

THE ART OF ATONEMENT: HOW MANDATED TRANSPARENCY CAN HELP RETURN MASTERPIECES LOST DURING WORLD WAR II

LUCIA FOULKES*

Abstract: Sixty years after the end of World War II much of the artwork looted or forcibly sold during the war has yet to be returned to its rightful owners. One of the primary problems encountered by individuals pursuing claims is that it is difficult to locate the necessary documentation on provenance. Organizations with information on a piece's history, museums in particular, often have a disincentive to share information that could assist in an heir's claim. A mandatory reporting requirement, for government and museum officials with unique access to information on provenance, would counterbalance that reluctance, and address the most basic stumbling block survivors and heirs encounter in building legal claims for recovery. While this obligation would work best if implemented in a binding international agreement, negotiating binding international agreements in this arena has proven difficult. The United States has been a leader in this field and is uniquely positioned to model a policy of mandatory reporting. The United States government should act unilaterally to transform the moral responsibility of government bodies and museum officials into an enforceable legal duty.

The works . . . which have never been recovered . . . have been lost as a result of the difficulties we faced, in Italy and elsewhere, in re-establishing the sense of morality and justice which regulates the relationships among civilized peoples.

—Rodolfo Siviero¹

INTRODUCTION

In September of 2010, German authorities stopped Cornelius Gurlitt on the train.² Suspecting tax evasion, investigators eventually searched his home, where

* Lucia Foulkes is an Articles Editor for the *Boston College International & Comparative Law Review*.

¹ RODOLFO SIVIERO, RECOVERED WORKS OF ART 8 (Gordon Moran trans., 1984).

² *Phantom Collector: The Mystery of the Munich Nazi Art Trove*, DER SPIEGEL ONLINE INTERNATIONAL (Nov. 11, 2013), <http://www.spiegel.de/international/germany/the-mystery-of-the-gurlitt-family-and-the-munich-nazi-art-find-a-932899-4.html>, archived at <http://perma.cc/E8XA-GL3P>.

an incredible surprise was waiting for them.³ Within Gurlitt's small and somewhat dingy apartment was a cache of artwork worth an estimated \$1.4 billion.⁴ Paintings by Picasso and Matisse, among others, which had previously been thought lost, were among the incredible treasure found.⁵

Hildebrand Gurlitt, Cornelius's father, had been one of the art dealers selected by the Nazi regime to assist them in the systematic looting and forced sales of Jewish-owned artworks.⁶ The stripping of these artworks from Jewish owners is one of the ongoing legacies of World War II, and much of this art has yet to be returned to its original owners or their heirs.⁷

Since the end of World War II, international bodies and members of the international community have worked to return art looted by the Nazis to the rightful owners.⁸ Despite a general consensus that the pieces should be returned, there have been many impediments to following through with this belief.⁹ Difficulties arise when current owners feel that they have proper title to pieces, even though the works may have been forcibly sold or seized during World War II.¹⁰ Other obstacles include the striking lack of transparency within the art world, as well as technical impediments, such as statute of limitations defenses.¹¹

Part I of this Note provides an introduction to the historical context under which art was wrongfully removed from original ownership. Part II explains the international agreements and national laws that have attempted to aid the return of this art to its rightful owners. Part III argues that a lack of transparency on the part of government and museum officials has inhibited heirs and former owners from making claims to their artwork. Part III also suggests that the international community place a mandate on officials with special access to

³ Simon Shuster, *Nazi-Art Bust: 6 Unanswered Questions*, TIME (Nov. 5, 2013), <http://world.time.com/2013/11/04/nazi-art-bust-6-unanswered-questions>, archived at <http://perma.cc/5SY6-RYRB>.

⁴ Alison Smale, *Report of Nazi-Looted Trove Puts Art World in an Uproar*, N.Y. TIMES (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/arts/design/trove-of-apparently-nazi-looted-art-found-in-munich-apartment.html?_r=0, archived at <http://perma.cc/X7NN-4RSL>.

⁵ *Id.*

⁶ LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 24 (1994).

⁷ STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 187 (2003).

⁸ Bert Demarsin, *Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 117, 135–46 (2011).

⁹ Gunnar Schnabel, *Nazi Looted Art: A Historical-Legal Commentary*, in *LOST LIVES, LOST ART: JEWISH COLLECTORS, NAZI ART THEFT, AND THE QUEST FOR JUSTICE* 232, 236–37 (Melissa Müller & Monica Tatzkow eds., 2010); Demarsin, *supra* note 8, at 135–46.

¹⁰ Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 170 (2005); see Demarsin, *supra* note 8, at 162–63 (describing multiple cases in which museums sought to quiet title based on the statute of limitations).

¹¹ Raymond J. Dowd, *Fritz Grünbaum's Stolen Art Collection: Legal Obstacles to Recovery*, in *HOLOCAUST ERA ASSETS CONFERENCE PROCEEDINGS* 837, 841–42 (Jiri Schneider et al eds., 2009); Emily A. Graefe, Note, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 480 (2010).

this information to report it to an international organization charged with sharing this information with the public.

I. BACKGROUND

A. *The Fate of Jewish-Owned Art During Nazi Occupation*

Among the artwork found in Gurlitt's apartment were pieces formerly owned by Paul Rosenberg, a Jewish Frenchman and art dealer by profession.¹² The fate of Paul Rosenberg's art collection was the same of that of many Jews living in occupied countries during World War II.¹³ His story, and the ongoing attempt to recover art that was unlawfully taken from him during World War II, demonstrates how art owned by European Jews was specifically targeted by the Nazi regime, and how difficult it has been for owners and their heirs to locate lost art.¹⁴

While history undoubtedly remembers the Nazi regime's plan for the "Final Solution," less study is given to the regime's early efforts to disenfranchise Jews by stripping them of their assets and their right to practice various occupations.¹⁵ Many of the Third Reich's laws, including the Law for the Restoration of the Professional Civil Service (Gesetz zur Wiederherstellung des Berufsbeamtentums), which excluded Jews from the civil service, and the Ordinance on the Registration of Jewish Assets (Verordnung über die Anmeldung des Vermögens von Juden) institutionalized the Nazi discrimination against Jews.¹⁶ This systematic approach aimed at the "exclusion of Jews from the social fabric of Nazi Germany . . . first at the destruction of their economic and

¹² Harriet Torry & Mary M. Lane, *Berlin Steps Up Nazi Art Probe*, WALL ST. J. (Nov. 11, 2013), <http://online.wsj.com/news/articles/SB10001424052702304644104579191943373086208> (last visited Mar. 4, 2015), archived at <https://perma.cc/JVY5-59M9?type=pdf>.

¹³ HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 73* (Hector Feliciano & Tim Bent trans., 1997).

¹⁴ *Id.* at 69–70; Patricia Cohen & Tom Mashberg, *Family, 'Not Willing to Forget,' Pursues Art It Lost to Nazis*, N.Y. TIMES (Apr. 26, 2013), http://www.nytimes.com/2013/04/27/arts/design/rosenberg-family-quest-to-regain-art-stolen-by-nazis.html?pagewanted=2&_r=0, archived at <http://perma.cc/2AQ8-9CKG>.

¹⁵ Schnabel, *supra* note 9, at 233; NICHOLAS, *supra* note 6, at 9; *Anti-Semitic Legislation 1933-1939*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007901> (last updated June 10, 2013), archived at <http://perma.cc/4N2C-HU9R>.

¹⁶ *See* Verordnung über die Anmeldung des Vermögens von Juden [Ordinance on the Registration of Jewish Assets], Apr. 26, 1938, REICHGESETZBLATT TIEL I [RGLB I] at 414–15 (Ger.); Gesetz zur Wiederherstellung des Berufsbeamtentums [Law for the Restoration of the Professional Civil Service], Apr. 7, 1933, RGLB I at 175 (Ger.); *Selected Laws, Regulations, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad*, CLAIMS RESOLUTION TRIBUNAL, http://crt-ii.org/_nazi_laws/ (last updated May 6, 2002), archived at <http://perma.cc/S3SN-YD7Y>; *Anti-Jewish Legislation in Prewar Germany*, U.S. HOLOCAUST MEMORIAL MUSEUM <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005681> (last updated June 10, 2013), archived at <http://perma.cc/568X-UTTN>.

cultural livelihoods, and ultimately at their physical annihilation.”¹⁷ Very importantly, “[t]he incremental plundering of Jewish art collections was part of this policy.”¹⁸

The motivations behind the plundering of the art were multifold.¹⁹ First, in many important ways art gives meaning to our lives, helps us to understand and consider the human condition, and makes us as humans unique. Stripping Jewish citizens of their art was yet another message from the Nazi party that, in their minds, Jews were subhuman.²⁰ Second, the artwork seized was also quite valuable economically.²¹ Taking the art transferred the economic value of the artwork from Jewish society to the Nazi party.²² Paintings in Nazi possession could no longer be sold by Jews to aid an escape or cobble together a living.²³ In addition to depriving their targets of these items of value, the Nazi party was able to sell paintings for money or display those they considered acceptable as symbols of their newfound power.²⁴

Lastly, the Nazis considered the looting and trading of art as part of their cultural “purification” and process of “Aryanization.”²⁵ By taking art from Jews and other citizens, the Nazi party worked to build a collection of old masters and classical German paintings, which they considered to be part of their Aryan cultural heritage.²⁶ Concurrently, they worked to rid the country (and occupied countries) of Modern and Impressionist art, which they considered “degenerate,” through lucrative trade and sale.²⁷ Thus, in the minds of the Nazis, the looting of art furthered Hitler’s goals of “Aryanization” and creation of a “pure” German nation.²⁸

Overall, it is estimated that throughout the war, Jewish people were unlawfully deprived, whether through forced sale, seizure, or other measure, of a total of 600,000 pieces of art, valued at \$2.5 billion in 1945 prices (\$20.5 billion in 2003 USD).²⁹ In 1945, the value of the art stolen exceeded the total value of all

¹⁷ Melissa Müller & Monika Tatzkow, *Introduction*, in *LOST LIVES, LOST ART*, *supra* note 9, at 7, 7 (Jennifer Taylor & Tammi Reichel trans., Melissa Müller et al. eds., 2010).

¹⁸ *Id.*

¹⁹ Graefe, *supra* note 11, at 473–74; *Looted Art*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography/looted-art> (last updated June 10, 2013), archived at <http://perma.cc/282S-BW87>.

²⁰ FELICIANO, *supra* note 13, at 5–6; Graefe, *supra* note 11, at 473–74.

²¹ NICHOLAS, *supra* note 6, at 4.

²² *Id.* at 43.

²³ *See id.*

²⁴ NICHOLAS, *supra* note 6, at 4, 10 (describing the “Temple of German Art”).

²⁵ *Id.* at 6, 25; Schnabel, *supra* note 9, at 232.

²⁶ Schnabel, *supra* note 9, at 233.

²⁷ *See* NICHOLAS, *supra* note 6, at 5–6, 22.

²⁸ *Id.* at 25.

²⁹ MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 202 (2003).

art in the United States.³⁰ In France, which was the center of the art world at the time, one-third of all privately-owned art had been taken.³¹

In France, there were three different groups that participated in the looting of art: the Art Protection Unit, the German embassy in Paris, and Reichsleiter Rosenberg Taskforce (Einstab Reichsleiter Rosenberg für die Bersetzten Geiete) (ERR), which was run by Alfred Rosenberg (unrelated to Paul Rosenberg), who was “[t]he Führer’s Representative for the Supervision of the Intellectual and Ideological Instruction of the Nationalist Socialist Party.”³² It was the ERR, the most active of these three groups, that raided a vault Paul Rosenberg had rented, which contained 172 of the paintings he owned as part of his gallery and art dealing business.³³ Like others in his situation, Rosenberg tried to protect and hide his assets as best he could, but many works were discovered and seized.³⁴ Along with the paintings found in the vault, Nazi forces took paintings from the gallery and home he had been forced to flee, and from his assistant—who had been attempting to ship Rosenberg’s paintings from the dealer’s vacation home before he was likely betrayed by the moving company.³⁵ The thorough and organized manner in which Nazi party officials sought out and seized Rosenberg’s art is representative of how they targeted major Jewish collectors and dealers in France and other occupied countries.³⁶

When the ERR and other Nazi forces involved in the looting found valuable works, they would be sent to a warehouse, and then often on to a sorting facility such as the French museum Jeu de Paume, which the Nazis had claimed as a place to “catalog and evaluate” the stolen art.³⁷ Many valuable collections, including a number from Paul Rosenberg’s collection, were processed at the Jeu de Paume.³⁸ There, the fate of the artworks would be determined.³⁹ Often, pieces the Nazis considered valuable and in-line with their aesthetic would be sent back to Germany, either to become part of the collection of a German museum, or to benefit the private collection of one of the leaders of the Nazi movement, such as Hermann Goering.⁴⁰

Art that was not considered desirable from the Nazi perspective would be put up for sale or trade to dealers who visited the Jeu de Paume.⁴¹ These visitors

³⁰ *Id.*

³¹ FELICIANO, *supra* note 13, at 4.

³² *Id.* at 4–5, 15.

³³ *Id.* at 74.

³⁴ *Id.* at 73.

³⁵ *Id.* at 69–70.

³⁶ *See id.* at 73, 125.

³⁷ *Id.* at 108.

³⁸ *Id.*

³⁹ *Id.* at 107–08.

⁴⁰ KENNETH D. ALFORD, HERMAN GÖRING AND THE NAZI ART COLLECTION 55–56 (2012); FELICIANO, *supra* note 13, at 112, 125.

⁴¹ FELICIANO, *supra* note 13, at 117.

could offer either to trade artwork which the Nazis considered desirable for modern or impressionist artwork that was being stored at the Jeu de Paume, or to buy the “degenerate” artwork outright, often at below-market prices.⁴² These paintings could then be put up for sale on the Parisian art market.⁴³ Pieces would often find their way to Switzerland, or other neutral countries such as Spain and Portugal, providing an entrée to the international market.⁴⁴

B. Post-War Efforts to Return Spoliated Art

Following the end of the war, there were immediate attempts by victims of Nazi seizures to reclaim art.⁴⁵ Paul Rosenberg, then living in New York, began to search for his lost artwork the day after Paris was liberated.⁴⁶ After taking stock of what had been seized he tried to track down missing pieces by talking with his contacts in the Paris art world; from time to time a piece might appear at auction or elsewhere on the market, which would enable Rosenberg to make a claim to it as rightfully his.⁴⁷ Many paintings, however, had disappeared into private collections during the war and were incredibly difficult, if not impossible, to track down.⁴⁸ Paul Rosenberg, by all indications, was among the more fortunate of those seeking the recovery of art; he had been able to escape with enough assets to begin a comfortable new life in New York.⁴⁹ Many survivors of the persecution and looting of the Nazis were not as fortunate and lacked the resources to locate their artwork.⁵⁰

In 1943, as the Allies noted that the “tide of battle” was turning against the Axis, they put together the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, commonly known as the “London Declaration.”⁵¹ The London Declaration warned the Axis powers that the Allies reserved the right to invalidate any “transfers of, or dealings with, property, rights and interests of any description whatsoever,” including those that may have appeared to have been “legal in form.”⁵² After the war’s

⁴² *Id.* at 108, 117; Schnabel, *supra* note 9, at 234.

⁴³ FELICIANO, *supra* note 13, at 121.

⁴⁴ BAZYLER, *supra* note 29, at 203; Schnabel, *supra* note 9, at 234.

⁴⁵ FELICIANO, *supra* note 13, at 171, 173.

⁴⁶ *Id.* at 171.

⁴⁷ *Id.* at 172.

⁴⁸ *See id.*

⁴⁹ *Id.* at 72.

⁵⁰ Schnabel, *supra* note 9, at 236.

⁵¹ Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation and Control, Jan. 5, 1943, I FOREIGN REL. OF U. S. DIPLOMATIC PAPERS, 1943 GEN. 439, 443–44, available at <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS1943v01>, archived at <http://perma.cc/DS86-CS49> [hereinafter London Declaration]; *Court of Restitution Appeals Report*, HARV. L. SCH. LIBR., <http://www.law.harvard.edu/library/digital/court-of-restitution-appeals-reports.html> (last visited Mar. 2, 2014), archived at <http://perma.cc/Z5NV-VJMS>.

⁵² London Declaration, *supra* note 51, at 444.

end, this Declaration was followed by a similarly intentioned Military Government Law Number 59, enacted in different iterations in the British and American Occupied Zones.⁵³ In the American Occupied Zones, the law was used to create agencies that processed claims from people whose property had been lost or stolen during the war.⁵⁴ In 1948, the Jewish Restitution Successor Organization took over the duty of handling these claims.⁵⁵

In France, restitution laws were passed in 1944 and 1945 to void acquisitions of property that occurred during German occupation.⁵⁶ The Commission de Récupération Artistique (CRA) compiled individual claims to create a list of lost pieces of art and hired investigators in an attempt to recover items on behalf of original owners, including Rosenberg.⁵⁷ The CRA's services had to be utilized quickly, however, as the deadline for filing a claim was 1949, absent special circumstances.⁵⁸ In 1949 the CRA ceased operation, and unclaimed works were either given to museums, which have since failed in the obligation they accepted to investigate provenance, or put up for auction.⁵⁹ On the Allies' side, the Americans and British charged their Monuments, Fine Arts & Architecture section (MFA&A) with the recovery work and compiled inventories of the victims of confiscation.⁶⁰ The Allies, with the exception of Russia, started warehouses in which works they obtained could be identified and returned to their former owners.⁶¹ Much of the art taken by the Nazis, however, had entered the general market during the war, and many missing pieces were difficult to locate.⁶²

In Switzerland, the statute of limitations for theft at the end of the war was five years.⁶³ Thus, there was limited time for victims of the war to act to reclaim their property.⁶⁴ Initially, there was reluctance on the part of the Swiss to create a

⁵³ Douglas Davidson, Special Envoy for Holocaust Issues, U.S. Dep't. State, Address Before New York County Lawyers Association: Should Nazi-Looted Art Works Be Returned? The View from the State Department (Mar. 25, 2013), <http://www.state.gov/p/eur/rls/rm/2013/mar/206719.htm>, archived at <http://perma.cc/47XV-4BM9> (transcript); see Military Government Law No. 59: Restitution of Identifiable Property, MILITARY GOV'T GAZETTE, GERMANY, UNITED STATES AREA OF CONTROL, ISSUE G (Nov. 10, 1947) (Ger.).

⁵⁴ PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT at Chapter V (Dec. 2000), available at <http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/StaffChapter5.html>, archived at <https://perma.cc/R9SZ-DFST?type=image>.

⁵⁵ *Id.*

⁵⁶ GUNNAR SCHNABEL & MONIKA TATZKOW, THE STORY OF STREET SCENE: RESTITUTION OF NAZI LOOTED ART: CASE AND CONTROVERSY 108 (2008).

⁵⁷ FELICIANO, *supra* note 13, at 172–73.

⁵⁸ SCHNABEL & TATZKOW, *supra* note 56, at 108.

⁵⁹ FELICIANO, *supra* note 13, at 218–19.

⁶⁰ *Id.* at 173.

⁶¹ *Id.* at 174.

⁶² *Id.* at 174–75.

⁶³ NICHOLAS, *supra* note 6, at 415.

⁶⁴ *Id.*

centralized method for people to submit claims.⁶⁵ People with claims, including Paul Rosenberg, were forced to appear before Swiss courts and litigate their claims to paintings.⁶⁶

Austria, under intense pressure from the United States and the Allies, passed laws from 1946 through 1949 that provided for the restoration of Jewish property.⁶⁷ The Austrian government, however, included many ex-Nazis, and was not committed to the effort; the laws it passed were “full of loopholes, with inadequate worldwide notice and short claims periods.”⁶⁸ Even for claimants who were successful, Austrian authorities often refused to allow the export of the paintings, at least until a few desirable pieces were donated to the Austrian state.⁶⁹

II. DISCUSSION

While well-intentioned, the efforts of individual nations to return looted art in the post-World War II era were piecemeal at best.⁷⁰ After some attention in the 1940s and 1950s to the problem of artwork that had been looted, the issue fell out of the public consciousness.⁷¹ It was only in the 1990s that the issue once again became a noteworthy topic of international conversation.⁷² Since the 1990s, two international conferences, the Washington Conference on Holocaust Era Assets (1998) and the Prague Holocaust Era Assets Conference (2009), which produced the Terezin Declaration on Holocaust Era Assets and Related Issues (Terezin Declaration), sought international agreement on the correct manner of dealing with the return of stolen art.⁷³ In addition, spurred by the non-binding principles agreed to in these conferences, there has been some effort among museums, government entities, and non-profits to make information related to claims or possible claims available online.⁷⁴

A. *The Washington Conference*

Much of the modern progress in the field of looted art is owed to Stuart Eizenstat, who, in his capacity as Ambassador to the European Union, orga-

⁶⁵ See *id.* at 418.

⁶⁶ *Id.* at 419–20.

⁶⁷ EIZENSTAT, *supra* note 7, at 281.

⁶⁸ *Id.*

⁶⁹ 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’L L. 49, 62 (2011).

⁷⁰ See NICHOLAS, *supra* note 6, at 415–20.

⁷¹ *Id.* at 442.

⁷² Demarsin, *supra* note 8, at 131.

⁷³ See *id.* at 135–40, 144–45.

⁷⁴ Simon J. Frankel & Ethan Forrest, *Museum’s Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitation in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 279, 286 (2013).

nized the Washington Conference on Holocaust Era Assets in 1998 (Washington Conference).⁷⁵ On the tailwind of the London Conference on Nazi Gold,⁷⁶ the Washington Conference convened 44 countries, including Great Britain, Switzerland, Austria, Russia, Germany and France,⁷⁷ that were either affected by or participated in the looting of art during World War II.⁷⁸ Based on principles first developed by the Association of Art Museum Directors (AAMD), the parties present at the Washington Conference created a set of non-binding principles (Washington Principles) meant to “encourage expeditious, just, and fair solutions subject to fact-specific analyses.”⁷⁹ The Washington Principles emphasize two major points: first, records, resources, and personnel should be “accessible” and “available” so as to facilitate claims and ultimately the return of art spoliated during the Holocaust; and second, that nations, in accordance with their “differing legal systems,” should “develop national processes to implement the principles.”⁸⁰ The Principles also lay out a best practice with regard to transparency, stating that, to enable the return of art, “[e]very effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted.”⁸¹

The Washington Conference achieved major progress in the field of restitution of looted art, primarily by raising awareness and spurring individual countries and institutions to re-examine the way they treated or prepared for such claims.⁸² Spurred by this conference, in 1998 Austria adopted a new Art Restitution Act (Kunstrückgabegesetz).⁸³ In 1999, German government entities published a joint statement agreeing to restate art provided that any previous compensation be returned. The French government also took action, founding the Commission for the Compensation of Victims of Spoliation (CIVS), which investigates assets lost due to persecution and aids claimants in seeking the return of their art.⁸⁴ In the United States, the American Association of Muse-

⁷⁵ See EIZENSTAT, *supra* note 7, at 193–94.

⁷⁶ *Id.* at 190.

⁷⁷ *Id.* at 197, 199.

⁷⁸ *See id.* at 197.

⁷⁹ Frankel & Forrest, *supra* note 74, at 296–97.

⁸⁰ Washington Conference on Holocaust-Era Assets, *Washington Conference Principles on Nazi-Confiscated Art* (1999), available at <http://fcit.usf.edu/holocaust/resource/assets/heacappe.pdf>, archived at <https://perma.cc/J9PM-FZJS?type=pdf> [hereinafter *Washington Principles*].

⁸¹ *Id.*

⁸² SCHNABEL & TATZKOW, *supra* note 56, at 108; Demarsin, *supra* note 8, at 139.

⁸³ SCHNABEL & TATZKOW, *supra* note 56, at 108; see Das Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen [Federal Law on the Restitution of Works of Art from the Austrian Federal Museums and Collections], BUNDESGESETZBLATT I [BGBl. I] No.181/1998 (Austria).

⁸⁴ SCHNABEL & TATZKOW, *supra* note 56, at 108–10; *Questions/Answers*, COMM’N FOR THE COMPENSATION OF VICTIMS OF SPOILIATION RESULTING FROM THE ANTI-SEMITIC LEGISLATION IN FORCE DURING THE OCCUPATION (Mar. 27, 2008), <http://www.civs.gouv.fr/article622.html>, archived at <http://perma.cc/R233-WZ3P>.

ums and the AAMD committed to the Washington Principles, and in Great Britain, the Spoliation Advisory Panel was founded to “resolve . . . claims from people, or their heirs, who lost property during the Nazi era, which is now held in UK national collections.”⁸⁵

B. Prague Holocaust-Era Assets Conference

Following the example of the Washington Conference, the international community met again in 2009 at the Prague Holocaust Era Assets Conference (Prague Conference).⁸⁶ There, 46 countries agreed to a new set of guiding principles that reaffirmed the ideas about looted art agreed upon by the Washington Conference participants.⁸⁷ The resulting Terezin Declaration was considered by officials at the State Department to be “the most comprehensive final document of the most ambitious of the five such post-war conferences on Holocaust-era assets.”⁸⁸ It addressed a wide range of issues facing Holocaust survivors from their current welfare to past wrongs suffered.⁸⁹ With regard to looted art, the Terezin Declaration affirms the principles and intentions of the Washington Conference and, “considering the experience acquired since the Washington Conference,” notes two areas in which the Prague Conference participants agreed there could be increased progress.⁹⁰

First, the Declaration encouraged open sharing and publicizing of information, stating that “restitution cannot be accomplished without knowledge of potentially looted art and cultural property.”⁹¹ To that end, the Declaration recommended “intensified” provenance research and the sharing on the internet of any information discovered.⁹² Second, the Declaration emphasized that disputes over art should be considered expeditiously and with consideration of the merits of the claim.⁹³ In particular, the Declaration noted that “[g]overnments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property.”⁹⁴

⁸⁵ SCHNABEL & TATZKOW, *supra* note 56, at 109; SPOILIATION ADVISORY PANEL, <https://www.gov.uk/government/policy-advisory-groups/spoliation-advisory-panel> (last visited Mar. 8, 2014), archived at <https://perma.cc/Q2ZB-UT78>.

⁸⁶ Frankel & Forrest, *supra* note 74, at 296.

⁸⁷ Prague Holocaust Era Assets Conference, June 26–30, 2009, *Terezin Declaration on Holocaust Era Assets and Related Issues*, HOLOCAUST ERA ASSETS CONFERENCE PROCEEDINGS 16–31 (Jiří Schneider et. al eds., 2009), available at <http://www.holocausteraassets.eu/en/conference-proceedings/>, archived at <http://perma.cc/27DU-6NH8> [hereinafter *Terezin Declaration*].

⁸⁸ Davidson, *supra* note 53.

⁸⁹ *Terezin Declaration*, *supra* note 87.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

C. Nazi-Confiscated and Looted Art

The Washington Principles and the Terezin Declaration provided a suggested approach to art restitution; however, they created no enforceable duty in public international law.⁹⁵ Instead, individual countries were left to follow the principles of the two conferences and develop their own legislation or commissions to deal with Holocaust victims asserting claims for lost or stolen property.⁹⁶

Following the Washington Conference, Austria passed new federal legislation regarding the return of spoliated artwork, the Federal Law on the Restitution of Works of Art from the Austrian Federal Museums and Collections (Austrian Art Restitution Act).⁹⁷ In 2009, following the Terezin Declaration, this legislation was amended to clarify and expand the Austrian Art Restitution Act.⁹⁸ It created an Art Restitution Advisory Board that was empowered to make findings as to the provenance of an artwork and to make a legal assessment as to whom the artwork or cultural asset belongs.⁹⁹ When a legal successor is identified, the piece will then be returned.¹⁰⁰

While this legislation creates a relatively easy process through which heirs can be identified and reunited with their property by the Art Restitution Advisory Board, it is limited in scope.¹⁰¹ Specifically, the law only allows for the examination of property of the Austrian government.¹⁰² This means that there is no private right of action created through which heirs can claim title to privately owned paintings.¹⁰³ This limitation has created problems when claims have been made for paintings such as those in the Leopold Museum, which does not fall within the scope of the law because, unlike many museums in Austria, it is privately owned.¹⁰⁴ Thus, some claimants have resorted to litigat-

⁹⁵ See Demarsin, *supra* note 8, at 145–46.

⁹⁶ See *id.* at 146.

⁹⁷ See Das Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen [Federal Law on the Restitution of Works of Art from the Austrian Federal Museums and Collections], BUNDESGESETZBLATT I [BGBl. I] No.181/1998 (Austria).

⁹⁸ See Änderung des Bundesgesetzes über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen [Amendment to the Federal Law on the Return of Works of Art from the Austrian Federal Museums and Collections] BGBl. I No.117/2009 (Austria); *The 1998 Art Restitution Act and Its 2009 Amendment*, JEWISH COMMUNITY OF VIENNA DEP'T FOR RESTITUTION AFF., http://www.restitution.or.at/schwerpunkte/s-kunst-kunststrueckgabegesetz_e.html (last visited Mar. 4, 2014), archived at <http://perma.cc/L47E-UABH>.

⁹⁹ *Art Restitution Practice*, JEWISH COMMUNITY OF VIENNA DEP'T FOR RESTITUTION AFF., http://www.restitution.or.at/schwerpunkte/s-kunst-praxis_e.html (last visited Mar. 4, 2014), archived at <http://perma.cc/46E8-V3T3>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ William D. Cohan, *The Restitution Struggle: Malaise, Indifference, and Frustration*, ART-NEWS (Sept. 11, 2013), <http://www.artnews.com/2013/09/11/the-restitution-struggle/>, archived at <http://perma.cc/B58F-LUFM>; Marlies Dachler, *Burden of Proof: Restitution Claims May Still Tarnish Aus-*

ing in American courts when a painting is in the United States for an auction, or, as in the case of “Portrait of Wally”, when a painting visits an American museum as part of an exhibition.¹⁰⁵

Restitution laws passed in Germany following the end of the war had statutory time limits that expired in 1966, with the exception of laws governing property in East Germany, which expired in 1992.¹⁰⁶ Under general German law, a claim for the return of unlawfully possessed property expires after thirty years, even if an item is possessed or was acquired in bad faith.¹⁰⁷

Following the Washington Conference, however, Germany made a renewed effort to facilitate the return of property through the creation, in 2003, of the Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (Advisory Commission), and the creation in 2015 of the German Centre for Lost Cultural Property, which plans to “advise and support public institutions in their search for Nazi-looted art” as well as provide guidance to private museums and collectors.¹⁰⁸ The Advisory Commission has the important position of arbitrating disputes brought to it regarding artwork currently in public institutions in Germany.¹⁰⁹ Two limitations to its effectiveness are, first, as in Austria, it can only arbitrate claims to property possessed by the government of Germany, and second, its decisions do not offer in-depth explanations of its conclusions.¹¹⁰ In addition, there has been resistance in Germany to the return of paintings, such as the return of Ernest Kirchner’s “Street Scene” from a German museum, which prompted one German auc-

tria's Image, VIENNA REV. (Apr. 1, 2008), <http://www.viennareview.net/news/front-page/burden-of-proof>, archived at <https://perma.cc/S655-GLSH>.

¹⁰⁵ Dachler, *supra* note 104 (describing how the painting was confiscated after it entered the United States for a show at the Museum of Modern Art).

¹⁰⁶ *Federal Republic of Germany: Summary of Restitution Law*, U.S. HOLOCAUST MUSEUM, <http://www.ushmm.org/information/exhibitions/online-features/special-focus/holocaust-era-assets/germany-restitution-law> (last visited Mar. 4, 2015), archived at <http://perma.cc/FQ4Y-YZ9Y>; see BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGLB] 195, as amended, § 197 (Ger.).

¹⁰⁷ Matthias Weller, *Art Law: Litigation is Coming Closer in Gurlitt Case*, DISPUTE RESOLUTION IN GERMANY (Nov. 30, 2013), <http://www.disputeresolutiongermany.com/2013/11/art-law-litigation-is-coming-closer-in-gurlitt-case>, archived at <http://perma.cc/WD5Z-FR36>.

¹⁰⁸ *Advisory Commission, BERATENDE KOMMISSION IM ZUSAMMENHANG MIT DER RÜCKGABE NS-VERFOLGUNGSBEDINGT ENTZOGENER KULTURGUTS, INSBESONDERE AUS JÜDISCHEM BESITZ* [ADVISORY COMMISSION ON THE RETURN OF CULTURAL PROPERTY SEIZED AS A RESULT OF NAZI PERSECUTION, ESPECIALLY JEWISH PROPERTY], <http://www.lostart.de/Webs/EN/Kommission/Index.html> (last visited Mar. 4, 2015), archived at <http://perma.cc/V7BE-MXP4>; *Art Commissions: Advisory Commission on the Return of Cultural Property Seized As a Result of Nazi Persecution, Especially from Jewish Possession*, LOOTEDART.COM, http://www.lootedart.com/MFEU4E88305_print;Y (last visited Mar. 4, 2015), archived at <http://perma.cc/87ZY-RXNM>; *Work begins at German Centre for Lost Cultural Property*, DEUTSCHLAND.DE (Jan. 28, 2015) <https://www.deutschland.de/en/topic/culture/arts-architecture/work-begins-at-german-centre-for-lost-cultural-property>.

¹⁰⁹ See *Advisory Commission*, *supra* note 108.

¹¹⁰ Cohan, *supra* note 104.

ioneer to comment that restitution lawyers “say the word Holocaust and they are talking about money.”¹¹¹ This backlash has led some to call for an end to restitution.¹¹²

Despite the limitations of specific restitution laws and the Advisory Commission, there remains one avenue in Germany for claims to art lost during the Holocaust.¹¹³ This is a claim made pursuant to the general restitution provision of the German Civil Code, Section 985, under which an owner may demand the return of his property currently illegally possessed by another.¹¹⁴

A 2012 case provides a basic understanding of how German courts might approach a claim brought under Section 985.¹¹⁵ In *Judgment of the Fifth Civil Senate of March 16, 2012*, the case of the son of a Jewish art collector making a claim against the German Historical Museum, the German Federal Supreme Court reversed a lower court and ruled that, if property was considered lost at the time the deadlines passed for restitution, a claim under Section 985 would not be excluded by the special restitution laws.¹¹⁶ Thus, if the owner never legally lost title to the artwork under German law (as might be the case if a transaction was later considered null and void, or if the item was confiscated), and the artwork was considered lost in the period before special restitution laws expired, then an heir or owner may be able to make a claim if there are no grounds for estoppel in the particular case.¹¹⁷

Switzerland, a major conduit in the looted art trade, has proved an inhospitable forum for claims to spoliated artwork.¹¹⁸ Under Swiss law, a good faith

¹¹¹ Ulrike Knöfel & Marion Kraske, *Stealing Beauty: Dispute Rages over Austria's Looted Art*, DER SPIEGEL ONLINE INT'L (Apr. 4, 2008), <http://www.spiegel.de/international/europe/stealing-beauty-dispute-rages-over-austria-s-looted-art-a-545392-3.html>, archived at <http://perma.cc/2BLM-SZQY>.

¹¹² *Id.*

¹¹³ Sabine Rudolph, *Legal Foundations for Restituting Artwork Confiscated from Jewish Collections*, COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org/sites/default/files/kone.pdf>, archived at <https://perma.cc/5TH5-26WJ?type=pdf>.

¹¹⁴ See BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL] 195, as amended, § 985 (Ger.); Rudolph, *supra* note 113.

¹¹⁵ Peter Bert, *Art Law: Federal Supreme Court Rules in Favour of Nazi Victim on Restitution Claims; Finds No Time Bar Applies*, DISPUTE RESOLUTION IN GERMANY (Mar. 19, 2012), <http://www.disputeresolutiongermany.com/2012/03/art-law-federal-supreme-court-rules-in-favour-of-nazi-victim-on-restitution-claims-finds-no-time-bar-applies>, archived at <http://perma.cc/8BZG-7X5D>.

¹¹⁶ *Id.*; see Bundesgerichtshof [BGH] [Federal Supreme Court] Mar. 16, 2012, SYSTEMATISCHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS [BGHR][SYSTEMATIC COLLECTION OF DECISIONS OF THE GERMAN FEDERAL SUPREME COURT (LOOSELEAF)] Urteil des V. Zivilsenats vom 16.3.2012 - V ZR 279/10 [Judgment of the Fifth Civil Senate of Mar. 16, 2012 - V ZR 279/10] (Ger.), available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=59992&pos=0&anz=1>, archived at <http://perma.cc/FN7B-E2RA>.

¹¹⁷ Bert, *supra* note 115; Rudolph, *supra* note 114, at 3.

¹¹⁸ See *Switzerland: Neutral Haven and a Willing Art Market*, COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org/cases/switzerland> (last visited Mar. 4, 2015), archived at <http://perma.cc/8JYF-6XMJ>.

purchaser “acquires title superior to the original owner.”¹¹⁹ Claims may be brought within five years, but after that period the current possessor of the item holds good title.¹²⁰ In 2005, the period during which claims for certain items could be brought was extended to 30 years, but this only applies to occurrences that took place after 2005.¹²¹ As the Commission for Art Recovery noted, “[d]espite a general belief that Holocaust looted art exists in quantity in public and private collections in Switzerland, the number of works restituted from Switzerland in recent years can be counted on the fingers.”¹²² Thus, claimants seeking restitution of artwork are wise to seek an alternative forum for their claim.¹²³

In France, laws passed following the end of World War II continue to invalidate and nullify any transfer of property that occurred during the German occupation.¹²⁴ Although a statute of limitations exists under these laws passed in 1949, there is an exception if the owner or heir was “unable to find out” that the artwork had been lost due to the occupation and persecution of the Jews.¹²⁵ In addition, artwork that was looted in France and later recovered in Germany may be part of the *Musées Nationaux Récupération* (MNR), which actively seeks to find heirs and return artwork.¹²⁶ The CIVS, the French commission specifically tasked with recovering art looted by the Nazis, investigates and makes recommendations regarding the artworks in the MNRs and provides financial compensation for pieces that cannot be located.¹²⁷

As noted above, laws created a cause of action within many European countries’ courts directly following the war.¹²⁸ The statute of limitations in most countries, however, now prevents heirs or owners from utilizing these

¹¹⁹ Arbella Yip, *Stolen Art: Who Owns It Often Depends on Whose Law Applies*, SPENCER’S ART L. J. (Spring 2010), <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal7-26-10.asp#yip>, archived at <http://perma.cc/5AD7-SFCW>; see SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 934 (Switz.).

¹²⁰ Judith Bresler, *United Kingdom: Holocaust-Looted Art: A Changing Legal Landscape*, LOOTEDART.COM (June 2011), <http://www.lootedart.com/OW91H4689161>, archived at <http://perma.cc/R3DX-BSGV>; see ZGB art. 934 (Switz.).

¹²¹ Bresler, *supra* note 120.

¹²² *Switzerland: Neutral Haven and a Willing Art Market*, *supra* note 118.

¹²³ Yip, *supra* note 119.

¹²⁴ SCHNABEL & TATZKOW, *supra* note 56, at 108.

¹²⁵ *Id.*

¹²⁶ *France*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/information/exhibitions/online-features/special-focus/holocaust-era-assets/france> (last visited Mar. 4, 2015), archived at <http://perma.cc/L5QC-KZXJ>.

¹²⁷ Jeanne-Pierre Bady, *Restitution and Compensation in Four Countries of Western Europe: Belgium, France, Luxembourg and the Netherlands*, in HOLOCAUST ERA ASSETS CONFERENCE PROCEEDINGS 825–36 (Jiří Schneider et al. eds., 2009).

¹²⁸ See SCHNABEL & TATZKOW, *supra* note 56, at 108–10.

laws.¹²⁹ Thus, claimants in Europe are at the mercy of commissions, which often lack transparency and have no power over private owners.¹³⁰

Federal legislation in the United States has focused on making government records public, as opposed to creating a cause of action for recovery of art.¹³¹ Thus, claims in the United States are often brought under state law in state court, often as a claim for replevin or conversion.¹³² One exception to this general rule is when claims are brought against foreign states, in which case the claim may be brought in federal court pursuant to the Foreign Sovereign Immunities Act (FSIA), which grants U.S. District Courts jurisdiction over civil actions brought against foreign states.¹³³ Replevin allows the court to order the return of personal property wrongfully taken from its owner.¹³⁴ To bring a claim of replevin, a claimant must first demand return of the property from its good faith purchaser and the purchaser must refuse the demand.¹³⁵ Conversion often goes along with replevin and means “any act in relation to goods which amounts to an exercise of dominion over them, inconsistent with the owner’s right of property.”¹³⁶

Conversion applies to goods that were illegally obtained and then “dispos[ed] of . . . to a third person.”¹³⁷ A successful claim of conversion in court will allow the plaintiff to recover damages from the person or institution that wrongfully possessed and then disposed of their property.¹³⁸ These claims, however, can be defeated four ways.¹³⁹ First, there may be insufficient information to conclude that the artwork belongs to the plaintiff.¹⁴⁰ Second, there may be a statute of limitations defense.¹⁴¹ Third, there may be a claim for adverse possession.¹⁴² Finally, there may be a defense of laches.¹⁴³

¹²⁹ See EIZENSTAT, *supra* note 7, at 281; NICHOLAS, *supra* note 6, at 415; SCHNABEL & TATZKOW, *supra* note 56, at 108.

¹³⁰ See Cohan, *supra* note 104.

¹³¹ See Demarsin, *supra* note 8, at 152–53, 157.

¹³² *Id.* at 157; Graefe, *supra* note 11, at 479.

¹³³ Jennifer Anglim Kreder, Colloquy, *State Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. REV. 315, 328 (2011); see Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2006).

¹³⁴ BLACK’S LAW DICTIONARY 1491 (10th ed. 2014).

¹³⁵ Graefe, *supra* note 11, at 479–80.

¹³⁶ BLACK’S, *supra* note 134, at 406–07.

¹³⁷ *Id.*

¹³⁸ Graefe, *supra* note 11, at 480.

¹³⁹ See Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 455 (1999); Graefe, *supra* note 11, at 486.

¹⁴⁰ See Demarsin, *supra* note 8, at 179–80.

¹⁴¹ Cuba, *supra* note 139, at 455.

¹⁴² *Id.* at 454.

¹⁴³ Graefe, *supra* note 11, at 486.

Statute of limitations defenses have been used frequently to prevent the reclaiming of artworks looted in the Holocaust by their owners or their heirs.¹⁴⁴ In the United States, there are two circumstances under which courts may find that the statute of limitations has begun to run, depending on the laws of their jurisdiction.¹⁴⁵ First, it may begin to run when the wrongful act is discovered, or second, it may begin to run when the item is discovered or identified, a demand is made for the item's return, and that demand is refused.¹⁴⁶

For example, in one extreme ruling, in *Detroit Institute of Arts v. Ullin*, the U.S. District Court for the Eastern District of Michigan, Southern Division, ruled that under Michigan law a claim for conversion expired three years after the wrongful act, and thus that the statute of limitations for the plaintiff's claim had expired in 1941, three years following the improper sale of a painting.¹⁴⁷ In Massachusetts, the First Circuit Court of Appeals considered a claim for a painting in the collection of the Museum of Fine Arts (MFA), Boston in *Museum of Fine Arts v. Seger-Thomshitz*, and held that the statute of limitations precluded the claim because once Seger-Thomshitz was aware of the fact that she was the heir to spoliated art, she did not act quickly enough in identifying the fact that the artwork was in the MFA.¹⁴⁸

The second interpretation for when statutes of limitations begin to toll is exemplified by *Grosz v. Museum of Modern Art*, in which the district court, applying New York Civil Practice Law and Rules, ruled that the statute of limitations for bringing a claim for the return of a painting under conversion and replevin was three years, which began to run as soon as the Museum of Modern Art refused a request for the painting's return.¹⁴⁹ Thus, the court found that the statute of limitations had run, and declined to consider the merits of the claim brought by the plaintiffs.¹⁵⁰

Another possible affirmative defense is laches.¹⁵¹ A successful defense of laches will prove that first, the plaintiff was unreasonably delayed in bringing a claim, and second, that this unfairly prejudiced the defendant.¹⁵² In the case *Wertheimer v. Cirker's Hayes Storage Warehouse*, the court found that the family should have made inquiries into the painting after a 1950s advertisement

¹⁴⁴ See generally Kreder, *supra* note 133, at 323 (discussing high frequency of restitution claims dismissed as time-barred).

¹⁴⁵ Graefe, *supra* note 11, at 481.

¹⁴⁶ *Id.*

¹⁴⁷ *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364 at *8 (E.D. Mich. Mar. 31, 2007).

¹⁴⁸ *Museum of Fine Arts v. Seger-Thomshitz*, 623 F.3d 1, 9 (1st Cir. 2010).

¹⁴⁹ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481, 486 (S.D.N.Y.) *aff'd* by 403 F. App'x 575 (2d Cir. 2010).

¹⁵⁰ *Id.* at 490.

¹⁵¹ Graefe, *supra* note 11, at 486.

¹⁵² *Id.*

made the painting's location "public."¹⁵³ As a result of that lack of action, the court applied the doctrine of laches, stating that "the Wertheimer family's lack of due diligence in seeking the return of the painting, as described above, substantially prejudiced de Sarthe by making it virtually impossible for de Sarthe to prove that any of its predecessors in interest acquired good title."¹⁵⁴

In addition to the affirmative defenses listed above, adverse possession has sometimes been applied to personal property.¹⁵⁵ To have a claim to ownership of an item, the defendant would have to have held the item "in a visible, open, notorious, and continuous manner for the prescribed statutory period."¹⁵⁶ Once the statute of limitations expires, a possessor acting in this way would have title to the property in question.¹⁵⁷ This doctrine is difficult to apply to art, however, because first, the display would have to be sufficiently public (as opposed to being in a private collection), and second, it is often extremely difficult for owners to locate stolen work.¹⁵⁸ Because of these obstacles, most U.S. jurisdictions have rejected the doctrine of adverse possession when offered as a defense to claims relating to spoliated art.¹⁵⁹ The statute of limitations, however, remains a commonly used and sometimes controversial defense to claims for the return of spoliated artwork.¹⁶⁰

III. ANALYSIS

Two groups have taken two different approaches to the problem of returning spoliated art: Nations have negotiated international agreements like the Washington Principles and the Terezin Declaration, while academics have concentrated on suggestions to extend statutes of limitations and create international tribunals to adjudicate claims.¹⁶¹ These past proposals overlook the need for an enforceable duty to disclose information about art that was possibly spoliated.¹⁶² Officials with conflicting loyalties and motivations need this legal

¹⁵³ *Wertheimer v. Cirkor's Hayes Storage Warehouse*, 300 A.D.2d 117, 118 (N.Y. App. Div. 2002).

¹⁵⁴ *Id.*

¹⁵⁵ *Cuba*, *supra* note 139, at 453.

¹⁵⁶ *Id.*

¹⁵⁷ *O'Keeffe v. Snyder*, 83 N.J. 478, 495 (1980).

¹⁵⁸ *Cuba*, *supra* note 139, at 454.

¹⁵⁹ *Id.* at 455.

¹⁶⁰ *Graefe*, *supra* note 11, at 480. *See generally* Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383 (2000) (discussing the controversy and moral problems with the use of statutes of limitations to evade meritorious claims).

¹⁶¹ *See* EIZENSTAT, *supra* note 7, at 193–94; Frankel & Forrest, *supra* note 74, at 296–97.

¹⁶² *See* Simon Shuster, *U.S. Pushes Germany to Reveal Hoard of Nazi Looted Art*, TIME (Nov. 22, 2013), <http://world.time.com/2013/11/22/u-s-pushes-germany-to-reveal-hoard-of-nazi-looted-art/>, archived at <http://perma.cc/AVK8-R7P3> ("The principles envision a number of creative solutions,

call to report, and claimants need this access to information to develop claims for what is rightfully theirs.¹⁶³

A. Learning from Past Attempts

1. International Agreements Have Created an Unpredictable Landscape and Fail to Remedy a Lack of Transparency

Both the Washington Principles and the Terezin Declaration call for accessibility of information and the evaluation of claims regardless of technical defenses such as statutes of limitations.¹⁶⁴ Despite the consensus found in these agreements, however, heirs seeking to reclaim artwork still face incredible obstacles.¹⁶⁵ One of the primary obstacles in the recovery of artwork is the fact that institutions and officials with information about art that fell out of possession during that era often choose not to make that information accessible to the public, and even fight attempts to access information necessary for claims.¹⁶⁶

In the German discovery of Cornelius Gurlitt's trove of art, this reluctance to abide by the principles set forth in the Washington Principles and Terezin Declaration to make information available promptly led to criticism from countries such as the United States and Israel.¹⁶⁷ Stuart Eizenstat, who organized the Washington Conference during his tenure as Under Secretary of State during the Clinton Administration, and now serves as the Holocaust issues advisor to Secretary of State John Kerry, has been vocal in advocating for a published list of the recovered artwork.¹⁶⁸ He explains that under the Washington Principles, "every effort should be made to publicize art that's found to have been confiscated by the Nazis and not subsequently restituted in order to locate their pre-war owners."¹⁶⁹ In this case, as in others, as Eizenstat has said, "the longer one goes . . . the more difficult it is for people to prepare potential claims . . . Justice delayed is justice denied."¹⁷⁰

just and fair solutions. But none of that is possible without the initial publication,' says [Stuart] Eizenstat.").

¹⁶³ See Dowd, *supra* note 11, at 8–13.

¹⁶⁴ See *Terezin Declaration*, *supra* note 87; *Washington Principles*, *supra* note 80.

¹⁶⁵ Dowd, *supra* note 11, at 8–13.

¹⁶⁶ *Id.* at 9.

¹⁶⁷ Melissa Eddy, *Cornelius Gurlitt, German at Center of Art-Cache Case, Sets Up Website*, N.Y. TIMES (Feb. 17, 2014), http://artsbeat.blogs.nytimes.com/2014/02/17/cornelius-gurlitt-german-at-center-of-looted-art-case-sets-up-website/?_php=true&_type=blogs&_r=0, archived at <http://perma.cc/2EW9-WD6V>.

¹⁶⁸ Shuster, *supra* note 162; *Nazi Trove in Munich Contains Unknown Works by Masters*, BBC NEWS (Nov. 5, 2013), <http://www.bbc.co.uk/news/world-europe-24818541> [hereinafter *Nazi Trove in Munich*].

¹⁶⁹ Shuster, *supra* note 162.

¹⁷⁰ *Nazi Trove in Munich*, *supra* note 168.

In addition to government actors such as Eizenstat, many within academia have noted the failure of international agreements.¹⁷¹ While the Washington Principles and the Terezin Declaration recognize the moral obligation to return looted artwork, they depend upon individual signatories to implement the principles agreed upon.¹⁷² Signing onto these agreements led countries to take first steps towards aligning their legal or claims systems with the principles, but these agreements' dependence on individual legislative bodies and self-enforcement has resulted in a spotty and unpredictable international landscape where the result of an heir's claim often depends upon the nation in which the artwork is found.¹⁷³

2. Previous Academic Proposals Overlook a Basic Obstacle to Recovery

Academic proposals to resolve the existing obstacles have centered on two ideas: first, that countries disregard or extend statute of limitations laws so as to consider the merits of a claim, and second, that an international tribunal be set up to consider claims independent of individual legal systems.¹⁷⁴ Implementing either of these proposals would be a step in the right direction.¹⁷⁵ Both fail to recognize, however, the most basic problem which Holocaust survivors and heirs encounter when attempting to build a claim: the shocking lack of transparency on the part of many museums and government entities when it comes to art which may have been spoliated during the Holocaust.¹⁷⁶

Officials with access to this information, especially museum administrators, have a disincentive to share this information.¹⁷⁷ Making this information public exposes their institutions to legal claims for the recovery of art, which bring with them expenses for additional provenance research, legal fees, and the risk of losing a prized part of their collections.¹⁷⁸ Museums, as public trusts, have a duty to maintain their collections; but despite the fact that knowing possession of spoliated art is unethical, making information public that

¹⁷¹ See Demarsin, *supra* note 8, at 119; Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 182 (2007); *Nazi Trove in Munich*, *supra* note 168.

¹⁷² See Demarsin, *supra* note 8, at 145.

¹⁷³ Julia Parker, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT'L & COMP. L. 661, 695 (2005).

¹⁷⁴ See Cuba, *supra* note 139, at 450; Falconer, *supra* note 160, at 385.

¹⁷⁵ See Cuba, *supra* note 139, at 450; Falconer, *supra* note 160, at 385.

¹⁷⁶ Dowd, *supra* note 11, at 9; see Cuba, *supra* note 139, at 450; Falconer, *supra* note 160, at 385; *Nazi Trove in Munich*, *supra* note 168.

¹⁷⁷ Dowd, *supra* note 11, at 9; *Nazi Trove in Munich*, *supra* note 168.

¹⁷⁸ See Graefe, *supra* note 11, at 498.

¹⁷⁸ *Id.*

could lead to deaccessioning could put officials in the uncomfortable position of assisting in the reduction of their collections.¹⁷⁹

3. Overcoming the Reluctance to Make Information Available

Museum officials formally recognized that they have a duty to return art for which heirs or former owners can make a legitimate claim in the 1998 Report of the Association of Art Museum Directors Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945) (AAMD Report), whose statement of principles provided the inspiration for the Washington Principles.¹⁸⁰ These principles stated that the “AAMD urges the prompt creation of mechanisms to coordinate full access to all documentation concerning this spoliation of art, especially newly available information.”¹⁸¹ In addition, the Report’s guidelines state that “[m]ember museums should facilitate access to the Nazi/World-War-II-era provenance information of all works of art in their collections.”¹⁸² In 2001, following the work of the Presidential Advisory Commission on Holocaust Assets in the United States, the AAMD Task Force issued an addendum to its Report, specifically describing how member museums should act with regard to Holocaust-era spoliated art.¹⁸³ The report stated:

It should be the goal of member museums to make full disclosure of the results of their ongoing provenance research on those works of art in their collections created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period, giving priority to European paintings and Judaica.¹⁸⁴

Despite the intellectual acceptance of this obligation, however, when heirs actually surface, many museums resist claims, refuse to share information with potential heirs, and utilize technical defenses such as statutes of limitations to defeat claims.¹⁸⁵

¹⁷⁹ *Id.* at 497–98.

¹⁸⁰ EIZENSTAT, *supra* note 7, at 193; ASSOCIATION OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE SPOLIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) at 1 (Apr. 30, 2001), available at <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.docx>, archived at <https://perma.cc/Z5KD-4UPD?type=pdf>, [hereinafter AAMD REPORT].

¹⁸¹ AAMD REPORT, *supra* note 180, at 2.

¹⁸² *Id.* at 3–4.

¹⁸³ *Id.* at 5.

¹⁸⁴ *Id.*

¹⁸⁵ Cohan, *supra* note 104 (“In the United States . . . restitution has become a hit-or-miss prospect, largely dependent on the goodwill of the museums that possess stolen artworks and a judicial system that has been increasingly willing to accept the legal argument that time has expired on these claims.”).

B. An Affirmative Obligation to Make Information Available

The obligations agreed upon in the AAMD Report, Washington Principles, and Terezin Declaration should be formalized in so far as they apply to government and museum officials.¹⁸⁶ It has been recognized that these officials have an obligation to make this information public.¹⁸⁷ Additionally, it has been recognized that the lack of transparency is one of the foremost obstacles for heirs and former owners to bring legitimate claims for the recovery of artwork that is rightfully theirs.¹⁸⁸ The United States should act to make this information more readily available for possible claimants by creating an obligation to publish this information.¹⁸⁹

An affirmative obligation for government and museum officials would obligate them to make information public regarding provenance, gaps in provenance, or relevant research, when it finds an artwork in their collection that may have been spoliated.¹⁹⁰ This obligation would affirm the public policy regarding looted art agreed to in the Washington Principles and the Terezin Declaration: that the knowing possession of any art which was spoliated from its owners is unethical, and that the obligation to return art and right the histor-

¹⁸⁶ See Parker, *supra* note 173, at 695; Justin Häne, *Swiss Missing Comprehensive Laws on Looted Art*, SWISSINFO (Dec. 16, 2008), www.swissinfo.ch/eng/politics/Swiss_missing_comprehensive_laws_on_looted_art.html?cid=686006, archived at <http://perma.cc/5EZ6-J9VB> (“If one really wants to strengthen the search for looted art, then the law should be changed and an obligation should be imposed on whoever holds art of which he knows or assumes that it could have been looted in the past to notify the authorities.”).

¹⁸⁷ *Terezin Declaration*, *supra* note 87; *Washington Principles*, *supra* note 80.

¹⁸⁸ Shuster, *supra* note 162 (“‘The principles envision a number of creative solutions, just and fair solutions. But none of that is possible without the initial publication’ says [Stuart] Eisenstat.”).

¹⁸⁹ Cohan, *supra* note 104 (“Charles Goldstein thinks that the promise of the Washington Principles is being squandered in the United States. ‘In general, museums do not examine their collections’ he said. ‘If they were complying with the Washington Principles, they would put on the Internet art that had a dubious provenance, or questionable provenance, but there’s no evidence that they’ve allocated any resources for looking into it.’”).

¹⁹⁰ See Michèle Laird, *Swiss Urged to Provide Missing Links to Nazi-Looted Art*, SWISSINFO (Nov. 7, 2013), www.swissinfo.ch/eng/culture/Swiss_urged_to_provide_missing_links_to_Nazi-looted_art.html?cid=37087348, archived at <http://perma.cc/69FZ-PHYR> (“No law obliges museums and art dealers to look for the origins of ownership, so few do. They see no reason to dedicate their funds to costly and lengthy research.”); Häne, *supra* note 186. Häne quotes the head of the Swiss Association of Jewish Communities as saying:

“If one really wants to strengthen the search for looted art, then the law should be changed and an obligation should be imposed on whoever holds art of which he knows or assumes that it could have been looted in the past to notify the authorities.” . . . “If the violation of this duty carries penal sanctions, I would imagine that a lot of looted art would show up. But I am not aware of any moves to change the law into that direction,” [the association head] added.

Häne, *supra* note 186.

ic wrongs of the Holocaust supersedes their duty to maintain their collections.¹⁹¹

This obligation, especially if adopted by countries with national museums, would also encourage government officials with important information to overcome their reluctance to make it public.¹⁹² While some may fear a public backlash if the information leads to an heir claiming an artwork, a legal obligation would make clear their duty to act and allow them to shift any negative reactions onto the legislation itself.¹⁹³ Finally, this legislation would make clear that the sharing of this information is a legislative priority, and the creation of this duty would allow institutions and government entities to lobby for increased funding in order to comply with the legislation.¹⁹⁴

1. Why the United States Should Act Unilaterally

The resolution of the issue of spoliated art has been a popular subject of international conferences.¹⁹⁵ Yet for all the discussion of the issues, governments have been hesitant to enact laws which fully implement the principles agreed upon.¹⁹⁶ In the last two decades of Holocaust art claims policy, each nation has made cursory attempts to comply with the Washington Principles and Terezin Declaration while at the same time protecting national institutions from high numbers of claims through regimes which were far from comprehensive.¹⁹⁷ As noted by one academic, “[t]he only way for the international community to achieve the spirit of the principles established in the Washington Conference Principles on Nazi-Confiscated Art . . . is to broadly implement the existing framework, not to add yet another nonbinding recital of good intentions.”¹⁹⁸

The United States has been a leader in the conversation on Holocaust restitution, and while the U.S. government has made efforts to make government information available through the Nazi War Crimes Disclosure Act, it has also sat by while legitimate claims for the recovery of art were discouraged and defeated because of technical defenses.¹⁹⁹ Since binding international agreements

¹⁹¹ See Graefe, *supra* note 11, at 512.

¹⁹² See Torry & Lane, *supra* note 12 (describing how German officials did not initially publish a list of works recovered in Gurlitt’s apartment).

¹⁹³ See SCHNABEL & TATZKOW, *supra* note 56, at 116–17 (describing the public backlash when the Kirchner painting “Street Scene” was removed from a Berlin museum and returned to its rightful owners).

¹⁹⁴ See AAMD REPORT, *supra* note 180, at 3.

¹⁹⁵ See, e.g., Terezin Declaration, *supra* note 87; Washington Principles, *supra* note 80.

¹⁹⁶ Demarsin, *supra* note 8, at 165, 169–70.

¹⁹⁷ *Id.* at 165–70.

¹⁹⁸ *Id.* at 185.

¹⁹⁹ See Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (1998); Cohan, *supra* note 104; Demarsin, *supra* note 8, at 148, 157–58; SCHNABEL & TATZKOW, *supra* note 56, at 108.

are difficult to achieve, the United States should take independent measures to improve claimants' ability to locate and recover artwork.²⁰⁰

2. The Proposed Obligation

This duty would come in a similar form to mandatory reporting requirements.²⁰¹ Museum and government officials have access to information about artwork that may not be accessible to the general public or may be incredibly difficult for the public to access.²⁰² Holocaust survivors, in turn, are not as well versed in researching provenance or locating lost art, and in the past have had great difficulty properly researching provenance and locating artwork before the statute of limitations precluded their claims.²⁰³ Society owes a duty to Holocaust survivors to aid them in legitimate claims.²⁰⁴ Museum and government officials with knowledge of art which may be connected to past misdeeds are specially situated to enable the return of wrongfully possessed property.²⁰⁵

As a practical matter, each museum or government entity would be obligated to publish the information they have about the provenance of their collection, and to highlight those pieces of the collection which have gaps in provenance or other indicators that they may have been spoliated during the Holocaust.²⁰⁶ The Nazi-Era Provenance Internet Portal, which houses information that museums have already willingly reported, could be the home for the increased information museum and government officials would be obligated to report under this law.²⁰⁷ Victims of spoliation or their heirs could then access this information as they created claims.²⁰⁸

While this would be only one step in righting the wrong of spoliated art, it would go a long way in enabling victims of spoliation and their heirs to consider whether or not missing artwork still exists, and if it might behoove them

²⁰⁰ See Demarsin, *supra* note 8, at 120.

²⁰¹ See generally Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R. 4th 782 (2013) (discussing the various statutory and judicial approaches to when duty to report child abuse is triggered as well as liabilities for failing to report).

²⁰² Patricia Cohen, *Museums Faulted on Restitution of Nazi-Looted Art*, N.Y. TIMES (June 30, 2013), http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html?pagewanted=2&_r=0, archived at <http://perma.cc/C46B-PYL6> ("Museums often fail to make their original research on a work's provenance or sale available or to submit the scholarship to peer review . . .").

²⁰³ See Cuba, *supra* note 139, at 449, 459.

²⁰⁴ See Graefe, *supra* note 11, at 474.

²⁰⁵ See Cohen, *supra* note 202.

²⁰⁶ See Cohan, *supra* note 104 ("There is a worrying lack of transparency which impedes the pace and possibility of restitution and defeats the purpose of the work.") (internal quotations omitted).

²⁰⁷ *About the Portal*, NAZI-ERA PROVENANCE INTERNET PORTAL, http://www.nepip.org/public/info/about.cfm?menu_type=info (last visited Mar. 4, 2015), archived at <http://perma.cc/M7RJ-C4QQ>.

²⁰⁸ See *Nazi Trove in Munich*, *supra* note 168.

to look further into developing a claim.²⁰⁹ The creation of this obligation in the United States would give senior diplomats and politicians credibility in future attempts to create an international regime for the return of spoliated artwork and could act as a test run of the practicality of this type of obligation.²¹⁰

CONCLUSION

Today, rectifying the wrongs perpetrated during the Holocaust often means nations, institutions, and individuals paying for the sins of those who came before them. Though the societal obligation to return spoliated art has been recognized by the international community in both the Washington Principles and the Terezin Declaration, in practice it can be difficult to follow these well-intentioned guidelines. After more than 60 years, those in possession of this art, especially good faith purchasers, often have trouble accepting this obligation, and, as we see in the frequent litigation over such art, they often do not. As a result, Holocaust survivors and their heirs often have great difficulty locating and reclaiming spoliated artwork.

The ineffectiveness of the Washington Principles and the Terezin Declaration has demonstrated that the international community needs to stop relying on toothless agreements. While well-intentioned, these agreements do more to assuage societal guilt than to actually rectify situations in which art is still wrongfully possessed. As the history of these agreements demonstrates, however, creating and agreeing to enforceable international obligations is an incredibly daunting task, which is unlikely to be accomplished in the near future.

The United States, having spearheaded past efforts to address the wrongs of spoliated art, is uniquely positioned to model a policy of mandatory reporting, which would make a significant difference in returning this art to its rightful owners. Turning the moral obligation of museum and government officials to share information into a legal obligation would assist Holocaust victims and their heirs in locating artwork, and would demonstrate to the international community the possible power of an enforceable international agreement on spoliated art.

²⁰⁹ See *id.*

²¹⁰ See Laird, *supra* note 190 (“In order to reactivate the international goodwill generated by the Washington Principles . . . the drive must once again come from the US . . . We need to be reminded of our moral obligations [to provide the missing provenance links.]”) (internal quotations omitted).