts law. Indeed, when the *Autocephalous* court applied the discovery rule, it did so because it concluded that the rule was part of Indiana's statute of limitation. The defendants vehemently challenged that conclusion on appeal, but the appellate court affirmed it.[41] Thus the court was able to avoid turning Indiana into a haven for possessors of stolen property.

This risk, however, is real and is particularly high in those cases in which: (a) the forum state follows the traditional common law approach of applying the forum's shorter statute of limitation on the theory that such statutes are always procedural[42] and (b) that statute does not contain or is not accompanied by a discovery rule. This is indeed a deadly combination. It means that the forum state can apply its own statute of limitations without even examining whether that state has any contacts that would make application of that law reasonable,[43] or even constitutionally permissible,[44] and thereby provides a safe harbor for virtually any thief who manages to bring his loot to that state. A discovery rule that, as proposed here, is made part of the applicable choice-of-law rule will avoid this phenomenon.

11. *The Discovery Rule and Nonforum Substantive Law*

As stated earlier, the discovery rule proposed here is meant to apply not only when the forum applies its statute of limitations, as in *Autocephalous*, but also when the forum applies its own or another state's law of acquisitive prescription (adverse possession) or other similar law.

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41. *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 287–290 (7th Cir. 1990)

42. *See* SYMEONIDES, PERDUE & VON MEHREN, *supra* note 37, at 384–87.

43. *See* Patricia Y. Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 1023 (2001) (cautioning that viewing the question as one involving conflicting limitations periods leads to a "misstep that most seriously undermines the policies at stake, because it permits the forum . . . to apply its own rule despite limited and insignificant connections of the forum with the parties and the art.").

44. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that the forum state may constitutionally apply its own statute of limitations even if that state lacks the contacts that would allow it to constitutionally apply its substantive laws to the merits).

The *Autocephalous* court's decision to apply Swiss law in the alternative is an example on point. As noted earlier, Swiss law arguably provides that if Ms. Goldberg was in good faith when she bought the mosaics, she would have prevailed because, although her purchase from a non-owner did not vest her with ownership, the owner's action to recover the mosaics was not filed within five years from the theft. In another publication, this Author has argued that Swiss law is neither as unreasonable nor as unfair to the owner as the above description suggests and that Ms. Goldberg could not have prevailed, even if she had acted in good faith.[45] This is so because (1) to the extent that the pertinent rules of Swiss law are rules of acquisitive prescription, Goldberg did not meet their requirements because she did not possess the mosaics openly and publicly for five years following her purchase and (2) in any event, Swiss law recognizes a discovery-type rule.

In the actual case, both of these points became moot because the court found that Ms. Goldberg was clearly not in good faith when she took delivery of the mosaics at the Geneva airport. In other cases in which the buyer is in good faith, however, the buyer qualifies as an "innocent" party and comes within the class of people whom the legal order is obligated to protect. The difficult question becomes how to choose between an innocent buyer and an innocent owner from whom the thing was stolen.[46]

The discovery rule proposed here makes the choice dependent on the owner's actual or imputed knowledge of the whereabouts of the property. If, despite exercising due diligence, the owner could not have known of the whereabouts of the property, including its presence in Switzerland, the owner could not have taken any effective legal action to protect his or her rights. In such a case, it is appropriate to consider the owner as the "more innocent" of the two parties and continue protecting the owner under the law of the situs of origin, even if the second situs (Switzerland) were to have a

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45. *See* Symeon C. Symeonides, *On the Side of the Angels: Choice of Law and Stolen Cultural Property*, *in* PRIVATE LAW IN THE INTERNATIONAL ARENA: FROM NATIONAL CONFLICT RULES TOWARDS HARMONIZATION AND UNIFICATION: LIBER AMICORUM KURT SIEHR, 649, 755–760 (Jurgen Basedow et al. eds., 2000).

46. *See* Reyhan, *supra* note 43, at 961.

> One central feature [that] characterizes disputes arising out of stolen art . . . [is that] [t]he disputes are between two relative innocents: the original owner from whom the art was wrongfully taken or withheld and a person or entity who is, or at least claims the status of, a good-faith purchaser. Such a juxtaposition is one that renders it impossible for the law to mete out exact justice.

(Internal quotations omitted); Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *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 (1995); Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT'L L. 1511 (1999).

materially closer connection and the defendant had bought the property in good faith. Conversely, if the owner knew or, in exercising due diligence, should have known of the whereabouts of the property, then the owner is no longer the more innocent party and does not deserve the continuing protection of the law of the situs of origin. This is precisely how the discovery rule proposed here is intended to operate. In this hypothetical case, the rule would suspend the running of time under Swiss law, regardless of whether that law was one of acquisitive or liberative prescription, and regardless of whether Swiss law itself contained a discovery rule of its own.

IV. METHODOLOGICAL COMMENTS

1. *Bridging the Common Law and Civil Law Approaches*

Although various legal systems handle actions for the recovery of stolen property through many different approaches, one can group these approaches into two basic categories: (1) liberative prescription (statute of limitations) and (2) acquisitive prescription (adverse possession).

The first approach, which is followed in many common law systems, such as the forum state of Indiana in *Autocephalous*, focuses on the owner's inaction, rather than on the adverse possessor's activity. If the owner fails to bring the necessary action against the adverse possessor within the period specified in the statute of limitations, then the owner's action is barred: (a) even if the possessor has not met the requirements for acquiring ownership of the property and (b) even if (in the absence of a discovery rule) the owner did not have actual or imputed knowledge of the whereabouts of the property.

The second approach, which is followed in many civil law systems, focuses on the activities of the adverse possessor rather than of the owner of the property. If the possessor possessed the property openly and publicly for the requisite period (which is shorter if the possessor acted in good faith), then the possessor acquires ownership, even if the owner did not have actual or imputed knowledge of the whereabouts of the property.

Contemporary realities, at least those involved in the cross-border trade of stolen cultural property, demonstrate the severe inadequacies of both of these approaches. The liberative prescription approach leads to a result that is both inequitable and conceptually anomalous. This approach is inequitable because, in the absence of a discovery rule, it bars the owner's action to reclaim the owner's property without regard to whether the owner ever had the knowledge necessary to assert it. It is conceptually anomalous in

that, by barring the owner's action, this approach effectively negates the plaintiff's ownership even when the defendant did not meet the requirements for acquiring ownership.

The acquisitive prescription approach avoids the conceptual anomaly, but it does not correct the unfairness resulting from the failure to inquire as to whether the owner had the necessary knowledge to protect his or her ownership. The original assumption, which was plausible in the context of small rural societies from which this approach originated, was that a diligent owner would easily acquire such knowledge because the adverse possessor's possession must have been *open* and *public* in order to be effective. Obviously, this assumption is no longer reasonable in contemporary cases of cross-border movement of stolen goods. With the speed of today's transportation, a stolen thing may be moved thousands of miles away in the course of a single day. Even if the thing is possessed "openly and publicly" in the second situs, it may be extremely difficult for the owner to discover such possession. As one author noted, "[u]nlike domestic animals, to which much of the early adverse possession cases apply, art is seldom open to view by the general public in the way that horses and cows are."[47]

The discovery rule would cure the inadequacies of both of these approaches by focusing on the owner and asking the right questions, namely, whether the owner knew *or should have known* of facts that would enable the owner to take effective legal action against the possessor of the thing.[48] If this is not the case, then the owner's rights should remain subject to the law of the situs of origin. If such is the case, then the owner's rights should be subject to the law of the state that has the "materially closer connection."

2. *Substantive Law Solutions to Choice-of-Law Dilemmas*

As noted earlier, the proposed rule deals with true or direct conflicts, namely cases that by definition present the most intractable of conflicts because each of the involved states has a legitimate claim to apply its own law. The state of the situs of origin has every reason to apply its law to protect the owner, who is likely to be one of its domiciliaries and who would ordinarily have no reason to anticipate the application of another state's law. Likewise, the state of the last

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47. Preziosi, *supra* note 39, at 234; *see also* Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2442 (1994) (noting that law developed for "horses, cattle, sheep, and mules" does not work well when used to cover more easily concealed objects).

48. *See* O'Keeffe v. Snyder, 416 A.2d 862, 872 (N.J. 1980) ("[t]he discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner" by asking "whether the owner has acted with due diligence in pursuing his or her personal property.").

situs has every reason to want to apply its law to protect third parties who may have acted within its territory in reliance upon that law. Good arguments can be made for applying the law of either state.

In making a choice between the two laws, the proposed rule relies on three tests or factors. The first test is "conflictual" while the remaining two are substantive.[49] The conflictual test is the classic method of weighing the geographical, personal, and other factual contacts of the case and the parties with the involved states in order to determine whether a state other than the state of the situs of origin has a materially closer connection.

The substantive tests consist of two additional inquiries directed, respectively, at the two disputing parties and those deriving rights through them. The first inquiry focuses on the buyer or other third party and seeks to ascertain whether they acted in good faith at the critical time. The second inquiry focuses on the owner and seeks to determine whether the owner knew or should have known of the whereabouts of the property and, if not, whether the owner exercised due diligence.

Obviously, these tests embody certain value judgments or considerations of substantive justice. The first is that only good faith purchasers and diligent owners deserve the protection of conflicts law. The second is that when both parties pass the test (such as when the buyer acted in good faith and the owner could not have known of the whereabouts of the property despite his due diligence) the proposed rule opts in favor of protecting the owner.

While there is no need to apologize for these value-laden choices, it is worth noting their methodological implications. Because of these choices, the proposed rule is neither a pure choice-of-law rule nor a pure substantive rule, but rather a blend or hybrid between the two—it is *une règle de conflit à coloration matérielle*.[50] As discussed in detail elsewhere,[51] this combination of substantive and conflictual elements is not only permissible, but also beneficial when used carefully.

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49. For the difference between "conflictual" and substantive or "substantivist" methods and techniques, see Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 4, 11–16 (2001).

50. For elaboration of this concept, *see* Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, *in* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 125 (Patrick J. Borchers & Joachim Zekoll eds., 2001). For comparative discussion, *see* SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 43–62 (1999).

51. *See* Symeonides, *supra* note 49, at 46–69 (discussing the challenge of combining jurisdiction-selecting rules with content- and result-oriented rules).

V. CONCLUSIONS

Combating illicit trade in stolen cultural property is and will continue to be a serious problem. Of all the measures that various states can take in combating this trade, the adoption of a choice-of-law rule would rank very low in importance and effectiveness. Even if one thinks only in terms of legal rules, there is little question that international conventions and agreements, criminal and other public-law statutes, and uniform substantive rules would be far more direct and effective than choice-of-law rules. At the same time, these other rules are much more difficult to adopt precisely because they presuppose a degree of consensus that is difficult to attain.

In contrast, a consensus for a uniform choice-of-law rule is a far less ambitious goal and thus easier to attain—or so one hopes. In turn, this hope cannot be tested without putting forward specific proposals or contributing to the relevant debate. This Article has proposed a specific, if only modest, but hopefully balanced choice-of-law rule. The rule may or may not be found acceptable, but if it helps stimulate the debate—even by becoming a target of criticism—then this Article will have served its purpose.