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

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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 Siviero

INTRODUCTION

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

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

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

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. 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.

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. Despite a general consensus that the pieces should be returned, there have been many impediments to following through with this belief. 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. Other obstacles include the striking lack of transparency within the art world, as well as technical impediments, such as statute of limitations defenses.

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

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5 Id.


10 Sue Choi, The Legal Landscape of the International Art Market After Republic of Austria v. Altman, 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).

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

cultural livelihoods, and ultimately at their physical annihilation.”

Very importantly, “[t]he incremental plundering of Jewish art collections was part of this policy.”

The motivations behind the plundering of the art were multifold. 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. Second, the artwork seized was also quite valuable economically. Taking the art transferred the economic value of the artwork from Jewish society to the Nazi party. Paintings in Nazi possession could no longer be sold by Jews to aid an escape or cobble together a living. 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.

Lastly, the Nazis considered the looting and trading of art as part of their cultural “purification” and process of “Aryanization.” 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. Concurrently, they worked to rid the country (and occupied countries) of Modern and Impressionist art, which they considered “degenerate,” through lucrative trade and sale. Thus, in the minds of the Nazis, the looting of art furthered Hitler’s goals of “Aryanization” and creation of a “pure” German nation.

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). In 1945, the value of the art stolen exceeded the total value of all

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

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.” 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. Like others in his situation, Rosenberg tried to protect and hide his assets as best he could, but many works were discovered and seized. 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. 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.

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. Many valuable collections, including a number from Paul Rosenberg’s collection, were processed at the Jeu de Paume. There, the fate of the artworks would be determined. 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.

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. 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. These paintings could then be put up for sale on the Parisian art market. Pieces would often find their way to Switzerland, or other neutral countries such as Spain and Portugal, providing an entrée to the international market.

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. Paul Rosenberg, then living in New York, began to search for his lost artwork the day after Paris was liberated. 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. Many paintings, however, had disappeared into private collections during the war and were incredibly difficult, if not impossible, to track down. 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. Many survivors of the persecution and looting of the Nazis were not as fortunate and lacked the resources to locate their artwork.

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.” 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.” 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.
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


\(^{55}\) Id.


\(^{57}\) 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-
nized the Washington Conference on Holocaust Era Assets in 1998 (Washington Conference). On the tailwind of the London Conference on Nazi Gold, the Washington Conference convened 44 countries, including Great Britain, Switzerland, Austria, Russia, Germany and France, that were either affected by or participated in the looting of art during World War II. 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.” 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.” 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.”

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. Spurred by this conference, in 1998 Austria adopted a new Art Restitution Act (Kunstrückgabegesetz). In 1999, German government entities published a joint statement agreeing to restitute 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. In the United States, the American Association of Muse-

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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.
81 Id.
82 SCHNABEL & TATZKOW, supra note 56, at 108; Demarsin, supra note 8, at 139.
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.”

**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). 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. 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.” It addressed a wide range of issues facing Holocaust survivors from their current welfare to past wrongs suffered. 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.

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.” To that end, the Declaration recommended “intensified” provenance research and the sharing on the internet of any information discovered. Second, the Declaration emphasized that disputes over art should be considered expeditiously and with consideration of the merits of the claim. 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.”

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

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95 See Demarsin, supra note 8, at 145–46.
96 See id. at 146.
100 Id.
101 Id.
102 Id.
103 See id.
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-


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).


109 See Advisory Commission, supra note 108.

110 Cohan, supra note 104.
tioneer to comment that restitution lawyers “say the word Holocaust and they are talking about money.” This backlash has led some to call for an end to restitution.

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. 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.

A 2012 case provides a basic understanding of how German courts might approach a claim brought under Section 985. 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. 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.

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

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112 Id.
114 See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL] 195, as amended, § 985 (Ger.); Rudolph, supra note 113.
117 Bert, supra note 115; Rudolph, supra note 114, at 3.
purchaser “acquires title superior to the original owner.” Claims may be brought within five years, but after that period the current possessor of the item holds good title. 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. 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.” Thus, claimants seeking restitution of artwork are wise to seek an alternative forum for their claim.

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. 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. 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. 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.

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

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

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. Thus, claims in the United States are often brought under state law in state court, often as a claim for replevin or conversion. 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. Replevin allows the court to order the return of personal property wrongfully taken from its owner. 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. 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.”

Conversion applies to goods that were illegally obtained and then “dispos[ed] of . . . to a third person.” 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. These claims, however, can be defeated four ways. First, there may be insufficient information to conclude that the artwork belongs to the plaintiff. Second, there may be a statute of limitations defense. Third, there may be a claim for adverse possession. Finally, there may be a defense of laches.

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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.
134 BLACK’S LAW DICTIONARY 1491 (10th ed. 2014).
135 Graefe, supra note 11, at 479–80.
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. 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. 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.

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. 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.

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. Thus, the court found that the statute of limitations had run, and declined to consider the merits of the claim brought by the plaintiffs.

Another possible affirmative defense is laches. 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. 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

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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.
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.” 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.”

In addition to the affirmative defenses listed above, adverse possession has sometimes been applied to personal property. 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.” Once the statute of limitations expires, a possessor acting in this way would have title to the property in question. 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. 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. The statute of limitations, however, remains a commonly used and sometimes controversial defense to claims for the return of spoliated artwork.

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. These past proposals overlook the need for an enforceable duty to disclose information about art that was possibly spoliated. Officials with conflicting loyalties and motivations need this legal

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154 Id.
155 Cuba, supra note 139, at 453.
156 Id.
158 Cuba, supra note 139, at 454.
159 Id. at 455.
161 See EIZENSTAT, supra note 7, at 193–94; Frankel & Forrest, supra note 74, at 296–97.
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 Cornelious 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

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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.
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. 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. 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.

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. Implementing either of these proposals would be a step in the right direction. 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.

Officials with access to this information, especially museum administrators, have a disincentive to share this information. 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. 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

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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.
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.
179 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.
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_ured_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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{195} Yet for all the discussion of the issues, governments have been hesitant to enact laws which fully implement the principles agreed upon.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{199} Since binding international agreements

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\textsuperscript{191} See Graefe, supra note 11, at 512.
\textsuperscript{192} See Torry & Lane, supra note 12 (describing how German officials did not initially publish a list of works recovered in Gurlitt’s apartment).
\textsuperscript{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).
\textsuperscript{194} See AAMD REPORT, supra note 180, at 3.
\textsuperscript{195} See, e.g., Terezin Declaration, supra note 87; Washington Principles, supra note 80.
\textsuperscript{196} Demarsin, supra note 8, at 165, 169–70.
\textsuperscript{197} Id. at 165–70.
\textsuperscript{198} Id. at 185.
\textsuperscript{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.
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).
208 See Nazi Trove in Munich, supra note 168.
to look further into developing a claim. 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.

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.

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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).