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RETHINKING THE LAWS OF GOOD FAITH PURCHASE

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This article is a comparative economic analysis of the disparate doctrines governing the good faith purchase of stolen or misappropriated goods. Good faith purchase questions have occupied the courts and commentators of many nations for millennia. We argue that prior treatments have misconceived the economic problem. An owner of goods will take optimal precautions to prevent theft if she is faced with the loss of her goods; and a purchaser will make an optimal investigation into his seller's title if the purchaser is faced with the loss of the goods. An owner and a buyer cannot both be faced with the full loss, however. The good faith purchase question thus presents a problem of "double marginalization," and as with these problems generally, it cannot be solved in a first best efficient way. However, the laws of the major commercial nations are less efficient than they could be. This is particularly true of current U.S. law: In the U.S., an owner always can recover stolen goods, which reduces her incentive to take optimal precautions but creates first best incentives to search for stolen goods. In turn, a buyer of those goods makes a suboptimal investigation into title because the owner may never find him. We propose that the owner should be permitted to recover goods only if she satisfies a negligence standard set at the socially optimal precaution level (which we argue is feasible). This would increase her incentive to take precautions while retaining her efficient incentive to search. Since owner search and buyer investigation are complements, our proposal leaves unchanged the buyer's (suboptimal) incentive to investigate. Also under current law, an owner who voluntarily parts with her goods cannot recover them from a good faith purchaser. This rule reduces the owner's incentive to search and so reduces the buyer's incentive to investigate. Thus, we propose that a negligence standard should apply to owners generally. We argue that the verifiability objections to a vague standard of negligence can be satisfied by the specification of rule-like proxies for owner negligence. A comparative analysis of the law of good faith purchase in the leading commercial jurisdictions shows the chaotic nature of the current disparity in treatment of owners and buyers. Since today many stolen goods cross national borders, a generally applicable solution to the good faith purchase issue will further reduce the demand for stolen goods, reduce the incidence of strategic litigation and enhance social welfare.

I. INTRODUCTION

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In 1945, at the conclusion of the Second World War, a valuable painting by Claude Monet was stolen from its owner in Germany. By 1956 the painting had appeared on the international art market and was acquired by a highly respected art dealer in New York. The dealer sold the painting in 1957 to a good faith purchaser for value. The purchaser held the painting for over 30 years without facing a claim from the original owner, although her identity was readily accessible through the Monet Catalogue Raisonne, a copy of which was available a few miles from the original owner's residence. The original owner discovered the location and identity of the purchaser in 1981 and sued in replevin to recover the painting.[1] In *De Weerth v. Baldinger,* the Second Circuit found for the good faith purchaser despite the "well-settled" American rule that neither a thief nor a good faith purchaser from a thief can pass good title to stolen goods.[2] The court held that New York would impose a duty of reasonable diligence on the owner to learn the identity of the ultimate purchaser.[3] Several years later, the Guggenheim Museum in New York brought an action in replevin to recover a stolen painting by Marc Chagall that had been sold to a good faith purchaser by a reputable dealer in 1967.[4] From the time of the theft until the Museum fortuitously discovered the painting's location twenty years later, the Museum had taken no steps to publicize the theft, nor did it inform other

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[1] The plaintiff sued within the three year New York statute of limitations that runs from the time a demand is made for the good's return that the purchaser refuses. The facts are reported in De Weerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), cert. denied, 486 U.S. 1056 (1988).

[2] 836 F.2d at 107-08. The "theft" rule is an application of the fundamental common law principle of *nemo dat quod non habet* -- one cannot convey greater rights in property than one has. It applies to sales transactions through UCC §1-103. The rights of good faith purchasers when the goods have been voluntarily transferred to a miscreant are embodied in UCC §2-403(1) & (2). For discussion, see ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES 491-526 (1991), and CLAYTON P. GILLETTE, ROBERT E. SCOTT & ALAN SCHWARTZ, PAYMENT SYSTEMS AND CREDIT INSTRUMENTS 44-5 (2007).

[3] Id. at 110.

[4] The trial court granted summary judgment for the purchaser, following the *DeWeerth* precedent. The Appellate Division reversed, on the ground that under New York's demand and refusal rule no due diligence was imposed on the owner to search for stolen goods. Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S. 2d 618, 621-2 (App. Div. 1990), aff'd 569 N.E. 2d, 426 (N.Y. 1991). The New York court did recognize the potential right of the buyer to use the lack of due diligence by the owner to support a laches defense. Laches would lie, however, only if "it was clear that the plaintiff unreasonably delayed in initiating an action *and* that the defendant was prejudiced by the delay." Robins Island Pres. Fund, Inc. v. Southold Dev. Corp. 959 F.2d 409, 423 (2d Cir. 1992).

museums, galleries, or any law enforcement authorities.[5] In *Solomon R. Guggenheim Found. v. Lubbell,* the New York Court of Appeals found for the Museum as original owner, holding, contrary to *DeWerth,* that New York's statute of limitations does not require the victim to search diligently for stolen property.[6]

The results in *DeWeerth* and *Guggenheim* illustrate the inconsistency in the treatment of original owners and good faith buyers in the law of good faith purchase. This disparity in treatment is even more evident when comparing results between jurisdictions that apply a "theft" rule, under which an owner who sues in a timely manner *always* recovers stolen goods,[7] and those that apply the doctrine of Market Overt. Under Market Overt, good faith purchasers from a merchant dealer prevail over owners of stolen goods notwithstanding an owner's diligent efforts to prevent the theft and to recover the goods once the theft has occurred.[8] This disparity in the legal treatment of stolen and misappropriated goods impedes international efforts to solve a significant economic problem: The annual national and international trade in stolen and misappropriated goods is in the billions of dollars.[9]

There are several reasons why good faith purchase law is a troubled legal area. Initially, scholars have not reached consensus on a solution to the good faith purchase problem; that is, they have not agreed on just when the owners of stolen or misappropriated goods should recover them,

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[5] For an excellent discussion of the case, see 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).

[6] 569 N.E. 2d at 428-29.

[7] The owner's right to recover stolen goods in jurisdictions, such as the United States, that follow the theft rule is contingent on the owner bringing suit within the statute of limitations for an action in replevin. See text accompanying notes 17 -20 infra, for discussion of the wide variety in limitation periods.

[8] See note 16 infra.

[9] Art theft is the third most profitable world-wide crime behind drug smuggling and illegal arms trading; the profits run to an estimated $2 billion annually. David Holmstrom, Stolen-Art Market is a Big Business at $2 Billion a Year, The Christian Science Monitor, Aug. 11, 1994 at 1.

and when not.[10] The literature has identified many of the considerations that should influence a solution, but has yet to aggregate these considerations into a coherent policy response. The fragmentation among scholars mirrors a similar fragmentation among law makers. Good faith purchase rules have been around for a long time – they appear in the Code of Hammurabi -- and the rules are part of every advanced state's commercial law, but to this day the laws themselves differ widely.[11]

Uniformity across legal systems does exist, but only at the level of first principles. Common law and civil code systems begin with the fundamental principle that, ordinarily, one cannot convey greater rights than one has (a principle embodied in the Latin maxim *nemo dat quod non habet).*[12] The variation across legal systems arises from the significant differences in the exceptions countries create to the *nemo dat* principle. Under the law of good faith purchase as it is embodied in the Uniform Commercial Code (UCC), the *nemo dat* rule is subject to only two exceptions. First, under the "voidable title" rule, if the original owner is induced (say, by fraud or deceit) to transfer goods under a transaction of purchase, the transferee acquires the power to transfer a good title to a good faith purchaser for value.[13] Second, under the "entrustment" rule, if the original owner entrusts goods to a merchant who deals in goods of the kind, the merchant has the power to transfer the

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[10] Compare Barak Medina, *Augmenting the Value of Ownership by Protecting It Only Partially: The "Market Overt" Rule Revisited,* 19 J. L. Econ. & Org. 343 (2003) (arguing for the relative efficiency of the "Market Overt" rule protecting rights of good faith purchasers of stolen goods), *with* Harold R. Weinberg, *Sales Law, Economics and the Negotiability of Goods,* 9 J. Legal Stud. 569 (1980) (arguing for the efficiency of the American "theft rule" protecting rights of original owners of stolen goods in contests with good faith purchasers), *and with* Menachem Mautner, *The Eternal Triangles of the Law: Toward a Theory of Priorities in Conflicts Involving Remote Parties,*90 Mich. L. Rev. 95 (1991) (criticizing the American "theft rule" on efficiency grounds), *and with* ALAN SCHWARTZ & ROBERT E. SCOTT, SALES LAW AND THE CONTRACTING PROCESS 508-12 (1991) (same).

[11] We review the laws of leading jurisdictions in Part V infra.

[12] See Appendix, infra.

[13] UCC §2-403(1) provides

> A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though (a) the transferor was deceived as to the identity of the purchaser, or (b) the delivery was in exchange for a check which is later dishonored, or (c) it was agreed that the transaction was to be a "cash sale," or (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

owner's title to a buyer in the ordinary course of business.[14] But, as noted above, in many other legal systems an innocent buyer can acquire rights in yet a third context – where stolen goods are transferred to a merchant dealer who, in turn, sells the goods to a bona fide purchaser for value.[15] The buyer, if in good faith, prevails against the original owner.[16]

Much of the action in good faith purchase contests, as measured by the volume of litigation, turns on statute of limitations questions. Here again there is great diversity, both among United States jurisdictions as well as internationally. There are currently three general rules used to determine when the statute of limitations begins to run. At the polar extreme in protecting the

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[14] UCC §2-403(2) provides

> Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him the power to transfer all rights of the entruster to a buyer in the ordinary course of business.

UCC §1-201(9) defines "buyer in ordinary course of business" as

> a person that buys in good faith, without knowledge that the sale violates the right of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind....

[15] Jurisdictions that have some version of the Market Overt rule include Israel (Sale of Goods (1968) §34), Italy (Civil Code Art.1161), France (Civil Code §2277), Germany (BGB §935), Quebec (Civil Code Art. 953), Spain (Civil Code Art. 464), Brazil (Civil Code Art.1219), Mexico (Civil Code Art. 799), China, Property Law of the People's Republic of China Art. 107), and Japan (Civil Code Art. 194). See sources cited in Appendix, infra. The rule traces its lineage to the Code of Hammurabi, the Ordinances of Manu (India), early Saxon law, and early Hebraic laws. Daniel E. Murray, *Sale in Market Overt*, 9 Int'l & Comp. L. Q. 24 (1960).

[16] In order to qualify as a Market Overt, the merchant dealer must display the goods openly for sale. In the true Market Overt, the good faith buyer who purchases in a qualifying market gets good title to the purchased goods. See e.g., Israel (Sale of Goods (1968) §34), Italy (Civil Code Art. 1161), Germany (BGB §935), and England until 1994 (Sale of Goods Act 1979 §22). In many civil law jurisdictions, as well as in regimes ranging from early India to Japan, the original owner is entitled to the return of his goods but only if he pays the buyer the purchase price the buyer paid to acquire them. See, e.g., French Civil Code §2277; Spanish Civil Code Art. 464; Mexico Civil Code Art. 799; Property Laws of the People's Republic of China Art. 107; Japan Civil Code Art. 194. A number of jurisdictions –Canada, India, England today and Russia—reject the Market Overt rule and follow the American rule allowing the original owner to recover stolen goods from the good faith purchaser. For citations, see Appendix infra. The American rejection of the Market Overt rule evolved as an artifact of the revolutionary period and path dependence largely explains why it remains to this day. Early U.S. courts declined to import the English rule of Market Overt in the period just after the Constitution was ratified because, as Chancellor Kent stated in an early New York case, "there are no such open markets in the United States." Wheelwright v. Depeyster, 1 Johns 471 (N.Y. 1806). The common law rule in England permitted the good faith buyer to prevail over the original owner if he bought in any "open" market (that is, a market where the goods were openly displayed to customers) in the City of London or in any of the "county fairs" that were regularly held. Peter M. Smith, *Valediction to Market Overt*, 41 Am. J. Legal Hist. 225 (1997). The English rule continued unchanged for several hundred years until repealed by statute in 1994. The repeal was not prompted by a principled preference for vindicating the original owner's rights, but because the British courts apparently encountered line drawing problems. Id. at —.

original owner's rights is the "demand and refusal" rule, under which the statute of limitations in replevin begins to run only when the owner finds his goods, demands their return, and the buyer refuses her.[17] At the other extreme are limitation periods that run either from the time of the theft[18] or the time of purchase by the merchant seller so long as the buyer can establish an open, notorious and continuous adverse possession.[19] Finally, a number of jurisdictions have adopted an intermediate "discovery" rule under which the statute of limitations begins to run when the original owner discovers *or should have discovered* the location of her stolen goods.[20]

The lack of harmony in good faith purchase laws, combined with the multi-billion dollar market in stolen goods, creates costly and unnecessary domestic and international litigation. Over the last two decades, there has been a dramatic increase in contests between original owners and good faith purchasers.[21] The cases raise complex conflict of laws issues. In many of the cases, the resolution of the contest turns on the question of which jurisdiction's law determines the parties'

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[17] Under New York law, the statute of limitations in replevin is three years. N.Y. Civ. Prac. L. R. §214(3) (McKinney 1990). The "demand and refusal" rule by which the statute of limitations is not triggered until a demand is made and return refused was adopted by the New York Court of Appeals in Gillet v. Roberts, 57 N.Y. 28 (1874); see also Menzel v. List, 267 N.Y.S. 2d 804, (Sup. Ct. 1966),*modified*, 279 N.Y.S. 2d 608 (App. Div. 1967), *rev'd* 246 N.E. 2d 742 (N.Y. 1969). The rule has been justified on the grounds that it protects the purchaser who, as a result of the rule, is not liable in conversion until a demand is made. Note, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 Duke L. J. 337 (1993). At least one foreign jurisdiction has adopted a similar statute of limitations. See Czech Civil Code §§102, 134 (stipulating that owner can assert property right against good faith purchaser for three years from when said right was asserted to the good faith purchaser).

[18] See e.g., French Civil Code Art. 2276; Swiss Civil Code §§722, 728, 729; Japan Civil Code Art.193.

[19] See e.g., Reynolds v. Bagwell, 198 P.2d 215, 216 (1948) ("the statute of limitations as to personal property, though stolen, when held in good faith for value, open and notoriously, runs in favor of such adverse possession so as to bar a recovery by the true owner after the expiration of [the statutory period]; *and* San Francisco Credit Clearing House v. Wells, 239 P. 319, 321 (Cal. 1925) (finding that possession lacked continuity and openness, thereby precluding operation of adverse possession). The "adverse possession" rule suffers from a verifiability problem: proving open and notorious possession of personal property is more problematic than it is in the case of real property. See text accompanying notes 98-100 infra.

[20] See e.g., O'Keeffe v. Snyder, 416 A. 2d 862 (N.J. 1980), and Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd,* 917 F. 2d (278) 7th Cir. 1990), *cert denied,* 112 S.Ct. 377 (1992). See also Property Law of the People's Republic of China Art. 107; Civil Code of the Russian Federation Arts. 196, 200, and 234.

[21] See infra notes 81, 89, 109 and 115.

rights. Thus, when the location of the goods and/or the domicile of the claimants are in different states or nations, the multi-jurisdictional character of the dispute substantially complicates the ownership issues. The choice of law determination may support the policy choices of a particular jurisdiction, but from a social welfare perspective, much of the litigation is socially wasteful and the law, as described by some commentators, is "chaotic."[22]

In this Article, we develop a novel treatment of the good faith purchase problem. This treatment has three purposes: to explain why the problem has been so hard to solve; to propose a solution that responds to the real difficulties that courts face in deciding these contests; and to show how various countries' laws can be harmonized to increase efficiency and reduce transaction costs.

To see why the problem is so intractable, recall first that there are at least four parties to any good faith purchase dispute: the original owner, the thief,[23] the ultimate purchaser and the seller to the ultimate purchaser, who is often a merchant. We focus here on the original owner (O) and the ultimate purchaser (B) for two reasons. First, the thief commonly is judgment proof, and seldom can be found. Second, the merchant is effectively a buyer. If the original owner prevails against the ultimate purchaser, the purchaser sues his seller on a title warranty;[24] if the original owner loses to the ultimate purchaser, the owner can sue the seller in conversion.[25] As a consequence, the seller to the ultimate purchaser is a buyer, in the sense that he must lose the goods' value to someone if he

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[22] For an excellent discussion of the "chaos" that results from the interaction of disparate good faith purchase laws and neutral choice of law rules, see Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigations Between Original Owners and Good Faith Purchasers of Stolen Art,* 50 Duke L. J. 955 (2001).

[23] A "thief" is either the person who actually steals goods, or is a voluntary transferee who wrongfully misappropriates the goods and sells them to a third party. As an example of this latter case, the transferee/thief acquires the goods in return for a check or a promise later to pay cash. Subsequently, the check is dishonored or the cash is not paid and the thief sells the goods to a third party.

[24] See UCC §2-312. If sellers in the relevant trade disclaim this warranty, the demand curve will reflect the risk that buyers bear, so a seller cannot entirely escape the consequences of selling untitled goods.

[25] Much prior analysis overlooks the possibility that owners can sue dealers for conversion. A notable exception is Hanoch Dagan, "The Market Overt as Insurance" (2009) (In Hebrew, English translation on file with the authors).

purchased a bad title.[26] Little generality is lost, therefore, by restricting the analysis to the behavior of the original owner and the ultimate purchaser.

Even so, there is no agreement regarding which legally induced incentives are appropriate for these parties. This is because the good faith purchase problem cannot be solved efficiently with the legal strategies that commercial law provides. Commercial law does not directly create incentives for parties to take particular actions, or refrain from those actions. Rather, the law allocates property rights among the relevant agents. The opportunity to protect or to acquire property rights creates whatever incentives commercial law provides, and those incentives are inadequate in the good faith purchase context.

Ideally, the owner, O, should invest in precaution until the reduction in the probability of an involuntary transfer[27] times the goods' value to her equals the marginal precaution cost. However, the incentive to protect against loss falls to the extent that losses can be undone. O thus chooses a suboptimal precaution level when she is legally entitled to recover lost goods. Different suboptimal incentives drive the buyer's behavior. The buyer should invest in ensuring that his title is good until the probability of receiving a good title times the goods' value to him equals the marginal inquiry cost. Buyers choose a lower inquiry level than this because (a) owners may not find goods that they are legally entitled to recover; and (b) buyers sometimes can keep goods that they purchase in good faith.

To illustrate the problem that these incentive weaknesses create, consider the American theft rule. As just noted, in order to give O efficient incentives to prevent theft, the right of O to recover stolen goods should be completely cut off. On the other hand, to give B efficient incentives to purchase only a clear title, O should always be permitted to recover stolen goods. The theft rule creates suboptimal incentives for the owner because she always can recover the goods, but the rule creates efficient incentives for the buyer, who always loses. Reversing the parties' rights would

[26] We argue below, however, that dealer/buyers should face higher damages than ultimate purchasers.

[27] We define an "involuntary transfer" as the theft of goods from O, or a voluntary transfer from O after which the transferee sells the goods to another without O's authorization. See note 23 supra.

improve the owner's incentives but at the cost of worsening the buyer's incentives. As is apparent, commercial law property right allocations cannot create optimal incentives for *both* O and B in the theft context.[28] Efficiency therefore is unattainable in the good faith purchase context when the law is restricted to allocating property rights. Scholars have not solved the good faith purchase problem because their inquiries largely have been conducted within the commercial law paradigm, and no optimal solution can be found there.

A further difficulty with solving the good faith purchase problem under commercial law is that the law creates two legal obligations that apply to the same goods, thereby complicating the ultimate buyer's maximization problem. American law is illustrative of this point although it arises as well under the laws of those foreign jurisdictions that have a version of the theft rule.[29] Recall that the ultimate buyer loses if the property was originally stolen, which creates an incentive for the buyer to inquire into the probability of theft. In contrast, the buyer can keep the goods if they had been delivered under a transaction of purchase or entrusted to a merchant and subsequently misappropriated, unless the buyer purchased them in bad faith. As we show below, it is less costly for a buyer to establish his good faith than it is for him to inquire optimally into the possibility of theft.[30] Thus, the voidable title and entrustment rules induce buyers to choose a lower precaution level than the level that the theft rule induces. When the buyer makes a purchase decision, however, he does not know whether the goods had been stolen, delivered or entrusted. Therefore, he does not know which legal duty he must satisfy, and thus how much he should invest in precaution.[31]

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[28] In economics, difficulties of this kind are referred to as "double marginalization" problems. For discussion of the problem of double marginalization in the tort law context, see STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 203-04 (2004).

[29] All jurisdictions that have adopted the theft rule also have the voidable title and entrustment rules as well thus creating the dilemma for the buyer that is described in the text. See Appendix infra.

[30] See text accompanying notes 49-51 infra.

[31] Canada (Ontario), England and India also apply two rules to the same goods. In these jurisdictions, the buyer wins if the goods were stolen but the owner's conduct was such as to estop her from asserting her title. The owner wins, however, if she was merely negligent. When an ultimate buyer purchases, he does not know how the original owner behaved.

The considerations set out here suggest that the solution to the incentive problems in the good faith purchase context must be found elsewhere than commercial law. We contend in this Essay that the optimal solution would be to abandon commercial law for tort: Tort solutions are regulatory; they directly hold agents to exogenously set standards. Applied here, a "tort type" solution would permit O to recover involuntarily transferred goods *unless* she was negligent in protecting them. If she had been negligent, then the buyer, B, can keep the goods.[32] An owner who anticipates being unable to recover the goods if she is negligent will take optimal precautions. And since a negligence rule permits non-negligent owners to recover stolen goods, the rule retains the owner's incentive to search optimally for them. This proposed negligence rule would make buyers strictly liable because they would always lose to non-negligent owners. Repealing rules that protect buyers who purchase in good faith would also raise the inquiry level that buyers would choose. Thus, a modified tort solution would improve on the commercial law of good faith purchase *but for* the difficulty of implementing a negligence rule.

Implementation is a significant concern because the efficient negligence standard for protecting goods would require O to choose the precaution level that O would have chosen if she were optimizing against the goods' full value to her. It can be difficult for a court to know what that level is. The goods' true value when stolen and when recovered and the precaution level that O actually chose may not be verifiable to a court. Further, to set the negligence standard, a court would have to know the owner's "production function" – the precaution choice the owner should have made given her costs, her valuation for the goods and the available technology. Production functions are difficult for courts to reconstruct.

Despite these difficulties, commercial law's inescapable limitations motivate us to propose a variant of the typical negligence solution. Our proposal instructs courts to use various verifiable proxies for an owner's negligence.[33] In the United States, these proxies can be adopted as part of a

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[32] In Part III(C), we discuss the cases a negligence solution does not resolve: when O and B both are negligent or when neither is negligent. We argue there that owners should prevail when neither is negligent and buyers should prevail when both are negligent.

[33] As we show in text accompanying notes 102-03 infra, a court only need consider proxies for negligence by the owner.

statutory revision to the UCC.[34] Indeed, the UCC now uses a negligence solution, together with proxies for negligence, to resolve property right contests between owners and purchasers of misappropriated commercial paper.[35] In the same vein, we propose, as examples, that O should be presumed negligent if she fails to take customary precautions,[36] or fails to increase the odds of recovery by tagging or marking goods when these identification tactics exist, or fails to make timely search for involuntarily transferred goods.[37] These proxies correlate with a lack of owner due care and courts could apply them, so our modified negligence solution seems promising.

We conclude this Introduction with two remarks. First, our proposed solution is incomplete because it does not respond to the under-enforcement concern that the good faith purchase problem raises. The concern in tort is that substantial subsets of victims do not sue. Hence, an appropriately set negligence standard actually functions sub-optimally.[38] The analogue in the good faith purchase context is the inability of every owner to find stolen or misappropriated goods. A buyer who is strictly liable for buying such goods would nevertheless take suboptimal care because he optimizes against the goods' actual value *discounted* by the probability that the owner finds him. We propose a variant of the tort fine as a solution to the under-enforcement concern: a bad faith dealer/buyer

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Buyers will have added incentives to take precautions under our proposal but because the buyer will prevail in all circumstances where the owner was negligent, there is no need for courts to evaluate buyer conduct independently. In effect, buyers face strict liability.

[34] Negligence proxies can also be implemented as revisions to the statutes and civil codes that govern good faith purchase contests in the other commercial jurisdictions. See Appendix infra.

[35] See UCC §§3-404-406 and text accompanying notes 85-88 infra.

[36] An example of a customary standard is the installation of a bugler alarm. We discuss these proxies in Part III.B infra.

[37] Failure to make reasonable search efforts would include a failure to make a reasonable investigation of a voluntary transferee. This obligation is apt when O would lose to a good faith purchaser and thus, we show, would search suboptimally.

[38] SHAVELL, supra note 28 at 285-87. A negligence standard in tort functions sub-optimally because the expected liability of a potential injurer is not the damage he causes times the probability of harm, but rather the damages of litigious victims times the probability of their harm. The potential injurer takes suboptimal care because his expected liability is less than the actual harm he causes.

should be required to pay a nondisclaimable civil fine to the state.[39] Second, the analysis to here assumes that the social preference should be to have commercial law rules induce privately optimal owner and buyer precautions against theft. This assumption may be controversial because the state also protects property with the criminal justice system. To support our assumption, we argue below that the appropriate division of labor as between private and public law would have private law attempt to induce the level of property protection that maximizes the private agents' utility.[40]

The Essay proceeds as follows. Part II sets out a model of the good faith purchase problem. We show that both the American theft rule and the voidable title rule (and its variants entrustment and Market Overt) reduce social welfare. In Part III, we present a reform proposal that encourages more efficient precautions by both parties while responding to the verifiability problems that otherwise render tort-type solutions impractical. Part IV defends our proposal against certain non-instrumental objections. In Part V, we evaluate the good faith purchase laws of the leading commercial jurisdictions in light of our analysis. This Part has two goals: to describe the costs of the current diversity of solutions to the good faith purchase problem, and to argue that our solution improves on the current approaches. Part VI briefly concludes.

II. A MODEL OF THE GOOD FAITH PURCHASE PROBLEM

A. Social and Private Optimality

Private precautions and the criminal justice system jointly regulate how society protects private property. We argue here that society should want private agents to choose privately optimal protection levels. The argument has three parts. First, society should invest a positive sum to protect private property. Second, private agents will attempt to protect their own property even when policing is effective. Third, a private agent best advances the social goal regarding property protection when she chooses the protection level that maximizes the value of her own property.

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[39] See text accompanying notes 71-75 infra. Alternatives to tort fines include punitive damages or subsidizing litigation (by awarding attorneys fees to successful plaintiffs). Tort fines are discussed in SHAVELL, supra note 28 at 272-75.
[40] See Part IIA infra.

Since commercial law rules importantly influence the actions private agents take, it follows that those rules should attempt to induce privately optimal behavior.

To begin, society protects an owner's property rights, on the economic view, for two reasons. First, in a decentralized economic system wealth is maximized when owners invest in increasing the value of their own property. The productivity of owner investment falls as the probability of theft increases. Put more simply, owners are less likely to invest if they cannot keep what they produce.[41] Second, a buyer who purchases goods values them more highly in expectation than the owner does. A thief may or may not have a higher valuation. Hence, the probability that goods move to a higher valued user is lower under theft than under trade.[42] Both reasons imply that the social level of investment in property protection is positive. The question is how this investment should be allocated as between public and private actors.

The answer to this question should turn on the extent of overlap between public and private goals. We claim that those goals are largely congruent. Initially, note that private agents will invest positive amounts in property protection independently of the level that the criminal justice system induces. A city police force, for example, may be especially effective at recovering stolen cars, but many owners will lock doors, take keys and park in safe areas nevertheless. The relevant policy question thus is what society should want private agents to do, not whether society should enlist agents in the theft reduction task.

Private agents internalize many of the social benefits and costs that protecting property attempts to achieve. The benefits are the increased productivity from investment that security in property induces and the increased utility (on average) that owners derive from possessing their own goods relative to the utility that strangers would derive from those goods. Owners also naturally bear many of the costs associated with protecting their property, such as buying locks for doors. As a consequence, there would be no conflict between individual and collective rationality were agents

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41 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 31-33 (7TH ED. 2007); *CF*, Frank I. Michelman, *Ethics, Economics and the Law of Property*, 24 Nomos 3, 25 (1982).

42 POSNER, supra note 45, at 205.

to take privately efficient precautions against theft. The benefits that owners would optimally invest to protect – investment gain and utility from goods – *are* the social benefits as well. The concern, therefore, is *not* that privately optimizing agents would invest too little in protecting their property; rather, it is that they might not invest enough.[43] When choosing a precaution level, an individual owner likely ignores positive externalities from theft prevention, such as the more extensive participation of citizens in the public life of cities when the crime level is low. It follows that society should implement the level of public enforcement that permits it to realize the gains that private agents ignore, while encouraging the agents to take privately optimal precautions.

This conclusion is strengthened by the realization that private agents are better informed than public agents at making the relevant choices. No social planner could quantify the benefits that an owner would derive from property ownership, nor could the planner sum those benefits across persons. Similarly, identifying an effective precaution often requires "local knowledge." For example, a factory owner likely knows best how to protect her valuable machines. Private agents thus not only largely share society's property protection goals; they also have a comparative advantage at realizing them.

B. A Model of Precaution

In the model we set out in this Part, we assume that society moves first to choose the level of policing and a set of private law rules. Private agents then make the precaution choices that the rules induce. Since, we show, society prefers those choices to be privately optimal, society should choose privately efficient rules. The model shows how the current rules fall short.

The two risk neutral agents in our model who move second – the original owner and the ultimate buyer –choose their own precaution level (the owner) and inquiry level (the buyer) taking as given the level of policing and the legal rules in place. The model's timing is as follows:

[43] An owner may be thought to over-invest in protection if she chooses a pathological precaution, such as installing a spring gun on her property. The law deters such behaviors specifically.

Precaution______Theft?_________Search?_____Find? _________________

t^o t^1 t^2 t^3

The owner chooses a precaution level, denoted c, to protect the value the goods have for her; this value is denoted $v(t^0)$. The probability that owner precautions prevent theft is p(c). A victimized owner searches for her goods, denoted "found goods", when their expected value exceeds search costs. The value of the goods themselves is denoted $v(t^3)$ because the owner cannot find goods until time t^3. The value of found goods to the owner, however, has two elements. First, if the law permits the owner of stolen goods to recover them, and if the owner values the goods more highly than the ultimate buyer does, the owner repossesses the goods. Second, if the buyer values the goods more highly than the owner does, the buyer purchases the right to keep them. Hence, the value of found goods to the owner, denoted v_r, is the sum of (a) the expected value of the goods when the owner has the higher valuation, and (b) the expected value of the price the buyer must pay to keep them when he has the higher valuation.[44] The cost of owner search is denoted z and the probability that search uncovers the goods is x(z). We initially assume that some level of precaution and of search is productive.[45]

The buyer can investigate to learn whether his seller has a good title to convey. From the buyer's viewpoint, the probability that the seller can convey a good title is exogenous. The buyer has an initial estimate of this probability and can refine his estimate – inquire into title -- at cost w.

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[44] Formally,

$$v_r = \left(1 - p(c)\right)x(z)\left\{\left(1 - Fv_b\right)v(t^3) + F(v_b)\alpha \int_{v(t^3)}^{\bar{v}} \left(\left(v_b\right) - v(t^3)\right)dv_b\right\}$$

The term outside the braces is the probability that the goods are stolen times the probability that they are found. The first term in braces is the expected value of the goods if the owner repossesses them; the second term is the expected value of the price the buyer pays to keep them (when his value is higher). The α before the integral indexes the owner's bargaining power (0 < α < 1).

[45] Technically, we assume that the marginal benefit of precaution and search are positive, starting at the zero level; that precaution and search costs are convex; and that it is suboptimal to protect or search infinitely. The assumption that the optimal level of precaution exceeds zero is motivated in note 47, *infra*. The assumption that the owner always searches is relaxed below. There seems no reason to believe, as a general matter, that $v(t^0)$ is higher or lower than $v(t^3)$. Some goods may fall in value due to later use or abuse. Other goods, such as art and jewelry, may increase in value. As a practical matter, owners only search for valuable goods so the conflicts the law must resolve, and thus the domain of our analysis, concern valuable goods.

The buyer's refined belief that he would be purchasing a good title is denoted g(w). The buyer's subjective probability that he can keep what he buys thus is the probability that he assigns to having a good title plus the probability he assigns to having a bad title times the probability that the owner never finds him. We write this joint probability as g(w) + (1 - g(w))(1 - x(z)).[46] If the law instead permitted a buyer to keep goods that he purchased in good faith, then the buyer would believe that he can retain the goods with probability g(w'), where w' is the cost of proving good faith to a court, *not* the cost of an optimal inquiry into whether the buyer's vendor has a good title to convey. In the United States, these costs differ ($w \neq w'$). The buyer values the goods at v_b.

The owner's incentive to invest in theft prevention and the buyer's investment in getting good title are (weak) substitutes: The more the owner invests in precaution, the smaller is the pool of stolen goods in commerce, so the lower is the inquiry level it is optimal for buyers to choose. Similarly, the more the buyer invests in checking title, the more difficult it is for thieves to sell stolen goods, so the lower is the precaution level it is optimal for owners to choose. On the other hand, the owner's incentive to search once goods are stolen and the buyer's incentive to ensure good title are complements: Search increases the probability that stolen goods are found, so buyer investments in ensuring good title become more productive as owner search increases.[47]

C. First Best and the "Double Marginalization" Problem

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[46] Recall that the probability that the owner finds stolen goods is x(z), so the probability that the goods remain hidden is 1 - x(z).

[47] Our model is similar to the model in William Landes & Richard A. Posner, "The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles," in ESSAYS IN THE ECONOMICS OF THE ARTS (V.A. Ginsburgh and P.M. Menger, eds. 1996). Landes and Posner's excellent analysis of the art market omits dealers, assumes that the owner can recover stolen art with certainty, the owner and the buyer place the same value on stolen goods, the buyer attempts to conceal his possession, and parties function under some legal uncertainty. These assumptions are plausible for the art market but not generally so we do not make them. For example, the buyer of a stolen Matisse may display it in a locked room, but the buyer of a stolen machine must openly use it. Also, because Landes and Posner focus on the art market, they do not derive generally applicable legal reforms nor do they make a comparative law analysis. A thoughtful, unpublished paper by Omri Ben-Shahar, "Property Rights in Goods: An Economic Analysis" (1998) (on file with the authors), also considers the incentives of owners and buyers. Ben-Shahar stays largely within the property rights paradigm and omits dealers but he helpfully integrates the thief's incentives into the owner's problem. Doing this here would not change our policy proposals. Ben-Shahar also does not consider how courts could apply a negligence solution, nor does he make a comparative analysis.

As argued above, society prefers an owner to choose the precaution level that efficiently protects her own property. She thus should maximize the following expression:

$$\text{Max}_c\,(p(c))v(t^0) - c$$

The solution is

$$(1)\quad p'(c)v(t^0) = 1$$

The owner should invest in precaution until the expected marginal increase in her return from preventing theft – the left hand side of (1) – equals the marginal cost of protection – the right hand side of (1). We denote this privately and publically optimal level of care c*.

The reasons that should lead society to prefer having the owner optimize against the goods value to her also imply that the buyer should optimize against the goods value to him when he inquires into his seller's title. Assume then that (a) the law permits O always to recover stolen goods and (b) O always finds them. The buyer's problem, on the two assumptions, is to choose the investigation level that maximizes the following expression:

$$\text{Max}_w\; g(w)v_b - w$$

The solution is

$$(2)\quad g'(w)v_b = 1$$

The buyer invests in inquiry until the expected marginal increase in the value to him of retaining goods – the left hand side of (2) – equals the marginal cost of investigation – the right hand side of (2). This level of inquiry, denoted w*, equals the level of care that society prefers. Therefore, the law should permit O always to recover stolen or misappropriated goods in order to ensure that B invests w*.[48]

[48] The representation of the buyer's problem above is oversimplified. The buyer actually faces what is called an optimal stopping problem. He should incur inquiry costs in checking title until it is optimal for him to stop, which is when the probability that the seller's title is good is sufficiently high to make further inquiries not worth their cost, or when the probability that the seller's title is bad is sufficiently high as also to make further inquiry not cost justified. The

Social welfare always is below first best in any commercial law regime for two reasons. First, the law cannot permit O always and never to recover stolen goods; nor can B be permitted always and never to keep stolen goods. This is a variant of the double marginalization problem. There is no first best solution to problems of this kind. Second, because the law cannot ensure that O always finds stolen goods, B necessarily behaves suboptimally: the probability he assigns to retaining stolen goods is not g(w), his updated belief that the goods were not stolen, but this belief times the probability that the owner does not find him.

C. Parties' Behavior under American Law

1. The theft rule.

a. The owner's problem: We initially assume that the owner can recover stolen goods from a good faith purchaser. Under this rule, the owner's problem has two aspects: to reduce the probability of theft and to locate stolen goods. To solve this problem, we begin at the last stage, after goods have been stolen. The owner's payoff from searching for the goods is the expected value of recovery (the probability of finding the goods times their then value for her) less search costs. The owner chooses the level of search that maximizes this payoff:

$$\mathrm{Max}_z\ x(z)v_r - z.$$

The solution to this problem is

$$(3) \quad x'(z)v_r = 1.$$

The owner invests in the search for stolen goods until the expected marginal increase in the return from locating them – the left hand side of (3) -- equals the marginal cost of search – the right hand side of (3). This is the first best search level, which we denote z*. O searches efficiently because, under the assumed rule, she can recover any goods she finds.

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mathematical representation of optimal stopping problems is complex. The complexity is unnecessary for our purposes. In an optimal stopping model, the buyer will stop searching too soon because he discounts the productivity of search by the likelihood that the owner will not find him. The text represents the buyer's problem as choosing a level of inquiry into title because this yields the same result in a more intuitively obvious way.

Turning to the initial stage, before the goods have been stolen, the owner's payoff from owning them is the expected value of protecting the goods less her precaution cost *plus* the expected value of recovering stolen goods less the cost of searching for them. She therefore must choose the precaution level that maximizes this payoff.

$$\mathrm{Max}_{c,}\ p(c)v(t^0) + \delta^{t3}\{(1 - p(c))[x(z^*)v_r - z^*]\} - c$$

The first term is the expected value to the owner of foiling theft (the probability of keeping the goods times their value). The second term is the expected value of recovering stolen goods, conditional on searching optimally for them: the probability that the goods are stolen times the probability that the goods are found times the value of found goods, and less the cost of searching. The last term is the owner's precaution cost. The payoff to recovering stolen goods is discounted back to when the owner chooses a precaution level because lost goods take time to find.[49] The solution to the owner's maximization problem is

$$(4)\quad p'(c)\{v(t^0) - [\delta^{t3}\ (x(z^*)v_r - z^*]\} = 1$$

The left hand side of Expression (4) is lower than the left hand side of Expression (1), the expression for social welfare, because the bracketed term in (4) is positive (the owner does not search unless the expected gain from search exceeds the cost). The owner thus chooses a suboptimal precaution level. Denoting as c^o the privately optimal level of owner precaution that solves Expression (4), we have $c^0 < c^*$. Intuitively, O's incentive to prevent theft is too low because she may recover the goods.[50] The disincentive to take precautions that the possibility of recovery

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[49] The analysis assumes that the goods are not found until time t^3 so the discount factor is δ^{t3}.

[50] To make this result clear, if O could promptly recover stolen goods, her incentive to prevent theft falls to zero. Formally, we would have $\delta^{t3} = 1$; $x(z^*) = 1$; and $v_r \rightarrow v(t^0)$. The term in braces in Expression (4) would then be negative so O would take no precautions at all. As shown, for first best efficiency the bracketed term should be zero so the left hand side of (4) should be $p'(c)v(t^0)$. When the owner can recover stolen goods, she chooses a precaution level such that the bracketed term lies between zero and one, which is inefficient.

creates is partly mitigated by the cost of delay. The longer it takes to locate stolen goods, the lower is the payoff to recovering them so the higher is the payoff to preventing theft initially.[51]

b. The buyer's problem: The buyer's payoff from purchasing is the expected value of the goods to him if he gets a good title (the goods were not stolen) or if his title is bad but the owner never locates the goods. The buyer's problem is to choose the investigation level that maximizes this payoff:

$$\text{Max}_w\ v_b[g(w) + (1 - g(w))(1 - x(z^*)] - w$$

The first term in brackets is the probability that the buyer assigns to purchasing a good title; the second term is the joint probability that his title is defective but despite optimal owner search he is not found; and the last term is the buyer's inquiry cost.
The solution is

$$(5)\quad g'(w)v_b(x(z^*)) = 1$$

We denote as w^o the privately optimal level of inquiry that satisfies Expression (5). Were $x(z^*)$, the probability that the owner finds the buyer, to equal one, Expression (5) would reduce to Expression (2): the buyer's inquiry level would more closely approach the social preference. Because $x(z^*)$ commonly is less than one, the buyer reduces his investigation level below this optimum ($w^o < w^*$). Intuitively, B's return from inquiring into his seller's title falls as the likelihood that B will lose the goods falls. As is apparent, the buyer's investigation level is increasing in $x(z^*)$ so owner search

[51] Formally, $\delta < 1$ so the discount factor becomes smaller as the time to find stolen goods gets larger. The owner's incentive to prevent theft increases toward the socially optimal level as the second term in braces in Expression (4) falls. We justify here an important assumption. Under the current theft rule, the owner may take no precautions and still recover stolen goods. To pursue this effect of the theft rule, denote the probability of no theft when the owner takes no precautions as p(0) and the expected value of found goods – the bracketed term in the owner's maximization problem – as [•]. Let $\Delta p = p(c^0) - p(0)$. Here Δp measures the productivity of precautions: the bigger it is the more productive precautions are. Then, saving the algebra, O takes some precaution when $\Delta p\delta^{t3}\{v(t^0) - [\bullet]\} > c$. Intuitively, O takes some precaution when precaution is productive (Δp is big); the owner values the goods highly ($v(t^0)$ is big); and the expected value of finding the goods is low ([•] is small). A way to put the last factor is that the owner takes precautions to prevent theft when the likelihood of finding stolen goods is low or when the value of found goods is much less than the value of goods when originally owned ($v_r << v(t^0)$. To be sure, delay does not necessarily reduce the value of discovery in all cases. For example, the owner in pursuing an action in conversion against the buyer may be able to recover the depreciated value of found goods.

and buyer inquiry are complements: as O increases her search, B's inquiries into title become more productive.

We summarize the analysis to here in Proposition One:

When the owner can recover stolen goods, she takes suboptimal precautions to prevent theft but searches optimally for stolen goods; the buyer takes suboptimal precautions to ensure that he receives a good title.

2. The voidable title rule (and its variants: entrustment and market overt).

Consider now the voidable title exception to the American theft rule. Recall that under the voidable title rule a transferee who wrongfully misappropriates the goods receives a voidable title if the owner "delivered [the goods] under a transaction of purchase."[52] A party with voidable title can convey a good title to a good faith purchaser for value.[53] The owner thus cannot recover goods that the initial transferee misappropriated. In the usual case, the transferee/thief[54] pays by check or the sale is denominated "for cash." The thief's title is voidable because the owner can recover the goods from him if the check is dishonored or the cash is not paid.[55] The thief, however, sells the goods to a third party.

The owner takes greater precautions to prevent theft under this rule than under the stolen goods rule because she is less likely to recover the goods. The owner searches less for misappropriated goods under this rule for the same reason, however. Formally, the probability that O can recover the goods now is the product of the probability that she finds them times the

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[52] UCC §2-403(1).

[53] *Id.*

[54] Even though the goods in this case are not "stolen" from the owner but rather are misappropriated, it is appropriate to designate this transferee as a "thief" because his acquisition of the goods is accomplished through "larceny by trick."

[55] E.g., Atlas Auto Rental Corp. v. Weisberg, 54 Misc.2d 168, 281 N.Y.S. 2d 400 (1967).

probability that the buyer fails to persuade a court that he purchased in good faith. We let g(w') be the probability that the buyer is persuasive at cost w'. Then the probability that the owner can recover misappropriated goods is x(z)(1 - g(w')), which we denote $x(z^{vt})$. The probability that the owner actually recovers misappropriated goods is *less* than the probability that the owner finds the buyer ($x(z^{vt}) < x(z^*)$). This is because the probability that a court will find B to have purchased in good faith is positive ($0 \leq (1 - g(w') < 1$). Intuitively, the buyer may persuade the court that he acted in good faith so there is a positive probability that O cannot recover the goods even if she finds them. As a result, O chooses an inefficiently low search level. The voidable title rule thus reduces the owner's precaution inefficiency but creates a search inefficiency.[56]

To understand how the voidable title rule influences buyer behavior, assume initially that only this rule applies.[57] The buyer now keeps the goods if (a) the owner cannot locate him; or (b) the owner locates him but a court finds that he purchased in good faith. On the assumption that only one rule applies, the buyer's problem is to choose the level of inquiry that maximizes his payoff from purchasing:

$$\mathrm{Max}_{w'}\ v_b[(1 - (x(z^{vt})) + x(z(v^{vt})g(w')] - w'.$$

The first term in brackets is the probability that the owner cannot find the buyer; the second term is the probability that the owner locates the buyer times the probability that a court finds the buyer to be in good faith. The last term in the Expression is the buyer's cost when he must appear to be in good faith. The solution to the buyer's problem is

$$(6)\ g'(w')[v_b(x(z^{vt}))] = 1$$

[56] Summarizing the reasoning above, when the term $x(z^{vt})$ is substituted in O's maximization problem, the second term in brackets in the solution, Expression (4), becomes smaller so the left hand side of (4) becomes larger, implying that O chooses a higher precaution level. Denoting the precaution level that O chooses under the voidable title rule c^{vt}, we have $c^0 < c^{vt} < c^*$. Expression (3), however, changes to $(x(z^{vt}))v_r = 1$, which reflects a suboptimal level of search.

[57] Our assumption here accurately describes jurisdictions that adopt the market overt rule, which protects good faith purchasers from merchants.

Comparing Expressions (5) and (6), the buyer chooses a lower inquiry level under the voidable title rule than under the theft rule for two reasons. First, the probability that the owner recovers misappropriated goods is *less* than the probability that the owner recovers stolen goods because the owner reduces her search intensity. Consequently, the buyer invests less in inquiry. The logic is that inquiry is less productive for B when he is less likely to be discovered. The second factor is more subtle. Again comparing the two solutions to the buyer's problem, B would inquire less under the voidable title rule if $g'(w') < g'(w)$; that is, if the buyer's marginal cost of establishing good faith is less than his marginal cost of inquiring into his seller's title. This inequality would be satisfied were it easier for the buyer to *appear* to act in good faith than to make an optimal inquiry. As it happens, United States commercial law does create a relaxed standard of inquiry for buyers of misappropriated goods. Section 1-201(20) of the UCC defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing."[58] The comment to this section confirms that good faith requires less of the buyer than taking good care would require: "'fair dealing' ... is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a person exercised ordinary care in conducting a transaction."[59]

We summarize the analysis of the voidable title rule with Proposition Two.
The voidable title rule increases an owner's incentive to invest optimally in precautions to prevent involuntary transfer but decreases the owner's incentive to search optimally for transferred goods. The rule decreases the buyer's incentive to ensure that he is purchasing a good title.

The voidable title rule is inefficient in two respects. First, the competing effects summarized in Proposition Two are unlikely to offset. Hence, the voidable title rule is ex ante inefficient. Second, while an owner probably values her goods more highly than the thief does, the owner may or may not value the goods more highly than the ultimate buyer does. Therefore, society should want the owner and buyer to bargain over which of them is the ultimate owner. The search dampening effect of the voidable title rule reduces the likelihood of such bargains taking place

58 UCC §1-201(20).

59 UCC §1-201(20) Comment.

below the likelihood that the theft rule yields. The voidable title rule thus is ex post inefficient as well.

This analysis applies to all voidable title cases, but it may be helpful to note its application as well to the United States entrusting rule and the Market Overt rule that applies in a number of other countries. Entrustment and Market Overt are particular species of the voidable title genus. For example, the entrustment rule provides that an owner who entrusts his goods "to a merchant who deals in goods of that kind" cannot recover the goods from a buyer who purchased them "in the ordinary course of business."[60] An ordinary course purchase is made in good faith from a "merchant who deals in goods of that kind."[61] Similarly, the Market Overt rule protects a good faith purchaser for value who buys stolen goods from a merchant dealer.[62] Both of these rules are defective in the ways that the voidable title rule is defective.[63]

To summarize, the American theft rule reduces to below first best the owner's incentive to take precautions because the owner can recover stolen goods, but it creates first best incentives for the owner to search for stolen goods because she can reclaim them. The voidable title rule – as well as the Market Overt rule that is followed in one form or another in many countries and the entrustment rule in the UCC -- have the opposite effect: this class of rules increases the incentive of the owner to take precautions to prevent the initial transfer to the misappropriating transferee because the probability that she can recover the goods falls; conversely, this class of rules reduces the owner' s incentive to search for misappropriated goods because the probability that she can recover them also falls. The American rules are inefficient in another way. Propositions One and Two show that the buyer has different incentives to inquire into title under the theft rule than he has

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[60] See UCC §§2-403(2).

[61] See UCC § 1-201(9).

[62] See, e.g., Israel (Sale of Goods (1968) §34 (good faith purchaser of stolen goods from merchant dealer who takes possession of the goods prevails over rights of the original owner).

[63] See text accompanying notes 50-56 supra.

under the voidable title rule. When the buyer makes a purchase decision, however, he does not know the goods' "legal origin"—whether the goods were stolen, delivered under a transaction of purchase or entrusted. The buyer thus will not choose the inquiry level that would be optimal for him under either rule.[64]

3. The Need to Abandon the Property Right Paradigm

We have shown that every good faith purchase rule is inefficient in some respect. Since perfection is hard to achieve, there remains a question whether one of the property based rules is sufficiently more efficient than the others as to justify its retention. Private information precludes taking this inquiry very far.

Society would like to allocate the property right to the party who is most productive in reducing theft. To see how it might proceed, we denote the marginal productivity of owner precautions as MP_o and the marginal productivity of buyer inquiries as MP_b. Now consider a move from the theft rule to the Market Overt rule. Proposition One shows that this move would increase the owner's incentive to take precautions: the efficiency gain is ΔMP_o. Proposition Two shows, however, that the move would reduce a buyer's incentive to inquire because the owner searches less and because the good faith standard requires less of buyers than an optimal inquiry requires: the efficiency loss from reducing the buyer's incentives is ΔMP_b. Therefore, moving from the theft rule to the Market Overt rule would create a net welfare gain *only if* $\Delta MP_o - \Delta MP_b > 0$.

No state institution could recover the information necessary to make this comparison. As argued above, the marginal productivities require local knowledge to evaluate, such as how effective guarding a particular warehouse would be as opposed to how effective purchasing only from reputable stores that sold the warehoused goods would be. A decision maker thus would have difficulty evaluating a particular context, and would face insurmountable difficulties globally because the efficiency calculus varies across contexts. This reasoning shows that the social goal –

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[64] A sophisticated buyer may assign probabilities to the various legal possibilities and then choose an intermediate inquiry level. There is no reason to believe that the result would be more efficient than the result either rule alone

to induce privately optimal precaution choices – cannot be achieved within the property rights paradigm. In Part III, we next develop a reform proposal that is more likely to yield efficiency.

III. A PROPOSED SOLUTION: NEGLIGENCE PROXIES

The owner's incentives can be improved under a negligence rule that permits her to recover the goods only if she invested efficiently in care. The rule would require the owner to choose the precaution level that she would have chosen if she could not recover lost goods. An owner would retain her property right only if she satisfied the negligence standard. Hence, if workable, the standard would increase the owner's precaution level to first best without worsening her incentive to search for stolen goods.[65] Buyers, in effect, are strictly liable under this proposal: they always lose to non-negligent owners. A negligence rule is necessary for owners because they face conflicting incentives. An owner's incentive to protect her property is partly counter-balanced by her ability to recover that property if it is stolen. The owner's precaution level must be regulated directly to overcome this offsetting effect. In contrast, buyers need only inquire into their seller's title, so strict liability can helpfully move the buyer closer to the optimal inquiry level. An additional virtue of a broad negligence rule is its unitary property: the rule would apply both to stolen and misappropriated goods so the buyer would know what inquiry level the law seeks to induce.

The negligence rule that we propose dominates two other possible solutions to the good faith purchase problem. The first is to have stolen or misappropriated goods escheat to the state. The virtue of this reform is that both the owner and the buyer would then take optimal precautions because they both lose the goods. The defect of the proposal is that it eliminates the owners' incentive to search for lost goods. A negligence rule is preferable to the escheat rule because negligence also creates optimal incentives for owners, if negligence would work, while retaining the

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induces.

[65] See text accompanying notes 64-67.. Formally, a negligence rule, if effective, changes the owner's maximization problem to the problem that Expression (1) solves rather than the problem that Expression (4) solves. The owner, that is, is induced to take first best precautions. The standard does not affect the problem that Expression (3) solves because the owner does not search for goods unless she loses them.

owners' optimal incentive to search. The second solution is to use a comparative negligence rule.[66] Such a rule cannot be adopted in its simple version because property seldom is divisible. An owner who is 60% negligent cannot be given 40% of a Rembrandt. Thus, comparative negligence could work only if the state auctioned off stolen or misappropriated goods and divided the proceeds according to the parties' negligence. Given the volume and variety of stolen goods, the additional deterrence such a procedure would generate likely would be insufficient to justify the procedure's costs.

Part IIIA shows how a negligence solution ameliorates the inefficiencies noted above. This Part assumes that courts can directly observe negligent behavior. In Part IIIB, we relax this sometimes unrealistic assumption to argue that courts *can* observe "proxy behaviors" that correlate well with the presence of negligence. Finally, in Part IIIC we discuss optimal property rules for cases when neither party is negligent or when both parties are negligent.

A. The Case for Negligence Rules

1. Theft

We begin with the theft case. Under current law, O chooses the protection level that c^o achieves rather than the higher optimal level c* because she can recover stolen goods. Under our proposal, O cannot recover stolen goods *unless* she invests c*. To see why the owner will comply with a negligence rule, let her first consider choosing a lesser precaution level, c < c*. If she chooses c, then she cannot recover the goods. But realizing that she cannot recover the goods, she revises and instead chooses the optimal level c*.[67] The search for stolen goods necessarily begins

[66] Under a comparative negligence rule, if both the injurer and the victim fail to take due care, each party bears a fraction of the accident losses. The fraction is based on comparing the degree to which each party's actual precautions departed from the optimal level. The incentive effects of a comparative negligence rule are discussed in SHAVELL, supra note 28 at 187. As we note below, the current version of Article 3 of the UCC adopts a comparative negligence rule in allocating responsibility between owners and good faith purchasers of forged or altered negotiable instruments. See note 84 infra, and UCC §§ 3-404 - 3-406 (2009).

[67] See Part II.B, *supra*.

after the owner has invested in precaution. The owner then has a right to recover the goods because she had invested c*. When she has this right, she chooses the optimal search level z*.[68]

The buyer's inquiry level remains inefficiently low because the owner may not find him. The "finding probability" is unchanged under a seller negligence rule because the owner searches optimally both under current law and under the proposed reform. We summarize this reasoning in the following Proposition Three:

If an owner can recover stolen goods only if she chose the optimal precaution level to protect against theft, the owner voluntarily chooses the optimal precaution level and the optimal search level. The buyer of stolen goods continues to invest too little in checking title because the owner may not find him.

2. Voidable title

Under the current voidable title rule, the owner chooses the higher (but still suboptimal) precaution level c^{vt} because her chance of recovering misappropriated goods is less than under the theft rule. But conversely, the owner chooses a lower search level z^{vt} for the same reason: she has less chance of recovering the goods. A negligence rule would bar the owner's recovery unless the owner optimally investigated potential transferees: that is, unless she invested c*.[69] An owner who did choose c* would have an absolute right to recover the goods; and this would induce her to invest optimally in search.

[68] See Proposition (1), supra. Note that the presence of owner's insurance should not negatively affect the incentives to search for stolen goods, as the insurer is subrogated to the owner's rights: the insurer, that is, has an absolute right to keep what it finds. Hence, the insurer would search efficiently so as to reduce losses from settling claims. On the other hand, a negligence rule will increase the insurer's incentives to monitor the actions of the insured and to use its expertise to propose precautions: more effective precautions by the owner reduce the insurer's risk exposure. Thus, by raising premiums or deductibles, or by requiring certain precautions (e.g., an alarm system attached to a valuable painting), insurers can induce conduct that the owner would not otherwise have taken. For discussion see Victor P. Goldberg, *The Devil Made Me Do It: The Corporate Purchase of Insurance,* 5 Rev. L. & Econ 1 (2009).

[69] Here precaution entails optimally investigating a transferee.

The buyer chooses an inefficiently low level of inquiry in the voidable title case for two reasons: the owner may not find him, and it costs buyers less to appear to be in good faith than to make a due care inquiry. A broad negligence rule for owners eliminates the second reason: the buyer cannot keep the goods if a non-negligent owner finds him. This reasoning leads to Proposition Four:

> *If an owner can recover voluntarily transferred but misappropriated goods only if she chooses an optimal precaution level, the owner behaves efficiently regarding both precaution and search. The buyer chooses a higher inquiry level than under current law, because he always loses if the owner finds him, but this level remains suboptimal because the owner may not find him.*

The proposed negligence rule is incomplete, however, because the good faith purchase problem raises a variant of the under-enforcement concern. In accident law, the concern is that potential injurers take suboptimal care because not every victim sues.[70] In good faith purchase law, the parallel concern is that buyers will take suboptimal care because not every owner finds her goods. The two standard solutions to the under-enforcement concern seem inapt in our context. One solution is to require the injurer to pay punitive damages, which are the grossed up value of the losses of those victims who sue; the other solution is to make a losing defendant pay the plaintiff's attorneys' fees.[71] Few individual buyers could respond in punitive damages,[72] and paying attorneys' fees also may unduly tax the resources of individual buyer defendants.

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[70] For discussion, see Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System,* 11 J. Legal Stud. 333 (1982).

[71] For discussion, see Peter Menell, *A Note on the Private versus Social Incentives to Sue in a Costly Legal System,* 12 J. Legal Stud. 41 (1983); Louis Kaplow, *Private versus Social Costs in Bringing Suit*, 15 J. Legal Stud. 371(1986); Susan Rose-Ackerman & Mark Geistfeld, The *Divergence between Social and Private Incentive to Sue: A Comment on Shavell, Menell, and Kaplow,* 16 J. Legal Stud. 483 (1987).

[72] Under a gross up solution, let there be Q owners whose goods were stolen, and let q of them find the ultimate buyer. Then a buyer faces the probability $q/Q = \alpha$ of being dispossessed. A buyer who is found would have to pay v_r/α as damages. This liability could be large because the probability of being found, α, usually is small.

A third solution, requiring dealer/buyers to pay nondisclaimable civil tort fines to the state, is more promising.[73] The details of a tort fine scheme require more attention than this Essay gives, but its essence can be briefly sketched. Under the proposal, the losing party – owner or buyer – is authorized to report to a state consumer protection agency a dealer who sold stolen or misappropriated goods. The agency would levy and collect the fine. The losing party should be encouraged to report by being awarded a small fraction of the fine.[74] The fine should be set by statute as a multiplier of the value of the affected goods, with the multiplier reflecting the local likelihood that stolen goods are recovered.

Our negligence/tort fine proposal, if workable, would lower the theft level and so help to realize the social goals that private agents ignore. To see why, assume that thieves choose their theft intensity by equating the marginal costs and benefits of crime. The negligence solution would increase the precaution level that owners choose, and so increase the marginal costs of theft. The marginal return to theft is a function of (i) the demand for particular stolen goods (e.g., the I-pad 2), which our reforms do not affect; and (ii) the buyer's purchase cost, which partly is a function of the inquiry level buyers choose. Buyers would increase their inquiry level under the proposed owner negligence rule because the rule withdraws from buyers the defense of purchasing in good faith: buyers would lose whenever owners find them. Our proposal thus lowers the theft level because it increases the marginal cost and reduces the marginal return from theft. Consequently, it is worth exploring whether our proposal is practical. To implement the proposal directly, two assumptions must hold: (a) a court can specify the optimal negligence standard for owners, c^*; (b) parties can verify compliance with c^*, or its absence, to a court. These assumptions may not hold in many real world contexts given the difficulties of establishing and verifying complying with negligence

[73] The benefit of using civil fines to improve incentives was first proposed in Michael Spence, *Consumer Misperceptions, Product Failure, and Producer Liability,* 44 Rev. Econ. Stud. 561 (1977).

[74] The full fine should not be paid to the losing party because that would defeat the incentives the negligence solution creates. A small bounty is needed, however, to insure that a nontrivial fraction of losing parties report that their dealer sold untitled goods.

standards by direct proof.[75] In Part IIIB, we next argue that verifiable proxies for the real variables of interest do exist, and that those proxies are likely to reduce substantially the verification costs associated with a negligence standard.

B. Using Proxies to Ameliorate the Verifiability Concern

We have argued that our proposed negligence solution would improve on the commercial law of good faith purchase *but for* the difficulty of implementing a negligence rule. Implementation is a significant concern because the efficient negligence standard for protecting goods would require O to choose the precaution level that O would voluntarily have chosen if she were optimizing against the goods' full value to her. It can be difficult for a court to determine what level of care that requires in particular cases. For this reason, commercial law uses pure negligence concepts infrequently. To be sure, notions of fault infuse contract and commercial law, ranging from prescriptions against intentional "bad behavior," to assessments of the reasonableness of an actor's behavior in assessing both liability and damages. The Restatement of Contracts identifies many of the fault principles that can be invoked in discrete settings, and whose availability is thought to justify a core strict liability regime.[76]

Strong efficiency arguments can support a "tort-type" analysis of party behavior in particular cases, but courts generally reject negligence for commercial law in order to reduce uncertainty.[77]

[75] The difficulty of verifying compliance with broad negligence standards has been noted. See e.g., Solomon R. Guggenheim Found. v. Lubell, 569 N.E. 2d 426, 430 (N.Y. 1991) (criticizing a proposal to impose a due diligence obligation on the owner on the ground that "the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence.") The court also stated (at 432): "it would be difficult, if not impossible, to craft a reasonable diligence requirement." For discussion, see Hawkins, Rothman & Goldstein, *A Tale of Two Innocents,* supra note 5 at 81-84, and Ben-Shahar, supra note 45.

[76] Restatement (Second) of Contracts, Chapter 11, Introductory Note at 309-12 (1981).

[77] The strong preference for strict liability in common law contract exists although contract doctrine appears in some areas to invite a negligence analysis. For example, if a promisor carelessly fails to take efficient precautions ex ante which results in breach ex post, the "willful breach doctrine" invites courts to increase damages to deter such inefficient behavior. Yet an analysis of decided cases shows that courts decline to employ the doctrine to deter an inefficient breach. Similarly, if the promisee fails to take efficient precautions prior to the breach that would reduce or eliminate losses, the mitigation principle invites courts to apply a "contributory negligence" bar to recovery. Yet courts adhere strictly to the rule that the promisee's mitigation responsibility is not triggered until the promisor breaches. For a

Typical negligence regimes use broad standards (i.e., "duty", "reasonableness"). Courts commonly have more difficulty verifying compliance with such standards than with rules, such as the theft rule and its various exceptions.[78] As a consequence, importing negligence concepts into commercial law could create uncertainty, and thereby impair parties' ability to predict how their deals will be evaluated.[79] It also is more costly for parties to litigate negligence issues than to litigate rules because enforcing a negligence standard requires layers of evidence production.[80] For example, under a negligence standard a party must first propose to the court the activities that constitute "reasonable care" and then provide evidence that she performed them.[81] The court must then choose an operative "proxy" against which to measure a party's performance:[82] What observable (range of) outcomes should count in determining whether (a range of) unobservable behavior would be "reasonable"? The evidentiary proxies a court selects in applying a negligence standard inevitably send a noisier signal to future parties than either the parties' direct observation of their own actions or a judicial determination of the conformity of an act to a rule requiring that act.

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discussion of plausible reasons why courts adhere to strict liability in these settings, see Robert E. Scott, *In (Partial) Defense of Strict Liability in Contract,* 107 Mich, L. Rev. 1381 (2009).

[78] For discussion, see Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design,* 115 Yale L. J. 814 (2006).

[79] For discussion see Kenneth S. Abraham, *The Trouble with Negligence,* 53 Vand. L. Rev. 1187 (2001).

[80] Scott & Triantis, supra note 78 at 836-39.

[81] Id. To illustrate, assume parties wish to pair particular future contingencies to corresponding performance obligations, i.e., when X occurs, the promisor must pay $Y. The parties can define X in several ways. X may be a rule: it conditions on a relatively specific fact, such as the delivery of a widget with a specified weight. Here, parties delegate to the court only the determination of what evidence is sufficient to satisfy X. Alternatively, X can be a standard, such as the delivery of a widget in excellent condition. Here the court must determine not only what evidence is sufficient to establish the weight of the widget, but also the degree to which weight is relevant to the determination of whether the widget satisfies the standard. Scott & Triantis, supra note – at 826.

[82] We use the term "proxy" in this Article to describe what proceduralists refer to as the "operative facts" that are relevant to establishing compliance with rules or standards. A precise rule narrowly confines the content of the operative facts. Indeed, in the limiting case the rule directly specifies the evidentiary proxy. A vague standard defines a broader space within which a court can select the evidentiary proxy that best establishes compliance with the standard.

The verification problem is much reduced when repeated transactions establish behavioral patterns that can serve as useful proxies for negligent behavior.[83] Thus, compliance with customs in the trade and with established professional standards are recognized proxies for reasonable care in evaluating claims that careless commercial or professional behavior caused physical injury.[84] Indeed, at the limit, a proxy for negligence can specify a single instance in the form of a per se rule, so that non-compliance is negligence as a matter of law. In most jurisdictions, for example, an unexcused violation of a statute is negligence per se.[85]

The use of proxies and per se rules to make negligence standards justicible also appears in the law of commercial paper.[86] We first describe and then build on this wisdom because there are similarities between the theft or misappropriation of valuable instruments and the theft or misappropriation of goods. Article 3 of the UCC governs property right contests between an original owner of a lost or misappropriated instrument and a subsequent bona fide purchaser with a combination of proxies for ordinary care and per se rules to decide negligence.[87] Sections 3-404

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[83] Justice Holmes famously predicted that repeated transactions would permit the evolution of negligence proxies:

> But supposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson that can be got from that source will be learned.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 98 (Mark DeWolfe Howe ed. 1963).

[84] See e.g., The T.J. Hooper, 60 F.2d 737, 739-40 (2d Cir. 1932); Sinclair v. Block, 633 A.2d 1137, 1142 (Pa. 1993). For discussion, see Abraham, supra note –at –.

[85] Martin v. Herzog, 126 N.E. 814 (N.Y. 1920); Abraham, supra note – at 1201.

[86] In addition to the example of commercial paper, negligence principles have also been applied to potentially preclude the owner of real property from reclaiming mineral rights under a misappropriated deed that was transferred to a good faith purchaser. Hauck V. Crawford, 62 N.W. 2d 92 (S.D. 1953).

[87] The *nemo dat* principle applies to negotiable instruments as well. Thus, as a general rule, neither a thief nor a good faith purchaser from the thief can acquire property rights superior to that of the original owner. Article 3 of the UCC then provides several exceptions to the *nemo dat* principle. In addition to the familiar rule that a thief of bearer paper can transfer good title to a holder (UCC § 3-201(b)), §§3-404, 3-405 and 3-406, specify exceptions to the theft rule that apply to instruments that require an indorsement by the owner to transfer title. That these exceptions rely on negligence principles is perhaps less surprising once we recall that the principal drafter of Article 3 in the initial UCC project was William Prosser. For discussion of the negligence rules in Article 3, see Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems,* 82 Va. L. Rev. 181 (1996).

and 3-405 consider the special problems raised by the so-called impostor or “fictitious payee” cases. Where an impostor induces the issuer (that is, the owner) of an instrument to issue it in the name of the impostor or in the name of a fictitious payee, the issuer is per se negligent and loses to a good faith “purchaser” (i.e., a person who takes the instrument for value), unless the good faith purchaser failed to exercise ordinary care in taking the instrument.[88] Similarly, under §3-405, the “owner” of an instrument is per se negligent if a trusted employee forges an indorsement and transfers the instrument to a good faith purchaser for value who exercises ordinary care.[89] Section 3-103(a)(9) of Article 3 defines ordinary care as the observance of prevailing commercial standards in the local area and further specifies a per se rule absolving banks from negligence liability if they fail to examine the instrument prior to payment.[90]

Building on these solutions, we partition stolen and misappropriated goods into two categories: (i) “anonymous” goods and (ii) “identifiable” goods. The original owner cannot prove that an anonymous good is hers even if she discovers a buyer in possession. For example, a person may have had her GPS stolen and observed another person with the same GPS brand. The GPS may belong to the owner but she cannot prove it.[91] Identifiable goods are in two categories: (a) Goods the owner can identify by their inherent nature, such as art by known artists, certain precious jewels

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[88] UCC § 3-404(a),(d). The 1990 revisions to Article 3 of the UCC adopt a comparative negligence rule in §3-404(d) (as well as in §§ 3-405(b) and 3-406(b)) in lieu of the pure contributory negligence principles that applied under the pre 1990 Code. While there are differences in terms of proportionate responsibility, the underlying incentive effects are similar.

[89] UCC §3-405(b)

[90] UCC §3-103(a)(9). See Bank of Texas v. VR Elec., Inc., 276 S.W. 3d 671 (Tex. App. 2008 (bank’s failure to have written policy regarding when checks should be manually examined was a failure to observe prevailing commercial standards in the area); and HSBC bank v. F&M Bank Northern Virginia, 246 F.3d 335 (4th Cir. 2001) (leaving one-half inch of open space following numerical portion of check and one inch of open space following its written indication of amount of check was not failure to observe prevailing commercial standards).

[91] Other examples include electronic equipment that is untagged, chopped up autos, melted silverware, and cut up diamonds.

and antiquities; and (b) goods that the owner can remove from the anonymous class, such as by tagging electronic equipment, registering automobiles and branding animals.[92]

The probability that owners can find anonymous goods approaches zero. Consequently, owners take optimal precautions against theft: an owner, that is, chooses the precaution level c*.[93] On the other hand, when owners do not search, buyers take no precautions.[94] There apparently is no private law solution to this buyer inefficiency.

Our goal, regarding identifiable goods, is to make a negligence solution to the good faith purchase problem plausible. The proxies we recommend below should be evaluated in this spirit. The combination of legislation and consequent litigation will determine which of these proxies, or others, will come to be legally efficacious. Commercial law cannot develop effective proxies, however, unless it commits to a negligence solution.

***1. Precautions against theft*.**

Proxies for owner negligence fall in two categories. First, as with negotiable instruments, owners should take customary precautions. As examples, it could be negligence not to have a burglar alarm, not to have a good lock for doors, not to have a safe and to put valuables in it, not to have night lights, not to bar ground floor windows in certain neighborhoods, not to hire guards in museums, not to attempt to conceal valuable shipments or to hire guards for them, not to have an internal control system that permits inventory to be tracked, not to use security cameras, not to bolt

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92 Whether goods are anonymous or identifiable may depend on when they are taken. Thus, while an individual GPS may be anonymous, a carton of them would be identifiable if the merchant owner found the carton before it is broken up.

93 When x(z), the probability of recovering stolen goods, is zero the owner solves the same maximization problem that the social planner solves, so she invests efficiently in precaution. Referring to Part II above, Expression (4) reduces to Expression (1).

94 Formally, when x(z) = 0, the left-hand side of Expression (5) becomes zero: the marginal return from buyer inquiry vanishes so the buyer will not incur costs to check title. Stepping outside the analysis, the purchaser may incur liability to public authorities if he violates criminal statutes against knowingly receiving stolen goods.

mobile equipment to immobile structures and the like.[95] More modern methods of deterring theft include systems that permit owners to disable lost goods from performing their functions or that can only be operated by their owners. It may be negligence for owners not to use such systems if their use is otherwise cost justified.

Second, goods that can be made identifiable in a cost-justified way should be made identifiable. As an example, it could be negligence not to tag when tagging would be efficacious. Identification reduces the gain to theft or misappropriation by clogging channels for selling defectively titled goods and reducing the price buyers will pay for them. Tagging is an evolving technology. A recent Google search for "anti-theft tagging" revealed 989,000 entries in .27 seconds. Thus, a negligence law for stolen goods will evolve as technology evolves. A contemporary illustration is instructive: The use of satellite technology now permits archeologists to identify thousands of valuable antiquities at their situs and thus monitor them for theft or damage.[96] By employing this technology, the Getty Conservation Institute in Los Angeles has built a web based system that uses satellite images to identify antiquities in over 10,000 sites in Jordan.[97] This system,

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[95] There are a number of proxies indicative of negligence in protecting artwork. These include factors that occur on an owner's premises, such as setting up a functioning alarm system, placing functioning security cameras in strategic locations, hiring guards, and placing glass protectors over paintings to preclude viewers from actually touching artwork in a museum. They also include actions post-theft, such as reporting the loss to local police or domestic Interpol or customs officials, registering the stolen item with a country's customs office and with organizations such as the Art Loss Register, a group based in New York that tracks lost or stolen works of art and employs private investigators to track it. See e.g., QMI Agency, "Charges in Van Gogh Heist," *The Toronto Sun*, Sept. 7, 2010 ("Eleven officials from Egypt's culture ministry have been charged with negligence" in the case of an August 2010 theft of a Van Gogh painting. The charges were partially based on the fact that "only seven of the 43 security cameras in the [Mohamed Mahmoud Khalil Museum in Giza] were actually working."); Kristen Chick, "The Thieves Had It Easy in Cairo Art Heist," *The Christian Science Monitor*, Aug. 24, 2010 (The negligence charges against the Egyptian officials were based on separate failures of any security systems or procedures to operate effectively: First, "[n]one of the alarms meant to protect the artwork in the museum sounded"; second, "[o]nly seven of 43 security cameras were working"; third, paintings lacked glass protectants and hung easily within reach of viewers; and finally, "guards were scarce enough that the thieves were able to drag a couch underneath the painting to stand on while cutting the $55 million painting from its frame in broad daylight." Julian Radcliffe, founder of The Art Loss Register, which maintains a stolen art database, explained: "[P]roperly protecting artwork is no simple task. It requires costly technological safeguards, such as burglar alarms and camera surveillance, and guards in every room.").

[96] As one archeologist observed: "The classic rule in preservation is that you can't preserve something until you know that you have it." Timothy P. Whalen, quoted in Randy Kennedy, *In History-Rich Region, a Very New System Tracks Very Old Things,* New York Times, c1-2, August 25, 2010.

[97] Id.

once expanded to other countries, would be an effective tool both to deter looting and to aid in the search for stolen objects.

2. Proxies for search.

Our proposal creates an incentive for the non-negligent owner to search optimally. Thus, there apparently is no need to evaluate how efficiently owners search. Out of equilibrium behavior sometimes occurs, however. For example, a nonprofit owner, such as a museum, may be dilatory. Thus, we would permit a buyer to raise the defense of negligence in owner search. Proxies for such negligence thus are helpful. Tagging or otherwise identifying goods facilitates search. The corollary is that the failure so to identify goods reduces the incentive to search for them, and therefore should be regarded as a search inefficiency. Second, search should be diligent and timely. The high profile art cases suggest that owners can find inherently identifiable goods, and prompt search may turn up goods that are in a transiently identifiable state.[98] In the case of stolen art, search is aided by the growth of on-line art registries that that can track stolen or lost art.[99]

The existence of proxies for reasonable search raises the question how a timely search, or its absence, can be shown. A number of commentators have argued for an adverse possession rule for stolen personal property.[100] Under this regime, the statute of limitations in replevin runs from the

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98 Examples of transiently identifiable goods include goods that are in an original, labeled package or have not had tags disabled.

99 See e.g., "Canada Hot for Stolen Art," *The Toronto Star*, Mar. 27, 2010 (Suggesting various options for owners of stolen artwork, including reporting theft to local Interpol office, or registering stolen item with country's customs and with Art Loss Register, which employs private investigators to track and verify stolen art.), and Guillermo Contreras, "Painting Sold in S.A. Ruled to Be Stolen," *San Antonio Express-News*, Jan. 15, 2010 (Citing U.S. Immigration and Customs Enforcement and the Art Loss Register as critical players in returning stolen art from San Antonio to the French museum from which it was stolen in the 1980s. In this case the Art Loss Register in New York notified French authorities after the stolen painting was submitted to an auction.)

100 See e.g., Patty Gerstenblith, *The Adverse Possession of Personal Property,* 37 Buff. L. Rev. 119 (1988); R.H. Helmholz, *Wrongful Possession of Chattels: Hornbook Law and Case Law,* 80 Nw. U. L. Rev. 1221 (1986); Nicholas D. Ward, *The Georgia Grind; Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case,* 8 J.C. & U.L. 533 (1981-2); John P. Dawson, *Fraudulent Concealment and Statutes of Limitations,* 31 Mich. L. Rev. 875 (1933).

time of the first possession by a dealer or other good faith purchaser.[101] This rule is easy to administer, but does not relate directly to the behavior the law should encourage. The shift in a number of American states to a "discovery" rule for recovery of identifiable stolen goods is a preferable means of implementing a negligence regime. Under such a regime, the statute of limitations begins to run when the owner "discovers or should have discovered" the goods.[102] The courts' discretion under this rule could be confined by verifiable proxies whose absence implies search negligence. As examples, owners should report thefts of identifiable goods to the police, list stolen goods on computerized databases or otherwise advertise their loss, publicize searches, check sale catalogues of notable art and antiquities, and in some cases hire professional searchers.

3. Proxies for buyer inquiry.

Under our proposal, the law need not evaluate the buyer's behavior. As argued above, the buyer should lose to a non-negligent owner regardless of the inquiry level the buyer chose. Moreover, we argue below that when both owner and buyer are negligent, the buyer should be permitted to keep the goods. As a consequence, the buyer prevails against a negligent owner regardless of the inquiry level he chose. Thus, the law needs to create incentives only for owners.[103]

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[101] See e.g., Dragoo v. Cooper, 72 Ky. 9 (Bush) 629, 632 (1873)("We perceive no valid reason why the rule of construction adopted in suits relating to realty shall not be applied in actions for the recovery of personalty."); Dee v. Hyland, 3P.388,388 (Utah 1883); Hull v. Davidson, 25 S.W. 1047(Tex. Civ. App. 1894) (finding for buyer who had been "claiming and holding [a horse] notoriously and adversely."); Gaillard v. Hudson, 8 S.E. 534, (Ga. 1889) (permitting buyer to tack prior purchasers period of possession); Burroughs Adding Machine Co. V. Bivens-Corhn, 119 P. 2d 58,59 (holding that using a typewriter in plain view in a business was an "open and notorious possession").

[102] See e.g., O'Keeffe v. Snyder, 416 A. 2d 862 (N.J. 1980), and Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd,* 917 F. 2d (278) 7th Cir. 1990), *cert denied,* 112 S. Ct. 377 (1992). See also Property Law of the People's Republic of China Art. 107; Civil Code of the Russian Federation Arts. 196, 200, and 234. A growing number of American jurisdictions have adopted the "discovery" rule for triggering the statute of limitations in replevin. Note, *The Case Against Statutes of Limitations for Stolen Art,* 103 Yale L. J. 2437, 2444-51 (1994).

[103] Although our proposal effectively imposes a strict liability standard on buyers if owners take efficient precautions, the steps buyers do take to discover whether artwork has been lost or stolen are a useful indicator of the resources an owner can access in reporting a theft or loss. In addition, current buyer actions suggest that buyers could respond to the incentives a strict liability regime creates for them. Regarding those actions, there is substantial evidence that buyers of valuable art and artifacts check the Art Loss Register and Interpol reports to see if a particular item has been reported as lost or stolen. These actions illustrate the efficacy of owners' attempts to protect their property and thus support the feasibility of implementing a negligence standard for owners. In addition, the common search strategies employed by professional buyers is evidence of relevant professional standards of care, at least for collectors/gallery owners. For example, in 1986, the International Council of Museums adopted a code of professional ethics that insists on due

If a state wishes to retain the distinction between the theft and voidable title cases, however, it should require the buyer to exercise due care in making a title inquiry (rather than the lower good faith standard). A buyer makes an optimal investigation into his seller's title when he invests w*. But again there is a verifiability problem: a court would have difficulty recovering w*. As with the owner, this problem can be ameliorated by providing appropriate proxies for negligence. We would define negligence by a buyer as buying from a non-standard source, or purchasing goods at a dramatic (more than two fold) discount from the current market price of similar goods,[104] or ignoring a tag or other standard method of identification. These verifiable proxies should improve the functioning of a voidable title rule.

C. Property Rules When Neither Party is Negligent or Both are.

When neither party is negligent or when both are, the law must allocate property rights between the parties. We argue that the owner should prevail as between two non-negligent parties for two reasons. First, the contrary rule – the buyer wins – is inefficient. To be sure, the owner's incentive to take precautions would be unaffected by a switch to the contrary rule. Under either rule,

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diligence for every item entering a collection. Elisabetta Povoledo, "Returning Stolen Art: No Easy Answers," *NY Times*, Oct. 27, 2007. Since galleries and museums are the major players in the art world on the buy side, their standards of care support holding owners to similar standards of diligence in reporting theft or loss. For discussion see The Associated Press, "New York City: Stolen Moore Sculpture Recovered in Toronto," *Newsday*, Mar. 26, 2010 (Highlighting that gallery owner of gallery housing stolen sculpture had searched the Art Loss Register database to see if it had been reported stolen, because "[w]hen a piece doesn't have any history, anything that is verifiable, you need to do due diligence."); Elisabetta Povoledo, "Returning Stolen Art: No Easy Answers," *NY Times*, Oct. 27, 2007 (Reporting that The Museum of Fine Art in Boston returned 13 archaeological artifacts to Italy, and citing museum codes and guidelines drafted in the spirit of a 1970 Unesco convention prohibiting illicit circulation of a nation's cultural property.); Patricia C. Johnson, " Museums Struggle to Make Sure They're Not Receiving Stolen Goods," *The Houston Chronicle*, July 16, 2006 (Discussing fact that "'[i]n today's environment, the collector needs to exercise due diligence,'" meaning that buyers must research in depth the origin or source of particular artwork, including "where, when and by who[m] it was made; if it was exhibited or documented in a book or catalogue; when and where it was sold or disappeared….It's the job of the collector, whether private or public, to evaluate the record" before procuring the item to ensure the collector will actually have good title."); David Bonetti, "A Mystery Behind Art Museum's Mummy Mask?," *St. Louis Post-Dispatch*, Jan. 20, 2006 (Reporting that a former art forger and smuggler accused the St. Louis Art Museum of purchasing and displaying a stolen Egyptian mummy. In defending itself, the Museum declared that it had done "due diligence" in purchasing the artifact, including contacting both Interpol and the Art Loss Register,)

[104] When a market exhibits price dispersion, purchase at a price that is more than one standard deviation below the mean would be in bad faith. Such a price is likely to be below the cost of reputable dealers.

the owner loses unless she takes optimal care so she takes optimal care. However, the non-negligent owner's incentive to search for lost goods under the contrary rule would be reduced because she could not recover the goods if the buyer behaved non-negligently. The buyer's incentive to take care would also be reduced because his return from inquiry falls as his probability of being found falls. Hence, letting the buyer prevail when neither party is negligent creates three inefficiencies: (i) the owner's incentive to search is reduced; (ii) the buyer's incentive to inquire into title is weakened even further; and (iii) because the owner searches less, the probability that the parties will bargain to permit the highest valuing party to own the goods falls. In contrast, if the owner prevails when neither party is negligent, the owner has first best incentives and the buyer's inefficiency is unchanged. Thus, efficiency considerations imply that the owner should prevail whenever she takes optimal precautions to prevent theft.[105]

Second, letting the owner prevail also follows from the premise that private law rules should not redistribute entitlements unless good instrumental reasons exist for doing so. We assumed above and argue below that owner negligence is a sufficient reason to cut off an owner's property right. Encouraging the free flow of commerce is a second and often asserted reason to cut off the owner's rights.[106] The social goal, however, should not be to encourage buyers to purchase goods simpliciter, but to encourage non-negligent buyers to purchase goods. Letting the buyer prevail when neither party is negligent would partly defeat this goal. And since there are no instrumental reasons to prefer innocent buyers to innocent owners, the premise that redistribution is a public law function should control.

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[105] This argument shows that our analysis illuminates the case when neither party is negligent. Courts and commentators sometimes express sympathy for buyers who may be dispossessed though they apparently purchased in good faith. We offer two comments by way of rebuttal. First, buyers keep anonymous goods because owners do not search for them. A buyer will not lose a sweater or a stereo. Second, buyers can repurchase goods from owners who find them. Hence, a buyer would be dispossessed only when the owner values the goods more highly than he does. This suggests that the owner who never finds the goods is the more sympathetic party.

[106] See SCHWARTZ & SCOTT, supra note 10 at 461-62 ("Metaphors of free flowing commerce or unclogged channels of trade do not illuminate [the good faith purchase] issue.")

In contrast, the law should protect the buyer when both parties are negligent. Our goal here is to minimize the disruption that involuntary dispossessions can cause. When the owner locates the goods, she has already been disrupted by theft or misappropriation. Alternatively, she has not been disrupted at all because she had *delivered* the goods under a transaction of purchase and so expected not to get them back.[107] Therefore, the owner's disruption costs are sunk (or never existed) when the law must make an allocation decision; and the owner has accommodated as well as she could to her loss. In contrast, the buyer has adjusted to owning the goods, not to losing them. Imposing the loss on the owner thus punishes her negligent behavior but does not further injure her. Imposing the loss on the buyer would punish his negligent behavior, but it also would create a new injury. In this context, one negligent party necessarily must be punished, but both parties need not be disrupted. Thus, a negligent buyer should be permitted to keep the goods when the owner also is negligent.[108]

We summarize this reasoning in Proposition Five:

When neither party is negligent, efficiency is enhanced by allocating the right to recover stolen or misappropriated goods to the original owner. When both parties are negligent, the goal of minimizing disruption costs supports allocating the right to keep stolen or misappropriated goods to the buyer.

D. Barriers to Enactment: Transition Costs and the Political Economy of Sales Law

The verifiable negligence rule we propose raises law revision concerns. Putting political economy issues aside for the moment, good faith purchase laws are relatively simple to revise.

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[107] In this case, the owner's immediate transferee cannot respond in damages so she asserts an in rem claim to the goods in the hands of the third party.

[108] A virtue of this result is that there is no need for courts to evaluate buyer behavior: buyers always lose when owners are not negligent; and buyers always win when owners are negligent. An objection to letting negligent buyers prevail is that buyers would behave strategically by seeking out negligent owners from whom to purchase. This objection seems implausible. Owners behave optimally in equilibrium. In practice, this means that many owners would behave well, so that buyers would have to search extensively to find possibly negligent owners. Also, whether an owner invested efficiently in precautions may not be conveniently observable to an outsider. The costs to buyer search for negligent owners thus probably exceed the gain. Also, permitting "passively" negligent buyers to prevail but barring "actively" negligent buyers creates another litigation issue. A negligent owner would have an incentive to litigate the category of buyer negligence. The social gain from so expanding good faith litigations seems too slight to justify the expansion.

These laws are governed in the United States and elsewhere largely by statute. Thus, for example, UCC §2-403 can be readily amended to incorporate negligence principles as well as to specify appropriate proxies for negligence. The significant drafting issue is whether the Code should specify bright line proxies for ordinary care in the form of per se statutory rules, provide courts a choice of proxies by putting illustrations of behaviors that constitute reasonable precautions in the Code comments, or use both methods. The solution should turn on the answer to an empirical question: how heterogeneous are the ways in which owners can take optimal precautions? Our tentative view is that the circumstances surrounding theft or misappropriation of goods are no more heterogeneous than those that accompany theft or misappropriation of commercial paper. Thus, we support a relatively precise statutory definition of negligent (or non-negligent) behavior modeled on the Article 3 treatment of verifiable negligence. This approach will give parties some guidance yet permit common law development.

There is a difficult question whether interest group opposition would block enactment of a verifiable negligence rule, either domestically or in foreign jurisdictions. We have previously argued that interest group competition among participants in private legislative processes such as the processes that determine UCC and Restatement content generate a strong status quo bias; powerful private actors can cause these "private legislatures" often to reject significant reform.[109] Our goal in this paper is to develop solutions to the good faith purchase problem that a well-motivated decision maker would adopt. Hence, identifying politically effective strategies for overcoming interest group opposition to such solutions is beyond our scope. We will, however, note some of the apparent difficulties.

Original owners and ultimate buyers are numerous and widely scattered and so neither group could constitute an effective political force. In contrast, dealers and museums that both sell and buy

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[109] Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures,* 143 U. Pa. L. Rev. 595 (1995). One of us has applied the insights from this model to the products of the groups formulating international rules governing the sale of goods. See Clayton P. Gillette & Robert E. Scott, *The Political Economy of International Sales Law,* 25 Int'l Rev. L. & Econ. 446 (2005). For a similar analysis of the products of such international treaties, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va J.Int'l. L. 743 (1999).

already are organized in associations; these groups could participate relatively conveniently in legislative considerations. Our solution imposes additional duties on dealers and on museums in their capacity as owners: to behave non-negligently and to search promptly. We also advocate a version of punitive damages for dealers: the tort fine.[110] Museums and dealers thus would face higher costs of doing business, and would also incur transition costs: to retrain personnel; to renegotiate relationships with intermediaries; to generate working groups and best practice statements. Turning to the international arena, dealers in Market Overt regimes collect premiums because they can convert bad titles into good ones. These premiums are industry-specific and thus not likely to be competed away.[111]

Assessing the severity of the political economy barriers to enactment is difficult as an a priori matter. As examples, increasing the costs of current dealers may increase the barriers to entry into the dealer market. In deciding whether to oppose our reform, dealers thus would have to trade off the gain from strengthened market power against reform costs.[112] Museums are nonprofits who often receive public subsidies, and so museums may be sensitive to good will losses from being perceived to oppose theft deterring reform. These considerations suggest that our reforms are not obviously infeasible politically, and so at this early stage should be considered on their merits. Further, in jurisdictions in which the primary negligence rule cannot be enacted, emphasis should shift from the substantive to the procedural; that is, from primary negligence to the relevant statutes of limitations. In the art market, at least, thieves expect that merchandise will chill over time.[113] This makes the statutes of limitation critically important. The New Jersey "discovery" rule, which declines to toll the statute for negligent owners, captures many of the benefits of our proposal.[114]

[110] See text accompanying notes 70 –74 infra.

[111] We are grateful to Paul Stephan for this point.

[112] There is an analogy to the cigarette companies, who did not oppose bans on advertising in many popular media. The companies' increased cost of reaching buyers were outweighed by the ban-created barrier to the entry of new competitors.

[113] ULRICH BOSER, THE GARDNER HEIST: THE TRUE STORY OF THE WORLD'S LARGEST UNSOLVED ART THEFT (2009).

[114] See e.g., O'Keeffe v. Snyder, 416 A. 2d 862 (N.J. 1980), and text accompanying notes 98-99 infra.

Moreover, dealer resistance might be easier to overcome if legal change were tied to reform of the statute of limitations rather than to a replacement of Market Overt with a negligence regime.

IV. MORAL OBJECTIONS TO A NEGLIGENCE RULE

We now consider two moral concerns that our negligence solution to the good faith purchase problem may raise. First, are the justifications for protecting property strong enough to overcome the efficiency case for barring a negligent owner from recovering her goods? Moral theorists adduce three reasons for protecting the property rights of original owners: (a) an owner has a special or particular relationship to property;[115] (b) protecting property assists directly in protecting liberty or personhood;[116] or (c) the possibility of owning property creates an incentive to create wealth which, in turn, enhances personal autonomy.[117] None of these considerations should defeat a negligence solution that applies in the voidable title and entrustment contexts. In the voidable title case, the owner transfers the goods with the expectation that the transferee will sell them and thereafter remit a portion of the price to the owner. A consignment sale is a common illustration of this behavior.[118] Property right considerations do not apply to the voidable title case because the owner's loss is pecuniary. She has voluntarily parted with goods in exchange for the promise of money, but has not been paid. She seeks the goods because her initial transferee is judgment proof and a claim to goods may be easier to enforce against relatively innocent third parties than a claim for money. In the

115 HANNAH ARENDT, THE HUMAN CONDITION 256 (1958) (asserting that "private property is a vital need for the soul…all men have an invincible inclination to appropriate to their own minds anything which over a long, uninterrupted period they have used for their work, pleasure or the necessities of life.").

116 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II, CH. V (1690) (PETER LASLETT ED. 1988) ("Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person."); Charles A. Reich, *The New Property,*73 Yale L. J. 733, 771 (1964) (arguing that property "performs the function of maintaining independence, dignity and pluralism."); cf. Margaret Jane Radin, *Property and Personhood* 34 Stan L. Rev. 957 (1982).

117 MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

118 Under UCC §2-403(1), an owner's voluntary transfer enables her transferee to convey good title to a good faith purchaser if the "goods have been delivered [to the transferee] under a transaction of purchase." See also §2-326 (the consignor loses to a good faith purchaser).

entrustment case, the owner expects to get the goods back. A common illustration of this case is where the entrustee sells goods he was supposed to repair and return. There also cannot be a property right objection to a negligence rule in the entrustment case because such a rule provides even greater protection to the owner than does current United States law; under a negligence rule, the owner prevails even over a buyer in the ordinary course of business if she makes a non-negligent choice of transferee.

A negligence rule, however, does materially weaken the owner's property right in the theft case because it grants the property right to buyers when an owner is negligent. But the case for vindicating the original owner's property rights in the theft case is weak. Justifications based on property as liberty or as personhood are strongly over-inclusive in the good faith purchase context. Business firms that are fictional persons lacking moral identities are nevertheless permitted to recover stolen property.[119] In the same vein, individuals can recover LCD TVs that have no unique personhood properties as well as engagement rings that do. A more nuanced rule that sought to accommodate liberty and personhood values might use a negligence regime with carve outs for particular classes of property interests. We are doubtful that the administrative costs of such a rule are justified, however, especially where an owner's rights are cut off under a negligence rule only if she materially contributed to her own loss. Finally, the wealth-creating justification for protecting the original owner's property interest fails as well. Granting such rights to a negligent owner may actually reduce wealth, by encouraging theft. A negligence rule, on the other hand, creates incentives to protect wealth.

The second moral concern challenges the instrumental justification for eliminating the distinction between the void and voidable title cases. Under a verifiable negligence rule, the owner prevails in both cases if she is not negligent; under current United States law, the owner only prevails in the void title case (there is theft) but loses in the voidable title case.[120] A possible

[119] See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 Yale L. J. 541, 556 (2003) (arguing that business firms are artificial persons whose autonomy the state need not respect on moral grounds and whose morality is ordinarily required by positive law).

[120] The void/voidable title distinction seems to have become part of U.S. law in consequence of a poorly thought out borrowing from the English common law. Other countries also make the distinction, however. See Appendix, infra.

justification for retaining current law may follow from the act/omission distinction. Under this distinction, actions are more blameworthy than omissions. An owner acts when she transfers goods to a transferee but only omits precautions when she is negligent.[121] The act/omission distinction is an application of the doctrine of "double effect." This doctrine, commonly applied in noncommercial contexts, distinguishes between consequences of actions that were intended, as ends or as means, and consequences that were only foreseen.[122] On this view, intentionally killing a person is more blameworthy than failing to take an action that would prevent the death of a person. In the former case, the actor intended to cause a death; in the latter case, the actor did not, though he could foresee that his failure to act would result in death.[123] As applied here, in the voidable title cases the owner intends to part with her property as the means to maximize her utility. In the void title cases, the owner could merely foresee that her failure to take appropriate precautions would result in the loss of her property and in harm to good faith buyers were she able to recover the property. But here the owner did not intend to incur a loss or to harm others.

Our verifiable negligence solution collapses the distinction between the void and voidable title cases partly because we reject the doctrine of double effect.[124] This doctrine confuses two questions. The first is whether an act is morally permissible. The second is whether an agent acted in a morally permissible way when she did the act. The former question must be answered by weighing the considerations for and against the act; the latter question requires an assessment of the agent's motives. To illustrate, a person may give money to a charity from base motives, such as a desire for recognition or to spite relatives who wished to inherit her estate. If the money will be well spent, however, the giving of it is morally praiseworthy even though the giver is not. Similarly, a

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[121] Some cases apparently apply this distinction. In *West v. Roberts*, 143 P.2d 1037 (Colo. 2006), the court distinguished the voidable from the void title cases because in the former the owner made a voluntary transfer of his property.

[122] Alison McIntyre, "Doctrine of Double Effect", *The Stanford Encyclopedia of Philosophy,* Edward N. Zalta (ed. 2009), URL = <http://plato.stanford.edu/archives/fall2009/entries/double-effect/>.

[123] Id.

[124] The following discussion owes much to THOMAS SCANLON, MORAL DIMENSIONS, Ch. I (2009).

person may drive too quickly in order to visit a sick friend, and her speeding may injure another. Here the person committed a blameworthy act, though she intended to do good, not harm.

Law reform should focus on acts, not motives. Applying this distinction here, an owner who fails to take effective precautions against theft encourages the theft and may cause harm to later purchasers. Her failure thus is culpable even though she probably did not intend harm to anyone. Losing her property is an appropriate sanction. In the same vein, an owner who voluntarily transfers property after making the right inquiries has acted in a blameless fashion, whatever her intent may have been. There thus seems no morally compelling reason to distinguish between the victim of theft and the victim of misappropriation. And to summarize, there apparently is no moral objection to applying a negligence standard to owners generally, thereby permitting only non-negligent owners to recover goods that either were stolen or misappropriated.

V. GOOD FAITH PURCHASE IN COMPARATIVE PERSPECTIVE

A. Harmonizing Good Faith Purchase Laws.

In this part, we consider how the laws of various jurisdictions would change in light of our analysis, and we also look at the costs of retaining the status quo.[125] The initial issue is simple, in a sense: no jurisdiction has adopted our modified negligence solution, so our proposal would change the law everywhere. It may be helpful to be somewhat more concrete. In Parts III and IV, we show how United States law would change. Canada, England, India, and Russia also allow original owners to prevail in the theft case, so our solution would reduce the owner's rights but increase her incentive to take precautions in those jurisdictions as well.[126]

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[125] Reasons for the lack of uniformity in good faith purchase laws are discussed in Saul Levmore, *Variety and Uniformity in the Treatment of the Good Faith Purchaser*, 16 J. Legal Stud. 43 (1987).

[126] See Appendix, infra. In England, Canada (Ontario) and India the owner cannot recover under the theft rule if the owner's conduct precludes him from denying the seller's authority to sell. However, mere negligence by the owner in failing to take precautions against theft does not constitute grounds for invoking an estoppel. See English Sale of Goods Act § 21; Ontario Sale of Goods Act § 22; Indian Sale of Goods Act, 1930 § 27. As indicated in the Introduction, these

Brazil, France, Japan, Mexico and Switzerland vary the theft rule: The owner prevails against an ultimate buyer in good faith only if she reimburses the price the buyer paid.[127] Under the reimbursement version of the theft rule, the owner's incentive to take precautions against theft increases because she no longer recovers the goods but rather recovers the goods *less* the cost of purchasing them a second time. For the same reason, the owner searches suboptimally for stolen goods. The buyer's incentive to inquire into title also is reduced under the reimbursement version of the theft rule because the buyer is more likely to keep the goods. These effects are similar to those that the voidable title rule produces (see Proposition Two above), but the reimbursement rule actually is less efficient than the voidable title rule for two reasons. First, the buyer's suboptimal incentive to inquire, because the owner may not find him, is further reduced because the law now insures the buyer's purchase price. Second, the reimbursement version of the theft rule dampens owner search more severely than does the voidable title rule.

To understand the second effect, realize that the owner's value for found goods and the price at which the buyer purchased those goods are positively correlated. Correlation exists because the owner and buyer usually have similar uses for the goods and so purchased in similar markets. Under the pure theft rule, correlation does not matter because the owner does not pay the buyer's price; she is entitled to recover any goods she finds. In contrast, under the reimbursement version of the theft rule, the owner must predict the price at which the buyer purchased because she will search only if her expected value less the buyer's price exceeds search costs. Correlation between the owner's value and the buyer's predicted price likely is substantial for commercial goods with relatively unitary uses, such as machines and trucks. Then search costs may cut off owner pursuit altogether.[128] This is ex ante inefficient because it much reduces the buyer's incentive to inquire,

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jurisdictions create a legal origin problem for buyers because two legal rules can apply to the same goods. Our unitary reform proposal would eliminate this additional inefficiency. In Germany and Mexico, the theft rule applies in part: The owner loses to a good faith purchaser who bought at a public auction. See e.g., The Civil Code (BGB), Section 935; Mexico Civil Code, Art. 799.

[127] See Appendix infra.

[128] Denoting the price of found goods as $q(t^3)$, two inequalities may hold: (a) $x(z^*)v_r > z$; (b) $x(z^{rb})[v_r – q(t^3)] < z$. The left hand side of (a) is the expected value of searching for goods under the pure theft rule (finding probability times

and it is ex post inefficient because it precludes the possibility of an ex post bargain under which the goods would end up in the hands of the highest valuing user. The pure theft rule and the voidable title rule thus are preferable on efficiency grounds to the reimbursement version of the theft rule.[129]

Many countries adopt the voidable title rule, and a majority of these adopt the entrusting rule.[130] A number of countries adopt Market Overt.[131] China adopts a reimbursement version of the voidable title rule and Brazil, China, France, Japan, Spain and Switzerland adopt the reimbursement version for Market Overt. The reasoning above suggests that these versions are less efficient than the rules for which they substitute. On the other hand, a number of jurisdictions have statutes of limitation that run from the time of theft rather than the time of discovery. These limitation periods run from one to five years.[132] Shorter limitation periods encourage search, which is efficient.

To summarize, no advanced country has an efficient law of good faith purchase. This defect has two causes. First, efficiency is precluded under the property right paradigm, which countries have yet to escape. Second, inchoate fairness notions appear to influence the rules. Thus, it may

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value); the right hand side is search costs. The left hand side of (b) is the expected value of searching for goods under the reimbursement version of the theft rule. The first term is the (lower) probability that the owner finds the goods under this rule; the term in brackets is the owner's net gain from recovery. As is apparent from (b), as the current price approaches the buyer's current value, search costs are more likely to preclude owner pursuit.

[129] Spain adopts the reimbursement version of the theft rule for goods bought at a public sale and China adopts the version for goods bought at auction or at a public market. See Appendix infra.

[130] For voidable title, see the Czech Republic, England, France, Italy, Germany, Japan, Russia and Switzerland. Countries that adopt the entrustment rule include England, France, Germany, Italy, Russia and Switzerland. See Appendix, infra.

[131] Italy has the most buyer friendly version of the Market Overt rule. The Italian Civil Code (Codice Civil) § 1153 provides: "He to whom movable goods are alienated by one who is not their owner, acquires their ownership by way of possession, provided he is in good faith (Article 1147) at the time of the delivery." Article 1599 also provides that "ownership is acquired free of rights of another in the thing if they do not appear in the instrument or transaction and the acquirer is in good faith." Other countries with a pure Market Overt rule include Israel and Germany (public auction only). Brazil, China, France, Japan, Mexico, Spain and Switzerland have the reimbursement version of the Market Overt rule under which the owner can reclaim his property from the good faith purchaser if he reimburses him for his original purchase price. See Appendix, infra.

[132] Some illustrations of short limitation periods include: Canada -- one year; China and Japan – two years; France, Mexico, and Spain -- three years:; Switzerland -- five years. See Appendix infra.

seem unfair to require an innocent buyer to yield goods without reimbursing the price the buyer paid. It also may seem unfair, however, to require an innocent original owner to pay for stolen goods twice. Fairness notions seem indeterminate in the good faith purchase context. Inefficient good faith purchase laws also create two categories of cost: first, the cost to a county of having an inefficient law; second, the costs to parties in all countries of coping with diverse inefficient laws. Our proposed reform thus has two virtues: it would improve the private incentives of parties affected by the law everywhere and, if adopted everywhere, it would eliminate the costs of diversity. We next focus more directly on diversity costs.

B. The Costs of Disparity in Good Faith Purchase Law

The laws of many advanced commercial nations protect most buyers against the claims of non-negligent owners of stolen goods. A consequence of these laws is to create potential havens for laundering valuable stolen goods, especially art and antiquities.[133] Owners respond to this possibility by attempting to sue buyers in jurisdictions whose law, in the instant case, favors the owners. The resultant conflict of laws issues are complex. In multi-jurisdictional contests, these issues turn on the interaction between the remedy the original owner uses to seek recovery of the goods (typically under United States law through an action in replevin) and the claims of the buyer that may trump the owner's title. The buyer's claim may be substantive, as in the case where the buyer claims rights to the good based on his purchase from a merchant seller, or it may be procedural, as when the buyer asserts the bar of a statute of limitations. Absent choice of law considerations, an owner seeking to recover stolen goods through a replevin action will be motivated to bring suit in a jurisdiction such as the United States that does not recognize the Market Overt exception to the *nemo dat* rule, as well as in a state, such as New York, that retains the "demand and refusal" rule for

[133] For discussion of the trafficking in stolen art and the problem of safe haven jurisdictions, see Harriet Crawley, *Forget the Video, It's Your Paintings They're After,* Daily Telegraph (London) June 16, 1992 at 16; Stanley Meisler, *Art & Avarice,* L.A. Times, Nov. 12, 1989, Magazine at 11; Don L. Boroughs et al, *The Hidden Art of Theft,* U.S. News & World Rep., Apr. 2, 1990 at 13 (noting Japan's laws protecting the bona fide purchaser); James Walsh, *It's a Steal,* Time, Nov. 25, 1991 at 87 (commenting on laws of Switzerland, Liechtenstein and Cayman Islands).

triggering the statute of limitations.[134] To do so, the owner need only acquire in personam jurisdiction over the defendant buyer in New York. Unfortunately for the owner, if the goods have been physically moved to (or from) other jurisdictions, the application of standard choice of law principles may well cause the forum of choice to decline to follow its own rule.

The uncertain effect of the interaction of disparate rules governing good faith purchase and the application of standard choice of law principles is well illustrated by the recent case of *Gemological Institute of America, Inc. v. Zarian Co., Ltd, et al.*[135] Zarian claimed ownership rights to a $375,000 diamond that had been stolen from its business in Dubai and subsequently sold to Siyance Brothers Diamond Corp. ("Siyance"). Siyance claimed that a member of its family business had purchased the diamond in Israel from a merchant dealer and then had transferred the diamond to its business in New York where it was brought to the Gemological Institute for grading. The case turned on the choice of law between New York and Israel as to the title to stolen goods: New York law applies the theft rule favoring the original owner[136] and Israel applies a Market Overt rule favoring a good faith buyer from a merchant dealer who takes possession.[137] The District Court applied the well-recognized choice of law rule that the validity of a transfer of personal property is

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[134] Recall that under the demand and refusal rule, the statute of limitations does not begin to run until the owner finds the stolen goods in the possession of the buyer, demands their return and the buyer refuses to return them. See TAN infra.

[135] 2006 WL 2239594 (S.D.N.Y.).

[136] Kunstsammlungen Zu Weimar v. Eliicofon, 536 F.Supp. 829, 846 (E.D.N.Y. 1981); Candela v. Port Motors Inc., 617 N.Y.S. 2d 49, 50 (App. Div. 1994).

[137] Section 34 of Israeli Sales Law states:

> Where any movable property is sold by a person who carries on the sale of property of the kind of the thing sold, and the sale is made in the ordinary course of his business, ownership passes to the buyer free of every charge, attachment or other right in the thing sold even if the seller is not the owner thereof or is not entitled to transfer it as aforesaid, provided that the buyer buys and takes possession of it in good faith.

For discussion of Market Overt in Israel, see Eyal Zamir, *Market Overt in the Sale of Goods: Israeli Law in a Comparative Perspective,* 24 Israeli L. Rev. V83 (1990). See also Shlomo Shetah v. Leon Bilder, District Court of Tel Aviv, C.A.582/89 (1991).

governed by the law of the jurisdiction where the property was located when it was transferred.[138] Unfortunately for the parties (and the court), the diamond trade relies on trust among members of a homogeneous community, and is marked by handshakes, relational contracting and a notable absence of documentation.[139] Thus, the evidence failed clearly to indicate whether the transfer of the diamond to Siyance occurred in Israel or New York. The court resolved this conundrum by holding for Zarian, the original owner, on the ground that even if Israeli sales law applied to the transaction, Siyance could not carry its burden of good faith given the absence of documentation, although such informal trades are common in the diamond industry.

It is difficult to rationalize the holding in *Zarian* on its own terms. There was no evidence of bad faith by Siyance. All of the testimony supported the claim by Siyance that a sale and transfer of possession occurred in Israel.[140] Testimony of the merchant dealer who sold the diamond to Siyance's representative in Israel affirmed the custom in the trade of exchanging diamonds with a simple note, a *petek* that is destroyed once the price is paid.[141] The dealer's bona fides were confirmed by his status as a Vice President of the Israeli Precious Stones and Diamonds

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[138] 2006 WL 2239594 at 2; Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 2001 WL 1657237 (N.Y. Sup. 2001); Greek Orthodox Patricarchate of Jerusalem v. Christie's Inc., 199 WL 673347 at 4 (S.D.N.Y. 1999). In applying the law of the jurisdiction where the property was located at the time of the transfer, the New York court in *Gemological Institute* was following the widely- recognized *lex locus situs* rule of private international law. This rule focuses on the law of the transaction that led to the possession of the goods by the buyer, a transfer which typically involves, as we have seen, a sale from a dealer to a bona fide purchaser. The *lex locus situs* rule thus neglects the issues surrounding the rights of the original owner, issues that are relevant in common law jurisdictions that retain the theft, voidable title and entrustment rules. In this way, the *lex locus situs* rule facilitates the laundering of stolen goods by protecting transfers from intermediaries to good faith purchasers in jurisdictions that follow Market Overt. For discussion see Winkworth v. Christie, Manson & Woods Ltd., [1980] 1 All E.R. 1121, 1126 and Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities,* 36 How. L. J. 17, 22-25 (1993).

[139] For discussion of relational contracting in the diamond trade and its global implications, see Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Toward a Positive Theory of Private Contracting,* 104 Colum L. Rev. 2328 (2004); and Barak Richman, *Ethnic Networks, Extralegal Certainty, and Globalisation: Peering into the Diamond Industry*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 31-49 (2009).

[140] 2006 WL 2239594 at 4.

[141] Id.

Exchange.[142] Lacking any evidence of bad faith, therefore, the only remaining inference is that the New York court determined to preserve the rights of the original owner, which would have been available to him had the American theft rule applied.

Zarian shows that problems do not stem from the choice of law rules themselves. The lex locus situs choice of law rule applied by the court is facially neutral regarding the substantive rights of owners and buyers and as between demand and refusal and discovery statutes of limitation. In effect, however, the governing choice of law rules facilitate the multi-billion dollar trafficking in stolen art, artifacts and antiquities by permitting wrongdoers to arbitrage between jurisdictions with different statutes of limitations and between jurisdictions that follow the theft rule and those that recognize Market Overt. Predictability in contests between owners and buyers thus requires a harmonization of both the substantive and procedural laws governing good faith purchase. A uniform approach to good faith purchase would (i) reduce the demand for stolen goods; (ii) dampen socially wasteful efforts to launder those goods prior to their sale to innocent purchasers; and (iii) minimize wasteful conflict of laws litigation over which jurisdictions' substantive and procedural rules govern, thereby reducing the incentives for forum shopping and wasteful litigation.

VI. CONCLUSION

Laws addressing the good faith purchase problem have been around for millennia, but as yet there is no consensus, either among jurisdictions or among commentators, regarding an appropriate solution. Discord exists because the problem is unsolvable within the regnant property rights paradigm. The law acts by assigning property rights to one or the other of the parties: the owner always, sometimes, or never can recover her goods from the ultimate purchaser; and the purchaser always, sometimes, or never can keep them. Property right solutions fail for two reasons. First, the owner will not take efficient precautions against theft or misappropriation unless she loses stolen or misappropriated goods, while the buyer will not take efficient precautions against buying tainted goods unless he loses them to the owner. Neither party can be given the property right always to

[142] Id. at 2.

lose or to keep the goods at issue. Second, the owner cannot be given incentives to search for stolen or misappropriated goods unless she recovers them when found; but if she recovers them when found, her incentive to protect against theft falls.

When a problem has no obvious solution, contingent factors and fairness concerns affect results. As examples, the United States distinction between how the cases of stolen and misappropriated goods are regulated probably results from an ineffective borrowing from English law in the early nineteenth century.[143] The inefficient rule in some countries that an owner can recover her goods from a good faith purchaser only if the owner reimburses the price the purchaser paid probably stems from an effort to treat the owner and buyer even handedly. Scholarly disagreement also stems partly from an inability strongly to defend any property rights allocation.

Our contribution here is to argue for abandoning the property rights paradigm in favor of a tort paradigm. We first show that the state should choose commercial law rules that induce privately efficient behavior. Our solution, in turn, is more efficient than the property right solutions, Under it, an owner loses the goods if she invests a suboptimal level of care in precaution or searches suboptimally for goods. A buyer always loses the goods to a non-negligent owner and always keeps them against a negligent owner. The combination of negligence for owners and strict liability for buyers improves the parties' incentives to protect against theft, to search for stolen or misappropriated goods, and to investigate title. Our solution, however, may founder over the difficulty courts may have in evaluating the parties' behavior. Many of the facts relevant to a negligence rule are hard for courts to recover.

We attempt to cope with this concern by translating to the good faith purchase context a solution pursued in negotiable instruments law: to use verifiable proxies that correlate with the existence or absence of negligent behavior. We argue that some such proxies exist today, and that more would emerge were the law committed to a negligence solution. Thus, abandoning commercial law for tort in the good faith purchase context is a promising next step.

We also make a comparative law analysis of good faith purchase rules. This analysis shows two things: the law is inefficient everywhere, though in different ways; and the law's inefficiency causes socially unnecessary litigation, as parties shop for jurisdictions whose laws are favorable in their particular cases. Our solution responds to these problems: adopting it would improve a particular jurisdiction's laws, and adopting it everywhere would minimize the costs of diversity.

Appendix[144]

[143] See note 16 infra.

[144] Where no official translations of primary sources have been available, translations from non-official entities have been used. No amendments have been made to unclear or incorrect translations of primary sources.

Country	Adopts *nemo dat* as base principle?	Theft rule?	Voidable title?	Entrustment?	Market overt?	Statute of limitations
USA	Yes	Yes (*see, Solomon R. Guggenheim Found. v. Lubbell*, 569 N.E.2d 426 (NY 1991)	Yes (UCC §2-403(1))	Yes (UCC §2-403(2))	Never adopted	Varies depending upon jurisdiction; ranges from "demand and refusal" to "discovery" rule
England	Yes (Sale of Goods Act 1979 §21)	Yes (Sale of Goods Act 1979 §21)	Yes (Sale of Goods Act 1979 §23)	Yes (Factors Act 1889 §2(1))	Repealed in 1995 (1994 amendments to Sale of Goods Act 1979 §22)	None (Factors Act 1889 §12)
Italy	Yes (Italian Civil Code Art. 832)	Yes, but the Code provides only for actions against the *taker*, not against the good faith purchaser (Italian Civil Code Arts. 834, 1161)	Yes (Italian Civil Code Art. 1153)	Yes (Italian Civil Code Art. 1153)	Yes (Italian Civil Code Arts. 1153 and 1599)	1 year from the discovery of the taking of the good, as against the taker (Italian Civil Code Art. 1168); 10 years for good faith purchaser before they're considered to have assumed ownership (Italian Civil Code Art. 1161)
Country	**Adopts *nemo dat* as base principle?**	**Theft rule?**	**Voidable title?**	**Entrustment?**	**Market overt?**	**Statute of limitations**

German	Yes (BGB §929)	Yes, except when good faith purchaser acquired the good at an auction (BGB §935)	Yes, so long as the buyer is in good faith and not grossly negligent (BGB §§932, 935)	Yes (BGB §§932, 935)	Yes, if the good faith purchaser acquired the good at an auction (BGB §935)	None
Switzer-land	Yes (§§ 641, 715)	Yes, but the owner must compensate good faith purchaser (Swiss Civil Code §641, 934)	Yes (Swiss Civil Code §717)	Yes (Swiss Civil Code §717)	Yes, unless owner reimburses the price paid by the good faith purchaser (Art. 934)	5 years from when the good was lost or stolen (Swiss Civil Code §§722, 728, 729, 934)
France	Yes (French Civil Code §711)	Yes, but owner has to compensate good faith purchaser (French Civil Code §§2276, 2277, 2280)	Yes (French Civil Code §§2276, 2277)	Yes (French Civil Code §2277)	Yes, good faith purchaser gets to keep goods unless owner compensates him (French Civil Code §2277, 2280)	3 years from when the good was lost or stolen (French Civil Code §2279)

Country	Adopts *nemo dat* as base principle?	Theft rule?	Voidable title?	Entrustment?	Market overt?	Statute of limitations
Spain	Yes (Spanish Civil Code Art. 348)	Yes, but owner has to compensate good faith purchaser if they bought it at a public sale (Spanish Civil Code Art. 464)	No (Spanish Civil Code Arts. 436, 447, 463, 464)	No (Spanish Civil Code Arts. 436, 447, 463, 464)	Yes, good faith purchaser gets to keep goods if he bought them at a sale, unless owner compensates him (Spanish Civil Code Art. 464)	3 years (Spanish Civil Code. Arts. 1955, 1962)
Portugal	Yes	Yes (Portuguese Civil Code Art. 892)	No, but owner must compensate good faith purchaser (Portuguese Civil Code 894)	No, but owner has to compensate good faith purchaser (Portuguese Civil Code Art. 1301)	No (Portuguese Civil Code Art. 892)	4 years from original misappropriation or theft (Portuguese Civil Code Art. 1300)

Country	Adopts *nemo dat* as base principle?	Theft rule?	Voidable title?	Entrustment?	Market overt?	Statute of limitations
China	Yes (Property Law of the People's Republic of China Art. 39)	No, though the owner has the right to compensati on from the person who transferred the goods to the good faith purchaser (Property Law of the People's Republic of China Art. 106)	Yes, but the owner can recover them after compen-sating the good faith purchaser for the expenses necessary to maintain the goods (Property Law of the People's Republic of China Art. 241, 243)	Yes, but the owner can recover from the good faith purchaser as long as he compensates them for the good (Property Law of the People's Republic of China Art. 107)	Yes, good faith purchaser at an auction or from a qualified operator keeps goods unless the owner compensate s the good faith purchaser for the price paid (Property Law of the People's Republic of China Art. 107)	2 years, beginning from when the owner knew or ought to have known the good was lost (Property Law of the People's Republic of China Art. 107)

Country	Adopts *nemo dat* as base principle?	Theft rule?	Voidable title?	Entrustment?	Market overt?	Statute of limitations
Japan	Yes (Japan Civil Code Arts. 179, 206)	Yes, but if good faith purchaser bought stolen good at an auction or at a public market or from a seller dealing in similar goods, owner must compensate good faith purchaser for it (Art. 194)	Yes (Japan Civil Code Arts. 188, 194, 204)	Yes (Japan Civil Code Arts. 194, 204)	Yes, unless owner compensates good faith purchaser for the good (Japan Civil Code Art. 194)	2 years from when the good was stolen or lost (Japan Civil Code Art. 193)
India	Yes (Sale of Goods Act, 1930, § 27)	Yes (Sale of goods Act, 1930 § 27)		Yes, mercantile agent in possession with owner's consent can pass good title to good faith buyer (Sale of Goods Act, 1930 § 27)	No	

Country	Adopts *nemo dat* as base principle?	Theft rule?	Voidable title?	Entrustment?	Market overt?	Statute of limitations
Czech Republic	Yes (Czech Civil Code §123)	Yes (Czech Civil Code §126)	Yes (Czech Civil Code §133(1))	Yes (Czech Civil Code §§612, 614(3))	No, the owner only has to compensate the good faith purchaser for the appreciation of the good's value from the time of loss to the time of the return within three years of the loss (Czech Civil Code §130)	3 years from when the right was asserted to the good faith purchaser (Czech Civil Code §§102, 134)

Country	**Adopts *nemo dat* as base principle?**	**Theft rule?**	**Voidable title?**	**Entrustment?**	**Market overt?**	**Statute of limitations**
Russia	Yes (Civil Code of the Russian Federation Art. 209)	Yes (Civil Code of the Russian Federation Art. 302(1)	Yes (Civil Code of the Russian Federat-ion Arts. 218, 223, 224)	Yes (Civil Code of the Russian Federation Arts. 218, 223, 224)	No, owner can reclaim a good acquired by good faith purchaser when the goods were either lost by the owner or the goods were stolen, or left the possession of the owner contrary to their will (Art. 302)	3 years from when the owner knew or should have known about the violation of his rights in the goods; but good faith purchaser gets ownership rights after 5 years of uninterrupted possession of the goods (Civil Code of the Russian Federation Arts. 196, 200, 234)

Country	**Adopts *nemo dat* as base principle?**	**Theft rule?**	**Voidable title?**	**Entrustment?**	**Market overt?**	**Statute of limitations**
Israel	Yes (24 Israel L. Rev. 82, 97 (1990).	Yes, as long as good faith purchaser acquired the good from one selling like merchan-dise (Israeli Sales Law § 34)	Yes (Israeli Pledges Law §5)	Yes (Israeli Sales Law § 34)	Yes, if goods are sold by merchant dealer in ordinary course of business, ownership passes to good faith buyer who takes possession (Sale Law (1968) § 34).	None
Canada	*Quebec:* Yes (Civil Code of Quebec Art. 947) *Ontario:* Yes (Sale of Goods Act § 22)	*Quebec*: Yes (Civil Code of Quebec Art. 953, 1713, 14) *Ontario*: Yes (Sale of Goods Act § 22	*Quebec:* No (Civil Code of Quebec Arts. 1713,14) *Ontario*: Yes (Sale of Goods Act § 24)	*Quebec:* No, but owner must compensate good faith purchaser (Civil code of Quebec Art. 1714) *Ontario*: Yes (Sale of Goods Act § 23)	*Quebec:* No, but owner must compensate good faith purchaser "in the ordinary course of a business enterprise" (Civil Code of Quebec Arts. 953, 1713-14) *Ontario*: No (Sale of Goods Act § 23)	*Quebec*: 3 years (Civil Code of Quebec Art. 2919)
Country	**Adopts nemo dat as base principle?**	**Theft rule?**	**Voidable title?**	**Entrustment?**	**Market overt?**	**Statute of limitations**

Brazil	Yes (Brazil Civil Code Arts. 1197, 1204, 1228)	Yes, but if the object is bought at a public auction, fair or market, the owner must pay the price paid by the buyer (Brazil Civil Code Art. 521)	No (Brazil Civil Code Arts. 1267, 1268)	No (Brazil Civil Code Arts. 1267, 1268)	Yes, if object bought at public auction, etc. the owner must compensate good faith buyer for his price; otherwise owner only has to compensate good faith purchaser for necessary and useful improvements to the good (Brazil Civil Code Art. 521, 1219)	3 years of possession by good faith purchaser gives title; 5 years of possession by any third-party, including thief, gives title (Brazil Civil Code Art. 1261)
Mexico	Yes (Mexico Civil Code Arts. 798, 830)	Yes, unless the good faith purchaser acquired the goods at an auction (Mexico Civil Code Art. 799)	No (Mexico Civil Code Art. 798)	Yes, but owner has right of action against seller (Mexico Civil Code Art. 799)	Yes, unless owner reimburses the good faith purchaser (Mexico Civil Code Art. 799)	3 years (Mexico Civil Code Art. 1153)

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