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# Analysis of the Holocaust Expropriated Art Recovery Act of 2016

*Jennifer Anglim Kreder\**

*What makes this particular crime even more despicable is that this art theft, probably the greatest in history, was continued by governments, museums and many knowing collectors in the decades following the war. This was the dirty secret of the post-war art world, and people who should have known better were part of it.*

Testimony of Ronald S. Lauder to a Senate Judiciary Committee on June 7, 2016.<sup>1</sup>

More than seventy years after World War II, second and third generation descendants of Holocaust survivors use databases such as Ancestry.com and Jewish Genealogy Portal to discover who their relatives were. People are still searching and finding newly declassified, searchable sources of evidence about what happened to their families. Likewise, evidence regarding people's uniquely identifiable belongings, such as cultural property and art, have recently become searchable. However, such information is scattered across countries and archives. A skilled researcher fluent in multiple languages can—with a lot of diligence and a little luck—unearth uniquely identifiable property linked to a specific person. When that happens, is there any reason the survivor or her heirs should not be able to reclaim that property today? As in so many other areas of law, the answer is, "it depends," and law and morality may not point to the same answer.

This article introduces readers to the problems facing Holocaust victims and their heirs today as they seek to recover art stolen during the Nazi era. It provides essential history,

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<sup>1</sup> *The Holocaust Expropriated Art Recovery Act--Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 The Holocaust Expropriated Art Recovery Act Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (statement by Ronald S. Lauder).

beginning with Hitler's rise to power, so that readers can understand the Holocaust Expropriated Art Recovery Act (hereinafter the "HEAR Act"), a bipartisan piece of legislation currently under consideration by the Senate Committee on the Judiciary (as of December 5, 2016).<sup>2</sup> Part I provides the essential pre-war and WWII-era history. Part II informs readers about the essential decisions a plaintiff must make before filing suit. Part III analyzes the key cases and legal developments concerning Nazi-looted art recovery since 1998. Part IV analyzes the HEAR Act. Part V concludes that the HEAR Act is a positive development that would allow survivors and their heirs a fair chance at recovering their stolen art.

### I. PRE-WAR AND WWII-ERA ART HISTORY

Many people do not realize that one core part of the Nazis' "Final Solution" was the destruction of Jewish culture and the targeted pillaging of its art.<sup>3</sup> Hitler sought to eliminate Jewish culture from the Third Reich, including modern art, which he deemed "degenerate."<sup>4</sup> The Nazis targeted this art either to destroy it or profit from it, with the latter often involving sales through Swiss dealers to raise foreign currency.<sup>5</sup>

On April 26, 1938, the Nazis passed one of their Nuremberg Laws, which required Jews with more than 5000 Reichmarks ("RM") in property to periodically declare and inventory their assets.<sup>6</sup> The Jews could not sell their property without authorization from the Nazi Property Control Office.<sup>7</sup> The Nazis obsessively documented their thefts to make them appear ordinary and legal.<sup>8</sup>

Why were Hitler and the Nazis so concerned with art? In his twenties, Hitler tried to make a living painting bland, unoriginal watercolors in Vienna. He believed he was great, but he wasn't, and he was out of step with the modern art movements of the day.<sup>9</sup> Those *avant-garde* art movements, such as Expressionism,

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<sup>2</sup> See S. 2763, 114th Cong. (2016).

<sup>3</sup> MICHAEL J. KURTZ, AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES 14–15 (2006).

<sup>4</sup> JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 54–55 (1996).

<sup>5</sup> NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 59 (2000); PETROPOULOS, *supra* note 4, at 60–61.

<sup>6</sup> GÖTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 42 (Jefferson Chase trans., Metro Books 2005); HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS 51 (2001).

<sup>7</sup> ALY, *supra* note 6, at 136.

<sup>8</sup> WILLIAM L. SHIRER, 20TH CENTURY JOURNEY: THE NIGHTMARE YEARS, 1930–1940 30 (1984).

<sup>9</sup> ADOLF HITLER, MEIN KAMPF, Vol. I Ch. I, [http://www.hitler.org/writings/Mein\\_Kampf/mkv1ch01.html](http://www.hitler.org/writings/Mein_Kampf/mkv1ch01.html) (describing Hitler's youthful interest in painting and architecture, and his

were often affiliated with leftist politics, including Communism.<sup>10</sup> Some of the successful artists were Jews. Hitler resented them and the art world's rejection of him in favor of them.

Hitler bottomed out in Vienna in his twenties. He was homeless and often went hungry—a long fall from his middle class upbringing in Linz, Austria. He joined the German military to fight in the First World War. He was injured and found himself down and out again in Bavaria. It is there that he found like-minded, miserable individuals in various paramilitary organizations.<sup>11</sup>

Hitler envisioned a revival of classic, realistic and patriotic art.<sup>12</sup> Although Hitler failed to gain entry to the esteemed Vienna Academy of Fine Arts, he viewed himself as an artistic intellectual.<sup>13</sup>

Hitler juxtaposed this view of classical art with his disdain for modern art styles, raging against modern art as “a great and fatal illness.”<sup>14</sup> To Hitler, art meant symmetry, order, natural color tones, and realistic physiology in portraits. This worship of order carried through into Hitler's political drive for control.

Works of art like paintings and sculptures are also relatively easy to transport throughout the world. The Nazis robbed Germany and its occupied territories of artistic wealth while simultaneously introducing ideological Nazi art into German society as the new cultural movement.<sup>15</sup> To follow the Nazi war machine trampling over Europe, Hitler created the *Einsatzstab Reichsleiter Rosenberg* (“ERR”) in 1940 for the special task of confiscating and destroying art in the occupied territories, with a particular focus on the West.<sup>16</sup>

belief that he was destined to be a great artist) [<http://perma.cc/MDE8-XXHB>].

<sup>10</sup> Ralph Croizier, *The Avant-Garde and the Democracy Movement: Reflections on Late Communism in the USSR and China*, 51 *EUROPE-ASIA STUDIES* 3, 483, 485 (1999).

<sup>11</sup> IAN KERSHAW, *HITLER: A BIOGRAPHY* 51 (2008).

<sup>12</sup> HITLER, *supra* note 9, at Vol. I Ch. II (“What had to be reckoned heavily against the Jews in my eyes was when I became acquainted with their activity in the press, art, literature, and theater . . . [i]t goes without saying that the lower the intellectual level of one of these art manufacturers, the more unlimited his fertility will be, and the scoundrel ends up like a garbage separator, splashing his filth in the face of humanity.”).

<sup>13</sup> KERSHAW, *supra* note 11, at 16.

<sup>14</sup> Godfrey Baker, *The unfinished art business of World War Two*, BBC NEWS (Nov. 4, 2013), <http://www.bbc.com/news/world-europe-24812078> (citing Hitler's opening speech to the *Haus der Kunst* “degenerate art” exhibition) [<http://perma.cc/XUS6-PRJG>].

<sup>15</sup> See, e.g., LYNN NICHOLAS, *RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR* (1995).

<sup>16</sup> Marc Balcells, *Plundering Boys: A Cultural Criminology Assessment of the Power of Cultural Heritage as a Cause for Plunder in Armed Conflicts Along History*, in *CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT* 329, 338 (Joris Kila & James Zeidler eds., 2013).

Despite internationally accepted rules of law forbidding the theft of art and cultural property, some dating back to Roman times, pillaging an enemy's cultural heritage during times of warfare is often seen as a symbol of the conqueror's total victory.<sup>17</sup> Additionally, art often is valuable. It was an easily moveable commodity readily seized by the Nazis along with the currency, jewelry, and other assets of German Jews after 1933.<sup>18</sup>

Hitler amassed a hoard of artworks for his proposed *Führermuseum* in Linz, his childhood town.<sup>19</sup> The *Sonderauftrag Linz* took orders directly from Hitler regarding which works of art to appropriate from the occupied territories for the Linz Museum.<sup>20</sup> Hitler was not the only Nazi leader with an affinity for the arts, however; Hermann Göring also held himself as a sophisticated purveyor of fine art.<sup>21</sup> The stolen collections of both men and other Nazi officers grew during the Second World War.<sup>22</sup> The systematic plunder of art from occupied Europe supplied the private and public collections of Nazi Germany with many thousands of works.<sup>23</sup>

Hitler and the Nazis did not merely target the nineteenth century classic art works. Through the systematic takeover of German culture by the Nazis, they realized that Nazi-sponsored art served as powerful visual propaganda when displayed to the public.<sup>24</sup> Similarly, they knew the destruction and seizure of works deemed undesirable had propaganda value as well.<sup>25</sup> The Nazi platform decreed that modern art was anti-German and mandated all modern art be turned over to the state.<sup>26</sup> Even

<sup>17</sup> *Id.* at 340.

<sup>18</sup> MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION 202 (2003).

<sup>19</sup> KERSHAW, *supra* note 11, at 7.

<sup>20</sup> The *Sonderauftrag Linz* was formed in 1939 and, along with the ERR, served as Hitler's primary means of capturing artistic spoils of war. DAVID ROXAN & KEN WANSTALL, THE RAPE OF ART: THE STORY OF HITLER'S PLUNDER OF THE GREAT MASTERPIECES OF EUROPE 174 (1965).

<sup>21</sup> JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY 2 (2000).

<sup>22</sup> The Berghof was Hitler's Bavarian estate and Carinhall was Göring's countryside retreat near Berlin.

<sup>23</sup> ROXAN & WANSTALL, *supra* note 20, at 174 ("It must be a conservative estimate to state that at least 100,000 works of art were looted by the Nazis during their years in power."). This estimate seems to be about just one of the Allies' 1050 central collection points throughout Europe.

<sup>24</sup> Balcells, *supra* note 16, at 347 (describing the use of visual displays and military processions as propaganda to convince the German masses of total Nazi cultural dominance).

<sup>25</sup> Point 23 of The Program of the N.S.D.A.P. stated: "We demand legal prosecution of artistic and literary forms which exert a destructive influence on our national life, and the closure of organizations opposing the above made demands." Document No. 1708-PS. Central Publishing House of the N.S.D.A.P., <http://sourcebooks.fordham.edu/mod/25points.asp> [<http://perma.cc/W5NX-7WK2>].

<sup>26</sup> FERNANDO BAEZ, A UNIVERSAL HISTORY OF THE DESTRUCTION OF BOOKS: FROM ANCIENT SUMER TO MODERN-DAY IRAQ 211 (2008). The Reich Culture Chamber

though the party turned against modernism, Joseph Goebbels and other prominent Nazis were modern art collectors who saw expressionism as powerful images of “aryan” strength; they maintained their private collections despite the seizure of modern works from the German public.<sup>27</sup>

The Nazis, realizing the powerful role art and architecture play in political propaganda, targeted their political opponents. Political opposition to the Nazis through artistic expression was shut down. Modern artists like George Grosz, a communist whose modern art served as political commentary, challenged the Nazi rise to power and was seen as a political threat that could not be tolerated. Modern art works by Grosz, Paul Clay, Otto Freundlich, Otto Dicks, Max Beckman, and Ernst Kirchner were denounced as “degenerate art,” and confiscated by the Nazis from museums and private owners. Nazi painter and ideologist Adolf Ziegler was a Nazi darling. He spoke at the opening of *die Ausstellung Entartete Kunst*, the Exhibition of Degenerate Art, held during the latter half of 1937.<sup>28</sup> The six-month Munich exhibition pressured the German populace to label modern art as “degenerate art unfit for the sophisticated German master race, which placed value on classical styles of order and symmetry.”<sup>29</sup> To influence Germans further, the Nazis launched a concurrent exhibition of Nazi-favored art to serve as an example of what Nazism believed art to truly be—a counter-balance to the degenerate exhibition.<sup>30</sup>

The Nazi ideology also claimed Slavic cultural influences had weakened Germany.<sup>31</sup> The Nazis set out to systematically seize control over all aspects of the German way of life as self-proclaimed saviors of German heritage amid the influx of

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(Reichskulturkammer) was established in September of 1933 under the supervision of Joseph Goebbels to “stimulate the Aryanization of German culture and to prohibit, for example, surrealism, cubism, and Dadaism.” *Id.*

<sup>27</sup> PETER ADAM, *ART OF THE THIRD REICH* 56 (1992); accord PETROPOULOS, *supra* note 21, at 1–2.

<sup>28</sup> NICHOLAS, *supra* note 15, at 18.

<sup>29</sup> *Id.*

<sup>30</sup> For the first time in history, works from both the “degenerate art” exhibit and the Nazi-approved art exhibit were on exhibition side-by-side at the Neue Galerie Museum for German and Austrian Art in New York. *Degenerate Art: The Attack on Modern Art in Nazi Germany, 1937* (Mar. 13–Sept. 1, 2014), <http://www.neuegalerie.org/content/degenerate-art-attack-modern-art-nazi-germany-1937> [<http://perma.cc/SQ2Q-URBA>]. This was the most recent exhibition of “degenerate art” in the United States since the 1991 exhibition “Degenerate Art”: Fate of the Avant-Garde in Nazi Germany at the Los Angeles County Museum of Art.

<sup>31</sup> Marsha L. Rozenblit, *Review of Steven E. Aschheim, Brothers and Sisters: The East European Jew in German and German-Jewish Consciousness*, 6 *MODERN JUDAISM* 311 (1986).

outsider influences.<sup>32</sup> Art in all forms became subject to harsh “Germanic culture laws” mandating the “aryanization” of personal property owned by those deemed by the Nazis to not be true German citizens based on factors such as race, ethnicity, religion, and mental capacity.<sup>33</sup> Although only a marginal percentage of Germans were Jewish, the Nazis labeled European Jews as a major cause of both Germany’s misfortunes in World War I and the failure of the Weimar Republic’s attempt to strengthen Germany once again.<sup>34</sup>

Others were added to the private collections of German art dealers like Hildebrand Gurlitt after being processed and “aryanized,” the systematic transfer from Jews to non-Jews by Nazi bureaucratic documentation after coerced sales.<sup>35</sup> Shortly after the public burning, public institutions like the Basel Museum in Switzerland and private modern art connoisseurs sought to buy the “degenerate art” the Nazis purged from the German museums.<sup>36</sup> To purge German society of “degenerate art” while also generating a profit, the Nazis arranged large auctions that took place in Switzerland and Berlin wherein stolen works by Picasso, Van Gogh, and other renowned artists were sold.<sup>37</sup> Funds from these auctions went directly to the German state.<sup>38</sup>

The Allied forces became aware of the level of destruction the Nazi war machine wrought on Europe’s ancient landmarks and the theft of cultural treasures. The London Declaration was an international agreement among the Allies that sought to ensure the ultimate restitution of cultural property stolen by the Nazis.<sup>39</sup> The London Declaration stated, in relevant part:

[The Allies] [h]ereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly the governments making this declaration . . . reserve all

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<sup>32</sup> See MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945* (2008) (explaining the theft component of the Nazi genocide).

<sup>33</sup> RICHARD GRUNBERGER, *THE 12 YEAR REICH: A SOCIAL HISTORY OF NAZI GERMANY 1933–1945* 424–25 (1971).

<sup>34</sup> Rozenblit, *supra* note 31, at 311.

<sup>35</sup> Balcells, *supra* note 16, at 338. Germans utilized legal mechanisms of the Nazi state to coerce sales from Jewish art dealers and others classified as having subservient legal rights.

<sup>36</sup> Baker, *supra* note 14 (citing Hitler’s opening speech to the *Haus der Kunst* “degenerate art” exhibition).

<sup>37</sup> NICHOLAS, *supra* note 15, at 4.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> Multilateral Declaration on Forced Transfers of Property in Enemy Controlled Territory (“London Declaration”), 3 Bevans 754 (1943), 1943 U.S.T. LEXIS 188.



their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever . . . This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.<sup>40</sup>

The Declaration singles out neutral countries because the Nazis sold off the undesired art in Switzerland to raise foreign currency. Lynn Nicholas' excellent 1995 book, *Rape of Europa*, described the process in detail, including how American middlemen purchased art that eventually was acquired by American museums.<sup>41</sup> Unfortunately, the declaration alone was not enough to ensure post-war restitution.<sup>42</sup>

The Allied military forces formed the Monuments, Fine Arts, and Archives ("MFAA") agency, which was responsible for countering the ERR's impact by mitigating damage to cultural monuments and reclaiming stolen works in war-torn Europe during the Allied advance.<sup>43</sup> The Art Looting Investigation Unit ("ALIU") also sought out Nazi-looted art and worked under the auspices of the Office of Strategic Services ("OSS"). Although the MFAA and ALIU were able to retrieve many thousands of works seized by the Nazis during their reign of terror, many pieces remain missing.<sup>44</sup> Furthermore, as in every war, soldiers stole art. Some American soldiers sent artworks back to the United States. The American government did much to find and return such stolen property. In contrast, Soviet soldiers took back artworks by the train load, including "trophy brigades" specifically tasked with the objective of appropriating art. The Russians thus far have expressed no intent to return stolen works, which they view as substitutionary compensation for the massive loss of human and cultural life in Eastern Europe at the hands of the Nazis.

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<sup>40</sup> *Id.*

<sup>41</sup> LYNN NICHOLAS, *RAPE OF EUROPA* (First Vintage Books Ed., 1995).

<sup>42</sup> See Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT. LAW 49, 60 (2011), <http://ejil.oxfordjournals.org/content/22/1/49.full> (discussing the 1943 Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control to address Nazi plunder from occupied territories and addressing the difficulty of providing restitution in international law for seizure by the Nazis of German Jews' property) [<http://perma.cc/D7JC-NF6P>].

<sup>43</sup> Cheryl White & Thomas Livoti, *Cultural Heritage Preservation: A Tool for Coin*, in CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT 195, 202 (Joris Kila & James Zeidler eds., 2013).

<sup>44</sup> Stuart Eizenstat, *The Unfinished Business of the Unfinished Business of World War II*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 297, 307 (Michael J. Bazzyler & Roger P. Alford eds., 2007).

After World War II, Western European nations set up special claims commissions to allow war victims to reclaim their property from the state. In some instances, the government returned property or paid a small amount of compensation, but generally the commissions did not function well. For one thing, victims forced to flee in haste often did not have evidence of what they owned. Photographs were not as commonplace then as they are today. Europe lay in ruins; Nazi archives of the property they systematically looted were destroyed, in disarray, or still classified, and it was not only Nazis who stole. Secondly, the window of opportunity to claim was far too short. And finally, yet just as importantly, those staffing the governmental bureaucracies after the war were not too uncommonly aligned with the Nazis during the war; many were anti-Semitic and biased against the victims.

While various estimates abound, no one can truly put a number on the artworks stolen and still missing today. Every once in a while, however, someone comes forward with research showing that a particular piece of art was, in fact, stolen during the war. Heirs seeking to recover such a piece of art face significant obstacles in seeing their property returned. If the survivor needs to sue, the next step would be choosing a court. That does not resolve, however, which nation's law applies to the lawsuit.

## II. CHOOSING A COURT AND LAW

If a survivor or heir brings a lawsuit challenging a current possessor's title to art in the United States, the court must first determine which nation's (or state's) law applies to resolve the claim.<sup>45</sup> Courts apply various tests that are notoriously difficult to predict, but the outcome of the tests often dictates whether the current possessor or the theft victim will win the case. If the court applies a European nation's law, the claimant's chance of success is generally less than when U.S. law applies.<sup>46</sup> If the court determines it must apply U.S. law, then it must decide which state's law applies.<sup>47</sup> Usually this will be the state where the property is located, which typically is where the lawsuit has been filed.<sup>48</sup>

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<sup>45</sup> See generally *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010).

<sup>46</sup> See generally Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009).

<sup>47</sup> See *Bakalar*, 619 F.3d at 142–43.

<sup>48</sup> See *id.* at 143.

Although there are some differences from state to state, American law generally provides that no purchaser or donee can acquire legal ownership of the property if a thief is in her chain of title.<sup>49</sup> If the true owner sues in such a case, the court will declare title to be in the true owner, unless the case is otherwise barred by an applicable statute of limitations, laches, or some other legal or equitable defense.<sup>50</sup> If the present-day possessor succeeds, she keeps the property while not technically having legal title.<sup>51</sup> Theoretically, there may be another forum where the true owner could assert a new claim under different law, but that risk is small and the market generally will treat the property as saleable. If the true owner succeeds, the out-of-luck buyer's only recourse is to try to recover the sales price from the person from whom she purchased the property.

Under civil law, these rules are radically different. Significantly, the successful claimant will have to reimburse a good faith purchaser the price paid for the property.<sup>52</sup> Moreover, it is generally possible for title to pass to a possessor of stolen property after the passage of a sufficient number of years, often thirty. In some civil law jurisdictions, such as Switzerland, title might pass immediately to a good faith purchaser who paid for the property.<sup>53</sup> And it is important to remember that contingency fees are not permitted in Europe, which also follows the loser-pays principle and charges high filing fees based on a percentage of the value of the property claimed. Thus, it is far more expensive and risky for a claimant to file a lawsuit in a European court.

### III. THE REVIVED QUEST FOR JUSTICE

Given the essential differences between United States and European laws, it might appear that a claimant would have a much better chance of recovering looted artwork in the United States than anywhere else.<sup>54</sup> For a while that seemed to be the case.

In 1998, New York District Attorney Robert M. Morgenthau seized *Portrait of Wally* by Egon Schiele. The painting had to be released under a New York statute, which is when the federal government stepped in to seize it. The seizures shocked the art

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<sup>49</sup> See *id.* at 140–41 (citing *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. N.Y. Cnty. 1966)).

<sup>50</sup> See *id.* at 141.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 140.

<sup>53</sup> See *id.*

<sup>54</sup> See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 684–85 (2004) (filing the case against Austria in Austrian courts would have cost Altmann “approximately \$350,000,” as opposed to the filing fee of \$175 or so she would have paid to file in the U.S. District Court in California).

world. The painting was on loan from the Leopold Foundation (referred to as the Leopold Museum) in Vienna, Austria, to the Museum of Modern Art (the “MoMA”) in New York. The ground for the seizure was that the painting was stolen property transported into the United States in violation of the National Stolen Property Act. The museums sought the painting’s release.

*Portrait of Wally* had been owned by Lea Bondi Jaray, a Jewish Viennese gallery owner forced to flee upon the Nazi annexation of Austria in March 1938, the *Anschluss*. Nazi officer Friedrich Welz stole *Portrait of Wally* from Bondi before she managed to flee to London. She was able to re-establish herself as an art dealer there after the war.

After the war, Welz was interned on suspicion of war crimes. The U.S. army returned the artworks Welz possessed to the Austrian government, which was supposed to return property to victims pursuant to a U.S.-Austrian treaty. Ms. Bondi’s lawyers managed to get some of her property back, but not *Portrait of Wally*. The Austrians included it in a shipment of artwork restituted to another family and simultaneously sold back to the *Österreichische Galerie Belvedere* (“the Belvedere”).<sup>55</sup>

Ms. Bondi learned of *Portrait of Wally’s* location in the Belvedere when she confronted Welz as part of one of her commission proceedings in 1954. She never could get the painting back, ran out of funds, and thought it unwise to pursue a lawsuit. A few years later, Dr. Rudolph Leopold, another Viennese Schiele collector approached her to buy more Schiele artworks. She told him about her predicament; they agreed to help each other. They never spoke again. Leopold traded other works from his own collection to the Belvedere in exchange for *Portrait of Wally*. An unsigned, handwritten note found in her London apartment after her death stated:

I myself prevent a court case with the Belvedere (Museum for Modern Art in Vienna) as I was reinstated as the proprietor of the Gallery Würthle, Gallery exclusive for Modern Art, and as this it was not possible for me to quarrel with the Museum of Modern Art and tried to get my picture back by peaceful means.<sup>56</sup>

After the war, Austrians still indulged in the myth that the Austrian nation was the first victim of Hitlerite aggression. This

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<sup>55</sup> Press Release, U.S. Att’y for S.D.N.Y., United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> [<http://perma.cc/PH4B-WM6X>].

<sup>56</sup> See Third Amended Verified Complaint at ¶ 5 (gg), *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009) (No. 99 Civ. 9940) (quoting Ms. Bondi’s handwritten note).

myth ignored the fact that most Austrians wanted Hitler to merge their country into the Third Reich and that the post-war restitution processes were not generous to Jews seeking compensation. Moreover, through the Austrian cultural ministry (*Bundesdenkmalamt*), the Austrian government demanded from victims donations of art to its museums in exchange for export permits for the art it was willing to return. This fact was not well known until well after the *Portrait of Wally* seizure brought the dark secret out into the light.

With an aura of justice, Deputy Secretary of the Treasury Ambassador Stuart Eizenstat, head Holocaust negotiator for the United States, was able to lead forty-four nations to sign the Washington Principles on Nazi-Confiscated Art after the Washington Conference on Holocaust-Era Assets in 1998.<sup>57</sup> The Washington Principles addressed key issues facing the successful restitution of Nazi-looted artworks, such as encouraging lenience for “gaps or ambiguities in the provenance” of the works and encouraging governments to inform the public of works in their collection with uncertain provenance “to locate its pre-War owners or their heirs.”<sup>58</sup>

Inspired by these developments, Austrian investigative journalist Hubertus Czernin committed to unearthing Austria’s murky Nazi past.<sup>59</sup> He published evidence that the Republic of Austria possessed Nazi-looted art in the Austrian Gallery’s archives.<sup>60</sup> In response to these allegations, the Austrian government passed the Art Restitution Law to open the Austrian Gallery archives to provenance researchers.<sup>61</sup> The Austrian government also established a commission to secure the safe return of any stolen art from the Austrian Gallery archives.<sup>62</sup> Mr. Czernin provided his research into the Gallery’s archives to Maria Altmann, which ultimately led to her claim against Austria.<sup>63</sup> Even though the Commission found documentary evidence demonstrating the illegitimacy of the Gallery’s claims of

<sup>57</sup> JUDITH B. PROWDA, *VISUAL ARTS AND THE LAW: A HANDBOOK FOR PROFESSIONALS* 229 (2013). Eizenstat was made Special Adviser on Holocaust Issues in December 2013, tasked with “offering policy advice on Holocaust-related matters[.]” *Stuart E. Eizenstat*, U.S. Dep’t of State, <http://www.state.gov/r/pa/ei/biog/218946.htm> [<http://perma.cc/K5YY-XRRP>].

<sup>58</sup> Bureau of European and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.html> [<http://perma.cc/K6GV-6ZZ4>].

<sup>59</sup> Associated Press, *Hubertus Czernin, 50, Reporter Who Helped Recover Stolen Art*, N.Y. TIMES (June 16, 2006), [http://www.nytimes.com/2006/06/16/arts/16czernin.html?\\_r=0](http://www.nytimes.com/2006/06/16/arts/16czernin.html?_r=0).

<sup>60</sup> *Altmann*, 541 U.S. at 680.

<sup>61</sup> See BARBARA T. HOFFMAN, *ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE* 174 (2006).

<sup>62</sup> *Id.*

<sup>63</sup> *Altmann*, 541 U.S. at 680.

ownership in Adele Bloch-Bauer's will, the commission never recommended the paintings be returned to their rightful owner.<sup>64</sup>

Altmann's Supreme Court case over the applicability of § 2 of the Foreign Sovereign Immunities Act ("FSIA") of 1976 concerned her right to pursue a claim for ownership of two paintings against Austria, *Portrait of Adele Bloch-Bauer I* (1907) and *Portrait of Adele Bloch-Bauer II* (1912) by Gustav Klimt.<sup>65</sup> Altmann was the niece of the last rightful owner of the paintings, Ferdinand Bloch-Bauer, who bequeathed the two mentioned paintings to her. The paintings were seized by the Nazis from Bloch-Bauer's residence in Vienna after he fled in 1938 following Germany's annexation of Austria into the Reich.<sup>66</sup> The Court determined the FSIA applied retroactively to conduct that occurred before the FSIA's enactment, which allowed Ms. Altmann and other claimants to file suit against "political subdivisions . . . agencies or instrumentalities" of a foreign state under the FSIA.<sup>67</sup> Despite Altmann's successful suit, no other case has yet been tried successfully to conclusion against any nation for the return of Nazi-looted artworks.

As the *Altmann* case progressed, those involved with restitution in the United States did not think a U.S.-commission was a necessary alternative to the courts. The Presidential Advisory Commission on Holocaust Assets in the U.S., Plunder and Restitution issued its last report in December of 2000 stating that progress had been made in restitution of stolen art from American museums and encouraged publication of their provenance findings.<sup>68</sup> That same year, the Vilnius International Forum on Holocaust Era Looted Cultural Assets resulted in the Vilnius Forum Declaration, a reaffirmation of the 1998 Washington Principles by the Council of Europe "encourag[ing] all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as

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<sup>64</sup> *Id.* at 681–82. According to evidence, Adele Bloch-Bauer left a will after her death in 1925 "in which she 'ask[ed]' her husband 'after his death' to bequeath the paintings to the Gallery." Because her will did not affirmatively bequeath the paintings to the Austrian Gallery, the Gallery did not gain ownership through her will. Further, Ferdinand Bloch-Bauer never transferred ownership to the Gallery. *Id.*

<sup>65</sup> *Id.* at 681 (affirming the Ninth Circuit's decision the Republic of Austria could not claim immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act"), 28 U.S.C. § 1602 *et seq.*, thereby allowing Ms. Altmann to successfully bring suit against Austria).

<sup>66</sup> *Id.* at 681–82. Ferdinand Bloch-Bauer was a Czechoslovakian Jew and Adele, the subject of both paintings Altmann sought, was his wife. Like her uncle, Altmann fled Austria in 1938. She moved to California and became an American citizen. *Id.* at 681.

<sup>67</sup> *Id.* at 691 (discussing Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a)).

<sup>68</sup> See generally Presidential Advisory Commission on Holocaust Assets in the U.S., Plunder and Restitution, Findings and Recommendations: Staff Report, Ch. 1 (Dec. 2000), [http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home\\_Content.html](http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home_Content.html) [<http://perma.cc/WU7V-2SN3>].

well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.”<sup>69</sup>

The nations committed again in 2009 to facilitate the return of art stolen by the Nazis “based upon the moral principle that art and cultural property confiscated by the Nazis . . . should be returned to [Holocaust victims] or their heirs.”<sup>70</sup> The nations again committed to creating commissions to oversee the enforcement of restitution claims.<sup>71</sup> This time, many Americans thought the United States might need a commission after all. However, the Principles were international agreements, not treaties, so while the commitments under the Washington Principles are honored by some nations, “they have little or no vitality in others.”<sup>72</sup>

Ironically, museums in the United States have asserted the statute of limitations against heir-claimants to shut down their claims to stolen art, even though the U.S. government has spearheaded the movement to encourage Holocaust-era restitution on the merits since 1998.<sup>73</sup> The Terezín Declaration of 2009 was a direct response to museums filing suits against individuals who claimed ownership of Nazi-looted art.<sup>74</sup> Forty-six states signed the Declaration, which addressed the issue of “Nazi-Confiscated and Looted Art” among others facing the victims of the Holocaust and encouraged states to refrain from applying legal provisions “that may impede the restitution of art and cultural property.”<sup>75</sup> Its most important part expressly states

<sup>69</sup> *Vilnius Forum Declaration on Holocaust Era Looted Cultural Assets* (Oct. 5, 2000), [http://www.dfs.ny.gov/consumer/holocaust/present\\_day\\_restitution/The%20Vilnius%20Forum%20Declaration.pdf](http://www.dfs.ny.gov/consumer/holocaust/present_day_restitution/The%20Vilnius%20Forum%20Declaration.pdf) [<http://perma.cc/XRS2-M7FP>].

<sup>70</sup> *The Holocaust Era Assets Conference Terezín Declaration 4* (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (referring to the Washington Principles).

<sup>71</sup> Bureau of European and Eurasian Affairs, *supra* note 58.

<sup>72</sup> Charles A. Goldstein, *Restitution Experience Since the Washington Principles* (1998), <http://www.christies.com/pdf/services/2011/charles-a-goldstein.pdf> [<http://perma.cc/RU2M-LWSV>]. Also in 1998, Congress enacted the Holocaust Victims Redress Act, which expressed the sense of Congress that:

[A]ll governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner. Holocaust Victims Redress Act, Pub. L. § 105-158, 112 Stat. 15 (1998).

<sup>73</sup> Even though the United States spearheaded the Washington Principles and enacted the Holocaust Victims Redress Act in 1998 to encourage Holocaust-era art restitution, federal courts put little emphasis on the historic aspect of such claims. Most are dismissed on technical grounds having nothing or little to do with the underlying thefts.

<sup>74</sup> *See The Holocaust Era Assets Conference Terezín Declaration 4*, HOLOCAUST ERA ASSETS CONFERENCE (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>.

<sup>75</sup> *Id.* at 1, 4.

that claims should be resolved based on the facts and merits, not technical defenses such as the statute of limitations.<sup>76</sup>

Nearly fourteen years have passed since *Wally* but only one case has been successful in an American court. *Bissonette* is a case with nearly undisputed facts. Dr. Max Stern inherited an art gallery in Germany.<sup>77</sup> He was of Jewish ancestry and quickly became a target for Nazi persecution.<sup>78</sup> The Nazi government, via The Reich Chamber for the Fine Arts, determined that Dr. Stern lacked personal qualities that would make him a suitable advocate for German culture.<sup>79</sup> Due to the determination by the Nazis, they advised Dr. Stern to liquidate the inventory and the additional property of the gallery.<sup>80</sup>

Dr. Stern appealed the order directing him to sign over the property but was unsuccessful.<sup>81</sup> The Lempertz Auction House (LAH), a government-approved purveyor, obtained most of the affected works and in late 1937 auctioned the pieces at well below their fair market value.<sup>82</sup> Dr. Stern fled Germany after the forced sale, fearing for his life, and settled in Canada.<sup>83</sup> After his relocation, Dr. Stern tried to locate the misappropriated art, but was largely unsuccessful. When he died in 1987, his estate took over his interests in the art.<sup>84</sup>

Unbeknownst to Dr. Stern, the painting (*Mädchen aus den Sabiner Bergen*), was purchased by Dr. Karl Wilharm and was then inherited by his step-daughter, Baroness Maria-Louise Bissonnette, in 1991.<sup>85</sup> Bissonnette consigned the painting to Estates Unlimited, where the painting was then scheduled for auction in 2005.<sup>86</sup> The Art Loss Register, a company that helps claimants find and recover stolen art, informed the Stern estate

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<sup>76</sup> See *id.* at 4–5.

[W]e urge all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

*Id.* at 4–5.

<sup>77</sup> See *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 54.

<sup>86</sup> *Id.*



about the painting; Estates Unlimited withdrew the painting from scheduled auction after learning of the other claimed interest.<sup>87</sup>

In January 2005, the Stern estate filed a claim for the painting with the Holocaust Claims Proceeding Office (“HCPO”), a New York governmental agency that helps claimants recover stolen property. The HCPO demanded the defendant return the painting.<sup>88</sup> After Bissonnette refused to return the painting, the parties entered settlement negotiations. The negotiations failed, and Bissonnette shipped the painting to Germany in hopes that a German court would support her ownership rights.<sup>89</sup> The Stern estate sued in U.S. federal district court. Bissonnette asserted the laches defense. The laches defense applies if a plaintiff has waited too long to file suit resulting in the defendant being prejudiced by the loss of evidence and an impaired ability to defend against the claim. It can cut a claim off even if the statute of limitations has not run. The court determined that Bissonnette’s laches defense was deficient.<sup>90</sup>

In summary, the court concluded:

A de facto confiscation of a work of art that arose out of a notorious exercise of man’s inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles. The mills of justice grind slowly, but they grind exceedingly fine.<sup>91</sup>

*Bissonnette* certainly got it right. The case gave reason to hope that courts would recognize the continuing injustice that occurs in depriving heirs of property that is rightfully theirs. But that hope was short-lived.

A federal court in Michigan ruled that the statute of limitations for a specific claim ran in 1941—this was before the Allies landed in Normandy and any prisoners were liberated.<sup>92</sup> *Detroit Institute of Art v. Ullin* was brought by the Detroit Institute of Arts against the heirs of Martha Nathan, who had not yet turned to the judicial process, seeking declaratory judgment.<sup>93</sup> The heirs alleged that the sale of *The Diggers* by Vincent van Gogh was done while Ms. Nathan was under duress and approached the museum about their allegations.<sup>94</sup> Shortly

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 56; see *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 308–11 (D.R.I. 2007).

<sup>91</sup> *Vineberg*, 548 F.3d at 58–59.

<sup>92</sup> See *Detroit Institute of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at \*3 (E.D. Mich. Mar. 31, 2007) (finding that conversion occurred in 1938 when the painting at issue was sold and that the statute of limitations barred any claims brought more than three years later, in accordance with Michigan law).

<sup>93</sup> *Id.* at \*1.

<sup>94</sup> *Id.*

after the heirs approached the museum, the museum responded by filing suit.<sup>95</sup> The museum asserted that the sale of the painting, which was located in Switzerland at the time of the 1938 sale, was voluntary because it occurred before the Nazis occupied France and after Ms. Nathan had fled Germany for Paris.<sup>96</sup>

It is not widely known, however, that the Nazis often forced fleeing Jews to convey their property located in Switzerland back to the Reich, often in exchange for the promise of safe passage of other family members that were being held hostage.<sup>97</sup> As a result, *The Diggers* is still on display as if Ms. Nathan had the ability to deal freely in commercial transactions while fleeing from a genocidal regime.

Unfortunately, *Ullin* is not the only case where museums reinforced the persecution of Holocaust victims. The Toledo Museum of Art brought suit against the Nathan heirs in 2006 seeking to quiet title to Paul Gauguin's *Street Scene in Tahiti*, also a transfer in the same 1938 sale.<sup>98</sup> The United States District Court for the Northern District of Ohio held that the claim should have been discovered earlier; the statute of limitation had expired, thereby barring the heirs' counterclaim for conversion and restitution.<sup>99</sup> The court implied that Ms. Nathan knew she lacked a valid claim to *Street Scene in Tahiti* because she had pursued other looted property before her death, but not this painting.<sup>100</sup> Tragically, the court wrote in dicta that:

[T]he public debate surrounding Nazi-era assets should have led the Nathan heirs to inquire into the location of her former assets. Based upon Martha Nathan's own previous claims, as well as those of her estate, the heirs knew she was persecuted by the Nazis and sustained wartime losses. This knowledge would have led a reasonable person to make further inquiries.<sup>101</sup>

This statement implies that Holocaust victims' heirs were negligent if they did not pay close attention and recognize that this litigation might have a bearing on them, even though they were not parties to these other claims. It is burdensome for someone that has already faced extreme persecution to continuously look for a needle in a haystack. Given the history of these survivors, many were wary of state authority figures.<sup>102</sup> It

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

<sup>98</sup> *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 807–08.

<sup>101</sup> *Id.* at 807.

<sup>102</sup> See, e.g., BOAZ KAHANA ET AL., HOLOCAUST SURVIVORS AND IMMIGRANTS 75 (2005) (explaining the feelings of survivors can cause mistrust of strangers, specifically those in

is preposterous to assume that Ms. Nathan would have known to look within the United States to find her misappropriated property. The court's opinion calls for heirs to search for property that they reasonably believed would never resurface, even if they had any idea they had a claim in the first place.

Courts heavily emphasize the statute of limitations requirement for Holocaust-era cases primarily for the protection of the defendants. A Boston Museum of Fine Arts' motion for summary judgment was granted by the United States District Court for the District of Massachusetts on statute of limitation grounds in an action filed against Dr. Seger-Thomschitz, heir of Dr. Oskar Reichel.<sup>103</sup> In addition to being a Jewish doctor, Dr. Reichel was an art collector and owner of a Viennese gallery.<sup>104</sup> Dr. Reichel's gallery was moved from Vienna in February 1939, following the Anschluss of Austria, and after he was forced to submit a property declaration listing all of his possessions to the Nazis.<sup>105</sup> The property declaration listed *Two Nudes (Lovers)* by Oskar Kokoschka.<sup>106</sup> The court concluded that the painting was innocently "transferred to" an art dealer in Paris for sale.<sup>107</sup>

The painting was transferred to Otto Kallir-Nirenstein (known as Otto Kallir).<sup>108</sup> Kallir was Jewish and transferred legal ownership of his own gallery to his non-Jewish secretary.<sup>109</sup> He opened the *Galerie St. Etienne* in Paris and then moved to the United States in 1939 to open a New York branch of *Galerie St. Etienne*.<sup>110</sup> This case and others like it challenge Kallir's reputation as a white knight helping Jews sell their art to flee the Reich.<sup>111</sup>

The defendant museum submitted letters to the court, written by one of Dr. Reichel's sons, Raimund, to art historians that were independently researching Kokoschka's work.<sup>112</sup> Dr. Seger-Thomschitz maintained that the letters show that Kallir

a position of authority).

<sup>103</sup> Museum of Fine Arts, Bos. v. Seger-Thomschitz (Seger-Thomschitz IV), No. 08-10097-RWZ, 2009 WL 6506658, at \*1, \*11 (D. Mass. June 12, 2009), *aff'd* 623 F.3d 1 (1st Cir. 2010), *cert. denied* 131 S. Ct. 1612 (2011), *reh'g denied*, 131 S. Ct. 2176 (2011).

<sup>104</sup> *Id.* at \*1-2.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*7.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at \*2. This was a common practice that Jews were forced to endure in attempts to protect their property from Nazis.

<sup>110</sup> *Id.* at \*2.

<sup>111</sup> *See* Jason Horowitz, *Dealer with the Devil*, N.Y. OBSERVER (Sept. 11, 2007), <http://www.observer.com/2007/09/dealer-with-the-devil/> (suggesting that recent litigation dismantles Kallir's reputation) [<http://perma.cc/PAL7-D9M7>].

<sup>112</sup> *Seger-Thomschitz*, WL 6506658, at \*2.

had deceived Raimund into believing Kallir also was a persecutee; thus Raimund accepted nominal consideration (\$250) for the painting. Dr. Seger-Thomschitz asked the court to toll the statute of limitations on different grounds, including that both Kallir and the museum had participated in fraudulent concealment.<sup>113</sup> The court rejected her arguments and found no evidence of “bad faith, laches or unclean hands” on behalf of the museum.<sup>114</sup>

The bottom line is that the case would have been a tough one on the merits. Dr. Seger-Thomschitz was urging one view of the evidence without the ability to question any of the people involved in the deal itself. It is doubtful that Dr. Seger-Thomschitz could have won the case on the merits. Nonetheless, she should have had her day in court. The court determined only that the case was too old to be heard. There was no objective airing of the case’s merits. When a museum as esteemed as the Museum of Fine Arts, Boston, asserts the statute of limitations, it renders the Washington Principles and Terezín Declaration all but meaningless. Other American museums have asserted the statute of limitations against claimants in court and/or sued survivors to shut down their inquiries on technical defenses like laches.<sup>115</sup> They are the Toledo Museum of Art, Detroit Institute of Art, MoMA, Guggenheim, and Norton Simon Museum of Art, Pasadena. They shut down any judicial inquiry into the merits of survivors’ heirs claims. They undermine the credibility of the United States as a leader seeking justice for Holocaust victims and their heirs.

#### IV. THE HEAR ACT

The Holocaust Expropriated Art Recovery Act (the “HEAR Act”) of 2016 is a bill that would provide the victims of Holocaust-era persecution and their heirs an opportunity to recover Nazi confiscated or misappropriated artwork in a U.S. court.<sup>116</sup> It seeks to unwind the damage done by the recent cases holding that claims were time-barred.

Two introductory paragraphs most succinctly state the case for why the HEAR Act is necessary:

(6) Numerous victims of Nazi persecution and their heirs have taken legal action to recover Nazi-confiscated art. These lawsuits face

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<sup>113</sup> *Id.* at \*10.

<sup>114</sup> *Id.* at \*6.

<sup>115</sup> See Jennifer A. Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 65, 85 (2012); Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 78 (2009).

<sup>116</sup> See S. 2763, 114th Cong. (2016).

significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., *The Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations and other time-based procedural defenses especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is the best way to ensure that claims to Nazi-confiscated art are adjudicated on their merits.<sup>117</sup>

The HEAR Act would provide a statute of limitations of six years from the time the survivor or heir has actual knowledge of the theft.<sup>118</sup> In practicality, this will mean the modern day after recent provenance research, not back during the war. It would eliminate the complex choice-of-law problem courts initially deal with in a case, at least as to which jurisdiction's limitations period applies. It would also eliminate the defenses of laches. The relevant text is as follows:

#### 5. Statute of limitations

##### (a) In general

Notwithstanding any other provision of Federal law, any provision of State law, or any defense at law or equity relating to the passage of time (including the doctrine of laches), a civil claim or cause of action against a defendant to recover any artwork or other cultural property unlawfully lost because of persecution during the Nazi era or for damages for the taking or detaining of any artwork or other cultural property unlawfully lost because of persecution during the Nazi era

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

- (1) the identity and location of the artwork or cultural property; and
- (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost.

(b) Possible misidentification

For purposes of subsection (a)(1), in a case in which there is a possibility of misidentification of the artwork or cultural property, the identification of the artwork or cultural property shall occur on the date on which there are facts sufficient to determine that the artwork or cultural property is likely to be the artwork or cultural property that was unlawfully lost.<sup>119</sup>

In terms of applicability, the Act will apply to any claim that is pending as of the date of the enactment of the Act as well as those that were filed during the period beginning on the date of enactment and ending on December 31, 2026.<sup>120</sup> In terms of previously dismissed claims, a claim that was brought and was dismissed before the date of the enactment and one in which final judgment has not been entered is also subject to the HEAR Act.<sup>121</sup> This Act will change the outcome of pending and future cases.

The Senate Judiciary Committee Subcommittees on The Constitution and Oversight, Agency Action, Federal Rights and Federal Courts heard personal testimony from Agnes Peresztegi. Dr. Peresztegi has over twenty years of experience handling Holocaust property claims. Additionally, she advises non-profit organizations that represent survivors and their heirs on issues related to the restitution and compensation for human rights violations during World War II.<sup>122</sup> Since 2001, Dr. Peresztegi has been the Executive Director for The Commission for Art Recovery, Europe.<sup>123</sup> Dr. Peresztegi is responsible for dealing with Holocaust era looted art claims in her position at the Commission.<sup>124</sup> She believes that the expropriation of the artwork is itself genocide.<sup>125</sup>

Dr. Peresztegi correctly testified that no one else should benefit from the crimes that were committed against the victims of

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See *The Lawyers*, SOFFER AVOCATS, ATTORNEYS AT LAW, <http://www.sofferavocats.com/en/the-lawyers/agnes-peresztegi-of-counsel/> (discussing the background and accomplishments of Dr. Peresztegi) [<http://perma.cc/9JZ2-LAAU>].

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the S. Comm. on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (testimony of Agnes Peresztegi).

the Holocaust.<sup>126</sup> In her testimony, Dr. Peresztegi acknowledges that since the establishment of the Washington Conference Principles, those that currently have Nazi-era misappropriated artwork have continually tried to mischaracterize the applicable U.S. policy, even though the policy has been clear and constant for over seventy years.<sup>127</sup>

Dr. Peresztegi testified that:

The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art should only be adjudicated on the merits.<sup>128</sup>

Dr. Peresztegi is critical of the United States for its lack of aid for victims of the Holocaust who owned misappropriated artwork. She testified that the United States did not make progress toward this goal via the Washington Conference Principles, but believes that by enacting the HEAR Act, the United States will display its support for restoring looted artwork to its rightful owners.<sup>129</sup>

Throughout the testimony given by Dr. Peresztegi, she referenced a case filed in 2010, *Simon v. Republic of Hungary*.<sup>130</sup> In this case, twelve of the plaintiffs allege they were transported from their homes in Hungary by Defendants to camps in various countries that were led by the Nazis.<sup>131</sup> Thirteen plaintiffs further allege that their possessions and those of their families were taken as they boarded the trains, and were sold, liquidated, or otherwise used to bring revenue.<sup>132</sup> The fourteenth plaintiff was not transported by the Defendant but still alleges that his property was stolen by MÁV (the Hungarian State Railway) and was never returned.<sup>133</sup> The conclusion reached by the court recognizes the atrocities that occurred during this time, but the court failed to provide redress for these families.

The Court concluded:

There is no doubt that the plaintiffs were wronged, atrociously so, and that they believed Defendant Hungary, assisted by its railway, has

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 2.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 387.

<sup>133</sup> *Id.*

not atoned adequately for its genocidal actions. Nevertheless, there are limits to the reach of the United States courts to provide redress where the Constitution and relevant laws and treaties say otherwise. For the foregoing reasons, the Hungary Defendants' Motion to Dismiss and Defendant RCH's Motion to dismiss are granted.<sup>134</sup>

Through this case we are provided a clear illustration of the problems that our court systems have. It is all too often that the justice system recognizes that it is not providing a just conclusion, but it is far too hard to get the correct legislation passed to correct the errors. Dr. Peresztegi acknowledges the problems that the HEAR Act may still have, but also appreciates the step that the Act takes to cure the issue.

While the federal government may be taking a step forward for protecting these victims, the museum lobby also is seeking legislative change in Senate Bill 3155 entitled "Foreign Cultural Exchange Jurisdictional Immunity Clarification Act."<sup>135</sup> Under this bill, if a work is imported into the United States from a foreign state for exhibition of the work in a cultural or educational institution in the United States, and if it is determined to have cultural significance, then any activity within the United States that is associated with the piece is not considered commercial activity.<sup>136</sup> There is an exception for Nazi-era claims.<sup>137</sup>

Additionally, Senators Tammy Baldwin and Marco Rubio, and Representatives Joe Crowley and Chris Smith introduced the Justice for Uncompensated Survivors Today Act (the "JUST Act") in early July 2016. This bipartisan and bicameral bill hopes to help Holocaust survivors and their families by requiring the State Department to report the progress of particular European countries as to restitution of wrongfully confiscated and transferred assets during the Holocaust.<sup>138</sup>

Representative Smith was correct when he stated:

Holocaust survivors—witnesses to brutal murders, torture, and heartless thievery of the Nazis and their accomplices—continue to be cheated and defrauded, inexplicably as they fight for the rightful return of their stolen property. This bill will help survivors get justice instead of excuses for their governments.<sup>139</sup>

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<sup>134</sup> *Id.* at \*444.

<sup>135</sup> *See* S. 3155, 114th Cong. (2016).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See* Marco Rubio and U.S. Representatives Joe Crowley and Chris Smith Introduce a Bill to Help Holocaust Survivors and the Families of Holocaust Victims, TAMMY BALDWIN: UNITED STATES SENATOR FOR WISCONSIN (July 7, 2016), <https://www.baldwin.senate.gov/press-releases/the-just-act> [<http://perma.cc/J7LT-L9UK>].

<sup>139</sup> *Id.*



The JUST Act seeks to build on the Terezín Declaration on Holocaust Era Assets and Related Issues of 2009, which provides that protection of property is a primary part of a democratic society and also recognizes the significance of compensating the Holocaust-based confiscations made during 1933–45.<sup>140</sup> The JUST Act will require the State Department to give reports on other countries' compliance with the progress they make toward the 2009 Terezín Declaration as well as the actions countries have taken to compensate the claims of U.S. citizens.<sup>141</sup>

## V. CONCLUSION

Reviewing the history of judicial proceedings for Holocaust-era cases leads to the conclusion that American museums have undermined the diplomatic efforts spent on the Washington Principles and Terezín Declaration. Survivors and their heirs deserve to be heard.

One problem that continues to present itself is the statute of limitations; even determining which jurisdiction's limitations period applies is a gamble. With many victims deceased and records destroyed, it seems nearly impossible to pinpoint when relatives knew or should have known that they were entitled to something they probably knew little about. Nonetheless, they are still asked to do so.

Most people view the purpose of courts as providing justice where inequity has been done. It is unfortunate when cases are dismissed for lack of evidence, or perhaps an expired statute of limitations, but institutions bringing suits against heirs of victims is the nadir of American policy on Holocaust restitution. The HEAR Act would help restore American credibility in this arena. All of the cases filed by museums against survivors or wherein museums asserted the statute of limitations against survivors would have come out differently under the HEAR Act. Each one would have been heard on the merits as envisioned in the Washington Principles and Terezín Declaration.

The JUST Act would also further the cause by requiring the State Department to report on other nations' progress in complying with the Terezín Declaration. It will be interesting to see whether focusing on other nation's developments will push the State Department to question its own past filings (in *Altmann*, *Norton Simon*, and *Cassirer*), encouraging courts to dismiss survivors and heirs' cases.

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

It would be appropriate to end this article with the following testimony of Ronald S. Lauder during the June 7, 2016, hearing before the Senate Subcommittee on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts:

When the United States endorsed the Washington Principles in 1998 and the Terezín Declaration in 2009, the U.S. committed itself to the recovery of art that was confiscated by the Nazis during the Holocaust. Our adherence to this commitment requires that resolution of such cases be based on the merits of each case and not on procedural technicalities or the capacity of one party to outspend, or outwait, the other.

There are museums here in the United States that have been waiting out the clock to pass the Statute of Limitations. This also forces claimants to spend enormous amounts of money on legal fees – another strategy to make them give up. This is not justice. Stalling claims is an abuse of the system. Sadly, there are museums that feel no need to uphold the Washington Principles. Many other institutions do the very least that is required and not much more.

The fundamental question posed by the HEAR Act is, have we here in the United States done enough to ensure fair and equitable solutions? I believe we have done a great deal, but we still could and should do much more.<sup>142</sup>

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<sup>142</sup> *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the S. Comm. on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (testimony of Ronald S. Lauder).