STOP THE CLOCK: THE CASE TO SUSPEND THE STATUTE OF LIMITATIONS ON CLAIMS FOR NAZI-LOOTED ART

The day the Nazis invaded Paris, Paul Rosenberg and his family fled to the Spanish border.[1] They were forced to wait there for several days before obtaining passage, along with thousands of other panic-stricken Jews.[2]

Meanwhile, back in the French town of Floriac, where Rosenberg had stored much of his art collection for safekeeping, German soldiers surrounded his house.[3] The Germans took every crate which contained paintings, loaded them onto trucks, and drove off.[4]

"Everything is gone, gone, gone," the letter read, referring to the collection of over three hundred paintings that Rosenberg had left behind.[5] Rosenberg's assistant sent him this letter in 1941—she had watched helplessly as the Nazis looted Rosenberg's home, his gallery and his storage vaults.[6] Paul Rosenberg, considered Paris's most important art dealer, befriended and discovered the talents of artists such as Henri Matisse, Georges Braque, and Pablo Picasso.[7] His collection included works by Renoir, Cezanne, Pissaro, Monet, and Delacroix—all of which eventually disappeared into Nazi warehouses.[8]

Rosenberg stored one painting, Matisse's *Odalisque*, in a vault in France's National Bank for Commerce and Industry for safekeeping.[9] In 1941, under orders of top Hitler aide Herman Göring, the Nazis seized the painting.[10] Thus began the painting's journey.

Odalisque, along with about 172 other works in the collection, was shipped to the Jeu de Paume in Paris, the Nazi storage facility.[11] It was then traded to Gustav Rochlitz. Rochlitz, a German living in France, played a key role in bartering confiscated modern

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1 HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 68 (Hector Feliciano & Tim Bent, trans., 1997).
2 *See id.*
3 *See id.*
4 *See id.*
5 *Id.* at 73.
6 *See id.* at 68.
7 *See id.* at 54-64.
8 *See id.* at 53.
9 *See id.* To see a picture of *Odalisque*, see *id.* at A6.
10 *See id.*
11 *See id.*

paintings for more classical works favored by the Nazi party.[12]

In 1954, *Odalisque* was sold to Knoedler & Co., a New York gallery.[13] Prentice and Virginia Bloedel purchased the painting that same year and, in 1991, donated it to the Seattle Art Museum.[14] The whereabouts of the painting were unknown to the Rosenbergs until a few years later when the Bloedel's granddaughter recognized a photograph of *Odalisque* in the book *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* by Hector Feliciano, and notified the museum.[15] The painting was included as one of Rosenberg's collections which had been looted by the Nazis.[16] Paul Rosenberg's heirs are now seeking to regain possession of *Odalisque*, which is today worth $2 million.[17] They have sued the Seattle Art Museum in federal court.[18]

The Rosenbergs' claim is but one of a proliferation of claims recently filed by people who have only recently realized their claims or recently located art that was looted by the Nazis during World War II.[19] The main reason so many claims are being lodged now for artwork stolen over fifty years ago is that the records and documentation were unavailable before.[20] Both Nazi confiscation

12 *See* JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 190 (1996). Hector Feliciano gives an example of this bartering system: the Nazis would trade their loot of five Picassos, three Matisses, and a Braque for a 14th century German classic painter. *See* Hector Feliciano, Remarks at Symposium, The Holocaust: Moral & Legal Issues Unresolved 50 Years Later (Feb. 9, 1998) (transcript on file with the *Cardozo Law Review*).

13 *See* Robin Updike, *SAM Sued Over Matisse Painting*, SEATTLE TIMES, Aug. 1, 1998, at A1.

14 *See id.* The Bloedels are founders of the Canadian Timber company MacMillan Bloedel Ltd.

15 *See id.*

16 *See id.*

17 The suit was filed by Elaine Rosenberg, the widow of Paul Rosenberg's son, and Micheline Nanette Sinclair, Paul Rosenberg's daughter. *See id.*

18 *See Who Owns this Matisse?*, NAT'L L.J., Aug. 17, 1998, at A8. On the eve of publication of this Note, the Seattle Art Museum agreed to return *Odalisque* to the Rosenberg family. The trail of *Odalisque* from World War II to the present, however, remains illustrative of the story of thousands of Nazi-looted art pieces that have not been returned.

19 *See, e.g.*, Goodman v. Searle, No. 96-C6459, (N.D. Ill. July 17, 1996). For a description of the facts surrounding the Goodman claim, see *60 Minutes: The Search: Lifetime Search for Family Paintings Stolen by Nazis During World War II Leads to Art Institute of Chicago* (CBS television broadcast, July 13, 1997). Despite on-going settlement negotiations, several problems have arisen. *See* Lee Rosenbaum, *Nazi Loot Claims: Art with a History*, WALL ST. J. (Europe), Jan. 29, 1999, at 14. *See also, e.g.*, Menzel v. List, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966).

In a third, recent, claim, two works by the Austrian artist Egon Schiele were on exhibition at the Museum of Modern Art. Descendants of two Jewish Viennese families made claims on these paintings contending that they had been stolen by the Nazis in the 1930s. The Manhattan District Attorney seized them pending a criminal investigation. *See* Robert Hughes, *Hold Those Paintings!; the Manhattan D.A. Seizes Alleged Nazi Loot*, TIME, Jan. 19, 1998, at 70. *See generally* Constance Lowenthal, *An Annotated Checklist of Cases and Disputes Involving Art Wrongfully Taken During the Nazi Era and its Aftermath*, SC 40 A.L.I.-A.B.A. 11 (1998).

20 *See* Mary Abbe, *Nazi Art Theft Claims Challenge Museums' Ethics*, STAR-TRIB. NEWSPAPER TWIN CITIES, May 7, 1998, at E1.

lists and records compiled by the Allied art-recovery troops at the end of the war were closely guarded throughout the Cold War.[21] In the past decade, governments in Germany, the former Soviet Union, France, and Switzerland have slowly begun to declassify governmental archives and documents.[22] The United States government has appropriated $5 million in order to further archival research of WWII looting.[23]

Access to archives will allow for the completion of an art registry, which will include inventories of Nazi-looted art.[24] The presence of these records and such an art registry will provide original owners[25] and their heirs with the ability to locate artwork and prove ownership.[26] Until such resources become available, the victims of Nazi art looting are at a great disadvantage as compared to plaintiffs in typical stolen art cases.[27] In the meantime, there must

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[21] *See id.*; *see also* Michael J. Kurtz, Ph.D, Assistant Archivist, U.S. National Archives and Records Administration, Washington D.C., Remarks at Symposium, The Holocaust: Moral & Legal Issues Unresolved 50 Years Later (Feb. 9, 1998) (transcript on file with the *Cardozo Law Review*). Mr. Kurtz asserted that the necessary records to prove these cases are only now being unsealed and declassified. *See id.* In addition, the World Jewish Congress released a 170 page report compiled by the CIA, listing more than 2000 people who handled art looted by the Nazis. This report, although helpful, is only a starting point for investigations. *See* Verena Dobnik, *List Tracks Art Looted by Nazis*, ASSOCIATED PRESS, Nov. 10, 1998, *available in* 1998 WL 22417251.

[22] *See Dobnik, supra* note 21. At a conference sponsored by the U.S. State Department and the U.S. Holocaust Memorial Museum, representatives from several European governments made a "moral commitment" to open their records and archives. *See* Thomas Lippman, *44 Nations Pledge to Act on Art Looted by the Nazis*, WASH. POST, Dec. 4, 1998, at A2.

[23] *See* Holocaust Victims Redress Act, Pub. L. No. 105-158, § 123, 112 Stat. 15, 17 (1998).

[24] The Holocaust Art Restitution Project ("HARP"), established in 1997, is setting up a database in order to assist victims of Nazi looting in locating their artwork. HARP is involved in amassing the information needed to locate the works and to prove ownership. *See* Elaine L. Johnson, *Cultural Property and World War II: Implications for American Museums, Practical Considerations for the Museum Administrator*, SC 40 A.L.I.-A.B.A. 29, 90-92 (1998).

[25] The term "original owner" is used here to describe the owners of the artwork prior to the Nazi looting. The term "present possessor" describes the person who owns the artwork when the action is brought against him.

[26] An international art-theft registry called *The Art Loss Register* assists victims of stolen art. Launched in 1991, this database stores descriptions and photographs of thousands of stolen items. These registries allow both original owners to publicize losses, and buyers to verify titles of purchases. *See* Barbara Lantin, *The Art of Helping Police with Inquiries*, THE INDEPENDENT (London), Apr. 3, 1996, at 24; *see also* Deborah DePorter Hoover, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443, 458-63 (1983) (detailing the different databases, agencies and other resources available for the investigation into the validity of title to art works). *The Art Loss Register* is currently being updated to include works looted by the Nazis. Auction houses, which are major sponsors of the Registry, can check the registry prior to sale. *See* Angela Madden, *New Hope For Nazi Victims' Families*, SCOTLAND ON SUNDAY, Aug. 23, 1998, at B12. A "Jewish Masterlist," which will list Nazi-looted art pieces, is also being compiled. *See* Godfrey Barker, *Why These Masterpieces May Now Be Worthless*, EVENING STANDARD (London), Sept. 30, 1998, at 28.

[27] HARP was established in September, 1997. One of their tasks is to establish a database which contains all the information needed to track down Nazi-looted art. *See* Johnson, *supra* note 24, at 90-92.

be a special rule to allow these plaintiffs the necessary time to locate their art and file claims. Otherwise, statutes of limitations will bar their claims.

This Note advocates that Congress suspend the statute of limitations for plaintiffs suing to reclaim possession of artwork that was looted by the Nazis. Further, this suspension should last only until the U.S. State Department has made a finding that the unique practical difficulties that surround claims to regain possession of Nazi-looted art are no longer present. Part I outlines the justification of a congressionally implemented rule based on the institutional competence of Congress. This section also criticizes the current judicial approach to stolen art cases as ill-equipped to recognize the complex circumstances surrounding disputes over Nazi-looted art. Part II presents the practical arguments based on: (1) the fact that none of the policy goals of the statute of limitations are met in cases of Nazi-looted art and, (2) the desperate need for a rule of law which influences governments to open their files and purchasers, specifically museums and auction houses, to research title. Part III provides moral justification for the suspension of the statute of limitations based on the inextricable link between the Nazi military effort to exterminate Jews and other cultures and the looting of these victims' art collections. This unprecedented wartime looting further contributes to the unique circumstances surrounding these claims. Part IV illustrates the global priority of restitution for Nazi looting evidenced by the enactments of several international conventions, yet expresses the need for congressional legislation based on the failure of these conventions to provide any workable solutions. Part V asserts that it is within Congress's powers to suspend the statute of limitations and within the State Department's powers to determine when to end the suspension upon its satisfaction that certain facts are present. The final Part of this Note implements the proposed solution in the form of an amendment to the Holocaust Victims Redress Act.

I. The Need for Congressional Intervention

A. *The Institutional Competence of Congress*

The circumstances surrounding litigation over Nazi-looted art are unique and complex: most of the thefts occurred more than fifty years ago; the thefts occurred in Europe during World War II and the art has since crossed many borders; the unavailability of records has prevented the victims from locating their art; negligence by purchasers or donees in researching title propels these

works of art through the marketplace. This myriad of complex factors contributes to the obstacles plaintiffs face in promptly bringing their claims.

As an institution, it is Congress, not the Judiciary, which is far better equipped to "amass and evaluate the vast amounts of data" bearing upon the complicated issues presented in these cases.[28] In the seminal decision of *M'Culloch v. Maryland*,[29] the Court recognized the superior qualities of Congress to make policy decisions given its "capacity to avail itself of experience, to exercise its reason and to accommodate its legislation to circumstances."[30] Since then, the Supreme Court has noted on several occasions that complex circumstances present a question of policy; "[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate for those who write the laws, rather than those who interpret them."[31]

Congress has both a superior institutional capacity to collect the necessary evidence, and the fact-finding abilities to recognize the exceptional circumstances of cases involving Nazi-looted art. This capacity derives from the significant resources available to the legislatures, namely their special committees, personal staff members, legislative hearings, the General Accounting Office, the Library of Congress Congressional Research Center, the Congressional Budget Office, and the Office of Technology Assessment.[32]

Such superior investigative abilities give Congress the power to

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[28] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (citing Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 331 (1985)); *see also* United States v. Gainey, 380 U.S. 63, 67 (1965) ("Significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.").

[29] 17 U.S. (4 Wheat.) 316 (1819).

[30] *Id.* at 415.

[31] United States v. Gilman, 347 U.S. 507, 512-13 (1954); *see also* Texas Indus., Inc. v. Radcliff Materials, 451 U.S. 630, 646-47 (1981) (noting that the just resolution in complex cases with a wide range of factors, which apply not only to a particular case, is inappropriate for judicial resolution and should be addressed by Congress); Diamond v. Chakrabarty, 447 U.S. 303, 317-18 (1980) (noting legislative competence to investigate, research and examine where the courts cannot); United States v. Topco Assocs., 405 U.S. 596, 611-12 (1972) (noting the ability of Congress to weigh the myriad of factors and interests in economic issues).

[32] *See* Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2315-16 (1998) (discussing the traditional arguments for judicial deference to the legislature's superior fact-finding ability); *see also* Jesse H. Choper, *The Supreme Court and Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 822-23 (1974) (discussing the ability of congressional committees to investigate, balance alternatives, and offer detailed and timely solutions).

create remedies far exceeding those available to the courts.[33] Congress can provide a more practical resolution to these conflicts by establishing a more flexible and responsive approach.

While a court only impacts the two parties to a dispute, Congress is able to enact broadly applicable rules which affect a large class of people.[34] It is Congress's role to locate and address those problems which have a scope extending beyond a single court room dispute and which require federal attention.[35]

These cases demand federal legislative attention since they present a difficult policy choice between two competing interests: victims of Nazi looting and good faith purchasers of the loot. It is for Congress, not the Judiciary, to make relative value judgments within the economy and balance competing interests.[36]

Moreover, the facts in Nazi-looted art cases are extremely similar to one another and should be given the same considerations. "[W]hen courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality . . . Congress' resolution is appropriate."[37]

Finally, Congress's political accountability makes it the proper branch to make a policy choice in these cases.[38] Should the federal courts usurp policymaking authority, "the legislative process with its public scrutiny and participation [would be] bypassed . . . ."[39] Since the federal courts are "free to reach a result different from that which the normal play of political forces would have produced," the intended beneficiaries of legislation lose protection and are "denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process."[40]

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33 *See* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975).

34 *See id.*

35 *See* United States v. White, 893 F. Supp 1423, 1434 (C.D. Cal. 1995).

36 *See Texas Indus.*, 451 U.S. at 647; Milwaukee v. Illinois, 451 U.S. 304, 313; *Diamond*, 447 U.S. at 317 (1980); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); *Topco Assocs.*, 405 U.S. at 611-12.

37 United States v. Gainey, 380 U.S. 63, 67 (1965).

38 The Framers intended that each of the three branches have a specialized role. Congress, due to its high degree of representativeness and accountability, will best understand the "passions" of the electorate, suiting it best to make policy choices. The completely insulated, life tenured, federal judiciary will have "neither FORCE nor WILL but merely judgment . . . ." THE FEDERALIST No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961). *See generally* D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985).

39 Cannon v. University of Cal., 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

40 *Id.*

B. *The Current Judicial Approach to Stolen Art is Ill Suited to Cases over Nazi-looted Art*

There are two main reasons why Congress should resolve the statute of limitations issue. The first reason, as discussed above, is that Congress is better equipped to deal with the complex issues in disputes over Nazi-looted art. The second reason is that current doctrines applied by the judiciary in stolen art cases are ill-equipped for, and unresponsive to, the extreme circumstances which surround Nazi-looted art.

A person seeking the return of a stolen piece of art has a cause of action in replevin.[41] Instead of damages or criminal prosecution of the possessor, a replevin action demands the return of the object at issue.[42] Courts apply two doctrines to determine ownership in stolen art cases: (1) adverse possession, which is the oldest rule, yet also the most inappropriate for Nazi-looted art and considered ill-suited to the needs of the art world, and; (2) the doctrine of the statute of limitations, which is better suited to stolen art cases, but fails to recognize the unique circumstances surrounding Nazi-looted art.

1. Adverse Possession

Although the doctrine of adverse possession[43] was historically applied to real property, courts have applied it to disputes over personal property as well.[44] This doctrine focuses primarily on the character of the defendant's possession. The required elements of adverse possession require property to be held in a visible, open, notorious, and continuous manner for the prescribed statutory period.[45] The statute of limitations begins to run when the defendant

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41 See R. BROWN, THE LAW OF PERSONAL PROPERTY 33 (3d ed. 1975); *see also* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1388 (S.D. Ind. 1989) (applying Indiana law); Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 619 (N.Y. App. Div. 1990) (applying New York Law).

42 An action in replevin is "an action whereby the owner or person entitled to repossession of goods or chattels may recover these goods or chattels from one who has wrongfully disdained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY 1297 (6th ed. 1990).

43 Adverse possession is based on the doctrine of disseisin. Before the statute of limitations expired, the possessor had the right to keep the property until it was claimed by the original owner. The only imperfection in the possessor's right to retain that property was the original owner's right to repossess. The running of the statute of limitations removed the imperfection, and the possessor had legal title to the property. *See* O'Keefe v. Snyder, 416 A.2d 862, 874 (N.J. 1980) (citing J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 321 (1890)).

44 *See* RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 1012 (abridged ed. 1968).

45 *See id; see also* Risi v. Interboro Indus. Parks, Inc., 470 N.Y.S.2d 174, 175 (N.Y. App. Div. 1984).

has satisfied each of these required elements.[46]

Adverse possession has been applied to personal property such as livestock that grazes on open land and is visible to the public.[47] In such cases, applying the doctrine of adverse possession is appropriate since the nature of possession is sufficiently open and notorious to put the owner on notice.

In the case of Nazi-looted art, however, such a doctrine creates an impossible burden: either the original owner must locate the stolen art, or the subsequent purchaser must meet the requirement of open and notorious.[48] Nazi-looted art has often crossed continental borders, changed hands several times, and been privately displayed, making it extremely difficult for an original owner to locate an item. Conversely, in order to maintain open and notorious possession, the present possessor would always be required to display the work publicly.[49]

Recognizing these problems, the court in *O'Keefe v. Snyder*,[50] rejected the application of adverse possession to stolen art disputes.[51] Prominent painter Georgia O'Keefe brought the action to recover three paintings which had been stolen in 1946 from a New York gallery owned by her husband, Alfred Stieglitz.[52] From the time of the theft until 1973 the paintings were displayed in the residence of a private collector.[53] Snyder, the defendant, purchased them in 1975.[54] The court reasoned that, since the paintings had been displayed privately since 1946, the possession was not sufficiently open and notorious to constitute adverse possession, and O'Keefe's claim was not barred.[55]

A holding which asserts that stolen art claims could be barred

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46 *See* HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY §§ 1133-1147 (3d ed. 1975).

47 *See, e.g.*, Dragoo v. Cooper, 72 Ky. (9 Bush) 629, 632 (1873) (holding for the bona fide purchaser of a stolen horse); Hull v. Davidson, 25 S.W. 1047, 1047 (Tex. Civ. App. 1894) (holding for the bona fide purchaser of a stolen mare).

48 *See* Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J., 337, 348 (1993).

49 *See* Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1078 (1991).

50 416 A.2d 862 (N.J. 1980).

51 *See id.* at 871-73; *see also* Redmond v. N.J. Historical Soc'y, 28 A.2d 189 (N.J. Eq. 1942) (holding that mere possession of a painting for 50 years did not satisfy the element of hostile or adverse possession, so the action was not barred).

52 *See* O'Keefe v. Snyder, 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979), *rev'd*, *O'Keefe*, 416 A.2d 862.

53 *See O'Keefe*, 405 A.2d at 842.

54 *See id.*

55 *See id.* at 844. The court held that title by adverse possession may never be acquired by mere possession of any length of time. "Display in one's home provides to the true owner no more notice of the possessor's claim or warning of the need for timely legal action than would its retention in a closet." *Id.*

by adverse possession would provide for certainty of title,[56] but it would also encourage art theft and create a "handbook for larceny."[57] That is, a person could steal a painting, hide it and eventually legally own it. Under such a rule, no purchaser would ever check title because a painting would belong to whomever held it in her possession for the statutory period. Realizing this possible outcome, most jurisdictions, including New York, have rejected the use of adverse possession in favor of other doctrines.[58]

2. The Statute of Limitations

The current judicial treatment of the statute of limitations in stolen art cases is also ill-suited to the complexity of factors involved in cases of Nazi-looted art. The statute of limitations limits the period in which a plaintiff possesses a legal right to assert a valid claim in a court of law. The expiration of the statute of limitations may bar an action in replevin.[59] Cases involving stolen art may depend solely on the court's interpretation of the statute of limitations. Often, a court will spend years deciding this issue alone.[60]

In most jurisdictions in the United States, the statute of limitations for suits to recover personal property ranges from two to four years.[61] But awareness of the length of the period is not nearly as important as knowing the jurisdiction's interpretation of when the clock begins to tick.[62] Most statutes are vague on this point. Rather than specifying a time or event that marks the beginning of the period, the typical statute of limitations provides that the pe-

56 *See* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 154-63 (1989) (supporting the application of adverse possession to personal property cases in order to achieve commercial certainty).

57 *O'Keefe*, 405 A.2d at 850 (Fritz, J., dissenting).

58 *See, e.g.*, DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y.) (holding that brief public displays of artwork do not constitute open and notorious possession) (applying New York law), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987); O'Keefe v. Snyder, 416 A.2d 862, 871-73 (N.J. 1980) (applying New Jersey law).

59 *See* BROWN, *supra* note 41, at 33; *see also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

60 *See, e.g.*, DeWeerth, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987), 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994) (spending 13 years addressing the complexities of the statute of limitations); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (spending eight years determining issues related to statute of limitations).

61 *See, e.g.*, CAL. CIV. PROC. CODE § 338(c) (West Supp. 1993) (three years); N.Y. C.P.L.R. § 214(3) (McKinney 1990) (three years); OHIO REV. CODE § 2305.09(b) (Baldwin 1992) (four years); TEX. CIV. PRAC. & REM. CODE § 16.003(a) (West 1986) (two years).

62 *See* John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1128 (1980).

riod should be computed from the time a cause of action accrues.[63] Historically, legislatures have left it to the courts' discretion to decide when accrual occurs.[64]

Courts have recognized that a strict application of the statute of limitations eliminates the legal remedy for a meritorious claim.[65] In response, courts hearing cases involving stolen art, have applied one of two other rules: (1) demand and refusal, and (2) due diligence and discovery. Courts within the same jurisdictions, and among different jurisdictions, vacillate on which of these two rules is preferable.

a. The Demand and Refusal Rule

According to the demand and refusal rule, the statute of limitations is tolled until the owner makes a demand for the return of the property and the possessor refuses.[66] This doctrine is applied to cases where an innocent bona fide purchaser is unaware of his wrongful possession—the demand serves to establish the defect in title and gives the purchaser the opportunity to return the painting.[67]

For example, in *Menzel v. List*,[68] Nazis illegally removed a Marc Chagall painting from the owner's residence in 1941, when the family fled Brussels.[69] The whereabouts of the painting, entitled *The Peasant on the Ladder*, were unknown from 1941 until 1955, when List purchased the painting from the Perls Gallery.[70] It wasn't until 1962 that the Menzels located their painting in the possession of List.[71] The court held that the statute of limitations

[63] "A cause of action 'accrues' when a suit may be maintained thereon . . . ." BLACK'S LAW DICTIONARY 20 (6th ed. 1990).

[64] *See, e.g.*, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, 917 F.2d 278 (7th Cir. 1990). "Under [this state's] statute of limitations for replevin actions, [the plaintiff] had six years from the time its cause of action accrued in which to sue . . . . [I]t is the court's responsibility to determine, based on the facts of each case, when the cause of action accrues." *Id.* at 287-88.

[65] *See, e.g.*, Urie v. Thompson, 337 U.S. 163 (1949) (stating that the statute of limitations begins at discovery); *Elicofon*, 678 F.2d at 1160 (stating that the statute of limitations begins only after demand and refusal); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991) (stating that the statute of limitations begins at demand and refusal); O'Keefe v. Snyder, 416 A.2d 862, 874 (N.J. 1980) (stating that statute of limitations begins at discovery of the theft); *see also* Eisen, *supra* note 49, at 1073.

[66] *See* Menzel v. List, 267 N.Y.S.2d 804, 809 (N.Y. Sup. Ct. 1966).

[67] *See* Eisen, *supra* note 49, at 1079 (citing Butler v. Wolf Sussman, Inc., 46 N.E.2d 243, 244 (Ind. 1943)).

[68] 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).

[69] *See Menzel*, 267 N.Y.S.2d at 816-17 (discussing the confiscation of private property as a violation of international treaty obligations).

[70] *See id.* at 808.

[71] *See id.* at 807.

did not begin at the time the plaintiffs fled Belgium, but instead, when the Menzels demanded the painting and List refused to return it.[72]

Similarly, in *Kunstsammlungen Zu Weimar v. Elicofon*,[73] the court held that the statute of limitations began to run when the plaintiff's demand for the return of two paintings by Albert Duerer was refused.[74] The paintings had been stashed in a castle in East Germany for safekeeping during WWII, they were stolen from the castle in 1945, and resurfaced in the home of Edward Elicofon in 1966.[75] The Second Circuit rejected the defendant's argument that the action was time barred, or that the statute of limitations began when the defendant purchased the painting, and held that the statute of limitations began to run upon the defendant's refusal of the plaintiff's demand.[76]

Although the plaintiffs ultimately prevailed, the *Menzel* and *Elicofon* cases provide little certainty for future litigation. The demand and refusal rule is open to several interpretations most of which remove the tolling of the statute of limitations and bar the action. For instance, some courts have interpreted the demand and refusal rule to mean that the statute of limitations begins at the time the *right* to make the demand exists.[77] This interpretation both fails to recognize the possibility that a plaintiff is unable to locate the person to whom the demand must be made, and that a plaintiff may be unaware a claim even exists.[78] Such an interpretation effectively abolishes the demand requirement and bars the claim.[79]

Moreover, the demand and refusal rule is unique to New York and only a few other jurisdictions.[80] Even when a plaintiff is fortu-

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72 *See id.* at 809.

73 678 F.2d 1150 (2d Cir. 1982).

74 *See id.* at 1161-62.

75 *See* Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp 829, 831-33 (E.D.N.Y. 1981), *aff'd*, *Elicofon*, 678 F.2d 1150.

76 *See Elicofon*, 678 F.2d at 1162-63.

77 *See, e.g.*, Federal Ins. Co. v. Fries, 355 N.Y.S.2d 741, 747 (N.Y. Civ. Ct. 1974) (holding that "ignorance does not stop the clock"); General Stencils, Inc. v. Chiappa, 272 N.Y.S.2d 337 (N.Y. Sup. Ct. 1966); Guild v. Hopkins, 63 N.Y.S. 2d 522, 531 (N.Y. App. Div. 1946).

78 *See Fries*, 355 N.Y.S.2d at 748.

79 *See* Stephen A. Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2446 (1994).

80 *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 5, at 94 (5th ed. 1984) (noting that only New York and two or three other states have a substantive demand requirement). The majority rule regards mere acquisition of goods by a bona fide purchaser as an assertion of an adverse claim, and no demand is required. *Id*; *see also* DeWeerth v. Baldinger, 836 F.2d 103, 109 (2d Cir. 1987) (stating that in virtually every state except New York demand and refusal are unnecessary in order for the action to accrue); RESTATEMENT (SECOND) OF TORTS § 229 (1965) (stating that a small minority of jurisdictions require demand and refusal in order for the action to accrue).

nate enough to be in one of these few forums which apply the demand and refusal rule, the court may still interpret the rule to the plaintiff's detriment. The case of *DeWeerth v. Baldinger*[81] is one such example. This decision highlights a court's failure to recognize the realities of the circumstances surrounding looted art.[82] The court's failure resulted in the application of another rule— discovery and due diligence.

b. The Discovery Rule and Due Diligence

The duty of due diligence requires that a plaintiff seeking the return of stolen property must both make a demand and take affirmative steps to locate that property.[83] As imposed by the Second Circuit in *DeWeerth*,[84] the statute of limitations begins to run when the plaintiff, by practicing this due diligence, discovers, or *should have* discovered the whereabouts of the stolen artwork.[85]

The dispute in *DeWeerth* was over the painting *Champs de Ble a Vetheuil* by Claude Monet.[86] In 1943, Gerda DeWeerth sent the Monet to her sister's home in Germany for safekeeping during World War II.[87] Two years later, in the midst of the war, it disappeared from the house.[88] Between 1946 and 1957, DeWeerth searched for the painting, reporting its loss to the military and civil authorities, and employed the services of an attorney and an art expert, but to no avail.[89]

Mrs. DeWeerth did not locate the painting until 1981 when her nephew spotted it in a *Catalogue Raissone*.[90] The catalog indi-

81 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987), 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 28 F.3d 1266 (2d Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994). The interpretation in *DeWeerth* has been rejected by the New York Court of Appeals. *See* Solomon R. Guggenheim Found. v. Lubell 569 N.E. 2d 426, 430 (N.Y. 1991). *DeWeerth* is, however, illustrative of the shortcomings of the due diligence duty as applied to looted art cases. The *DeWeerth* approach may be applied in other jurisdictions.

In addition, even after the federal Court of Appeals reversed the decision after DeWeerth's efforts to reopen the case, *see DeWeerth*, 804 F. Supp. 539, the court held that the result should stand. *See DeWeerth*, 28 F.3d 1266.

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

83 *See DeWeerth*, 836 F.2d at 109.

84 *Id.*

85 *Id.* at 108-09; *see also* O'Keefe v. Snyder, 416 A.2d 862, 872 (N.J. 1980).

86 DeWeerth v. Baldinger, 658 F. Supp. 688, 690 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987).

87 *See DeWeerth*, 658 F. Supp. at 690.

88 *See DeWeerth*, 836 F.2d at 104-05.

89 *See DeWeerth*, 658 F. Supp. at 694.

90 A *catalogue raisonne* is a definitive listing and accounting of the works of an artist. It usually depicts each work by the artist in chronological order of creation, and sets forth each work's history of ownership, or provenance, exhibitions in which it has been shown and published references to the work. *See DeWeerth*, 836 F.2d at 112; *see also* Mary McKenna,

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cated the painting had been sold by the Wildenstein Gallery in New York.[91] The Wildenstein Gallery had acquired the painting from a Swiss dealer, exhibited it in its gallery, and then sold it to Baldinger, the defendant, in 1957.[92] DeWeerth sued Baldinger for the painting's return and the court barred the action.[93] The court reasoned that art is a unique property since it is housed in private collections and, therefore, original owners must be encouraged to perform extensive investigations.[94]

Such a holding fails to recognize that due to the extenuating circumstances of Nazi-looted art, even an original owner who conducts an extensive search may still fail to locate the stolen artwork.[95] Art looted during World War II is often located only after an elaborate search.[96] As the lower court noted in *DeWeerth*, an individual in search of a lost work usually lacks the knowledge, resources and experience successfully to locate the art.[97]

By focusing solely on the actions of the original owner, the due diligence rule ignores the duty of the purchaser to research the origins of title.[98] Negligence by galleries or art dealers in inves-

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Comment, *Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property*, 12 U. PA. J. INT'L BUS. L. 83, 104 n.89 (1991).

91 *See DeWeerth*, 658 F. Supp. at 692. The catalog, however, did not list the name of the purchaser of the painting, and the gallery would not disclose that information. In order to find out the identity of the purchaser, DeWeerth had to bring a proceeding in New York Supreme Court to compel disclosure. The court ruled in DeWeerth's favor and Wildenstein divulged Baldinger's name. *See id.* at 690-91.

92 *See id.* at 691.

93 *See DeWeerth*, 836 F.2d at 111-12 (finding that DeWeerth had failed to (1) make use of the Central Collecting Points established by the Allied Forces at the end of the war; (2) publicize the theft in available listings made to notify museums; (3) continue her search between 1957 and 1981; and (4) consult the *Catalogue Raissone*, a definitive accounting of Monet's works which showed the painting was exhibited in 1970). The lower court had not barred the claim and considered the following factors: (1) DeWeerth's report to the military authorities in 1946; (2) in 1948 she solicited the help of her attorney to assist in finding the painting and; (3) she made several inquiries to an art expert in 1955 and reported the painting's loss to the civil authorities in 1957. At this point, given the fact that DeWeerth was 63 years old and there were very few public references to the painting, the court excused her for not continuing to search. *See DeWeerth*, 658 F. Supp. at 695.

94 *See DeWeerth*, 836 F.2d at 109.

95 *See* Hayworth, *supra* note 48, at 367 (noting that the decision in *DeWeerth* overlooks the fact that much of this art is never located, and if it is, it is only after a "fortuitous chain of events").

96 In his book, *The Lost Museum*, Hector Feliciano spent more than seven years tracking the paths of the largest art fortunes in France which were looted by the Nazis during WWII. Drawing on recently declassified documents, interrogation reports, detailed Nazi inventories, private family archives, museum catalogs, and dozens of interviews, Feliciano paints a vivid picture of the international art trade with links in France, Germany, Switzerland, Great Britain, the former Soviet Union, and the United States. *See* FELICIANO, *supra* note 1.

97 *See DeWeerth*, 658 F. Supp at 694-95. The district court stated that "any comparison with *Elificon* is inappropriate. There the plaintiff was a government-owned art museum with resources, knowledge and experience that far exceeded any means an individual such as Mrs. DeWeerth could muster to carry on a credible search for a missing painting." *Id.*

98 *See* Hoover; *supra* note 26.

tigating title is common, and therefore compounds the problem.[99] A rule that hinders original owners's ability to recover looted art serves only to further discourage thorough title investigations and provides incentive for art dealers to continue to sell art with tainted title.[100]

Furthermore, the records and archives that could assist many of these plaintiffs in locating their art have been locked behind the Iron Curtain; the records that survived the war were not accessible to art historians, scholars, lawyers, or heirs of Holocaust victims.[101] The evidence contained in these government files and Nazi inventories is only recently being unsealed; the same evidence which proves a claim is often that evidence which located the art in the first place.[102] A plaintiff should not be penalized for being deprived access to necessary evidence.

Another problem with the due diligence requirement is the inconsistency with which it is applied. The court in *DeWeerth* gave no guidelines as to what actions satisfy the due diligence requirement. Rather, the court imposed a burden on the plaintiff to continue her search or hire someone else to do so, even after more than ten years of searching unsuccessfully.[103]

The "due diligence" requirement, like adverse possession doctrine, fails to recognize the special circumstances of the plaintiff in Nazi-looted art cases. Owners already face numerous practical difficulties in recovering Nazi-looted art, and they should not have to bear the additional burden of satisfying an arbitrary "due diligence" standard in tracking down their property.[104] Moreover, by focusing primarily on the plaintiff's conduct in searching for the stolen works, courts provide no incentive for the subsequent purchaser to conduct an extensive title search.

With the proliferation of suits to reclaim Nazi-looted art, courts are in need of a mechanism to resolve the time issue in a manner responsive to the needs of the modern art world. At present, the judicial approaches courts apply in determining times of

99 *See id.* The "hear-no-evil, see-no-evil" dilemma is at the heart of trade of stolen art. *See* David Goldstein, *Heirs Try to Reclaim Art Stolen by the Nazis*, SAN DIEGO-UNION TRIB., Sept. 5, 1997, at A2.

100 *See, e.g.*, Drum, *supra* note 82.

101 *See* Johnson, *supra* note 24, at 59.

102 *See generally* FELICIANO, *supra* note 1.

103 *See* DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987); *see also* Charles D. Webb, Jr., *Whose Art is it Anyway? Title Disputes and Resolution in Art Theft Cases*, 79 KY. L.J. 883, 892 (1991).

104 *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991) (holding that, in order to offer greater protections to original owners, the burdens of title investigation and due diligence should be placed upon the potential purchasers).

accrual render uncertainty in the art market and permit the trade of Nazi-looted art to continue. It is time for the Federal legislature to intervene and to make policy decisions which are responsive to the complex circumstances of these cases.

II. The Practical Justifications

A. *Barring Claims that are not Truly Stale*

To judge whether the statue of limitations should bar any particular claims, it is necessary to understand the policy goals behind the statute. Statutes of limitations are not intended either to shield wrongdoers or to provide them with peace of mind regarding potential liability.[105] Rather, the purpose of statutes of limitations is to bar stale claims. Stale claims present evidentiary problems: witnesses die, memories fade, and evidence is lost.[106] Timely adjudication is intended to ensure that fresh evidence is used to decide questions of fact and that witnesses are available to testify.[107]

In cases of Nazi-looted art, however, much of the evidence has only recently been discovered. Government records regarding the whereabouts of these works of art are only recently being unsealed and scrutinized, despite the fact that the thefts occurred during World War II.[108]

Among these discovered records are meticulous inventories in which the Nazis listed all of their loot.[109] The Nazis were obsessive record-keepers, and often wrote initials or numbers on the back of each painting as a system to catalog.[110]

Since these paintings were stolen so long ago, they have usually followed a long and winding path to the present. In order to prove a claim, or even to realize the existence of one, it is necessary

105 *See Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1187 (1950).

106 *See id.*

107 *See* Kim Marie Covello, Wilson v. Johns-Manville Sales Corp. *and the Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule*, 32 Cath. U. L. Rev. 471, 474 (1983).

108 The National Archives in Washington D.C. and records in Switzerland and Germany are currently being unsealed and examined to trace ownership of Nazi-looted art. *See* Kurtz, *supra* note 21.

109 *See id; see also* Joseph Altman, Jr., *Washington Briefing/A Weekly Report on People and Issues in the Nation's Capital/Unraveling Nazi War Crimes/President Set to Sign Bill Declassifying Documents*, Newsday, Aug. 16, 1998, at A22 (noting that the Nazis made lists of what they took) (quoting Constance Lowenthal, Director, World Jewish Congress Commission for Art Recovery); Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, 20 Whittier L. Rev. 67, 67 (1998) (stating that art inventories, consisting of descriptions and photographs of looted works, are the best evidence used in locating these works of art).

110 *See* Abbe, *supra* note 20.

to check family archives, governmental files and auction records.[111] These information sources are often located in several countries, sometimes several continents.[112] As one United States Congresswoman admitted: "[f]ederal agencies have been permitted to keep certain information secret at the expense of families and researchers who are simply looking for closure and answers to questions that have plagued them for decades."[113] Since much of the information necessary to make a claim is sealed in governmental records, a statute of limitations could arbitrarily foreclose a plaintiff's claim which is not truly stale.[114]

B. *The Law Must Pressure Governments to Open their Records*

In order to decrease the difficulty in locating Nazi-looted art and increase the realization of claims, governments and institutions must be encouraged to grant the public access to their records. Although several files and archives have been declassified in the past few years, this is only the first step; it remains extremely difficult for individuals to research their claims.

Richard Weisberg, an attorney representing class action suits on behalf of Holocaust victims and their heirs against French and Swiss banks and insurance companies, has encountered problems in gaining access to records essential for cases.[115] Weisberg encountered a lot of stonewalling by private institutions and governments alike.[116] For example, to obtain access to records in France, one still needs to obtain a letter from the Minister of the Interior.[117]

Weisberg relates the following anecdote which is illustrative of the reluctance of private institutions to offer any information to aid victims in reclaiming property lost during WWII. Weisberg's client, who was part of the class action against Credit Suisse, entered the bank to try to reclaim the money from her father's account or to obtain any information about the account which had not been

111 *See id.*

112 *See* Constance Lowenthal, Remarks at The Holocaust: Moral & Legal Issues Unresolved 50 Years Later (Feb. 9, 1998) (transcript on file with the *Cardozo Law Review*).

113 Rep. Carolyn Maloney, New York, *quoted in* Altman, *supra* note 109.

114 *See* Bibas, *supra* note 79, at 2457.

115 *See* Interview with Richard Weisberg, Esq., professor of law, Cardozo School of Law, and author of *Vichy Law and the Holocaust in France* (1996), in N.Y, N.Y. (Feb. 25, 1998) (on file with the *Cardozo Arts & Entertainment Law Journal*) [hereinafter Weisberg Interview]. The parties have since settled out of court for $1.25 billion. *See* Lynn Neary (host), *Talk of the Nation* (NPR radio broadcast, Aug. 17, 1998).

116 *See* Weisberg Interview, *supra* note 115.

117 *See id.*

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opened since World War II.[118] Credit Suisse acknowledged that her father's account did indeed exist, but would only agree to release information regarding the account to the woman's father.[119] She informed them that her father was dead.[120] "Do you have a death certificate?" they asked.[121] "No, my father died at Auschwitz."[122] Regardless, the bank denied her access to the money or the records.[123]

Hector Feliciano spent seven years researching the art collections of several wealthy French Jews, which had been looted during World War II.[124] He, too, experienced stonewalling and rejection when inquiring into governmental archives.[125] The French government denied Feliciano access to their archives, forcing him to travel to Germany, Switzerland, and the United States to conduct his research.[126]

In order to realize their claims, and then prove their claims, plaintiffs' access to these records is essential. The Vatican is one institution that refuses to open its records. Experts believe that the records which the Vatican refuses to open are "desperately needed" to trace provenance.[127] Without these records, rightful owners of looted art cannot be traced and remain unaware of their right to make a claim.

Conferences have been held in order to pressure governments to open their archives, but many still refuse. In December 1997, forty-one nations participated in an international conference on Nazi gold. Russia's participation was contingent on the conference not focusing on stolen art. The Vatican participated only as an observer, and still refused to open its wartime archives.[128] In November 1998, at a conference sponsored by the U.S. State Department

118 *See id.*
119 *See id.*
120 *See id.*
121 *Id.*
122 *Id.*
123 *See id.* Through public and political pressure, these class actions have settled, forcing all institutions to open their records of Nazi gold. *See id.*
124 This research culminated in a fascinating book entitled *The Lost Museum*, *supra*, note 1.
125 *See* Interview with Hector Feliciano, author of *The Lost Museum* and Editor-in-Chief, World Media Network, N.Y., N.Y. (Feb.18, 1998) (on file with the *Cardozo Arts & Entertainment Law Journal*) [hereinafter Feliciano Interview].
126 *See id.*
127 *See* Barry Hildenbrand, *A Paper Chase for Gold: In London, Scholars Struggle to Untangle History of Nazi Plunder, Will the Victims Ever Get Their Due?*, TIME ATLANTIC (Int'l ed.), Dec. 15, 1997, at 34 (quoting Elan Steinberg, Executive Director, World Jewish Congress); *see also* Carole Landry, *44 Countries Chart Course for Restitution of Nazi-Stolen Assets*, AGENCE-FRANCE-PRESS, Dec. 3, 1998, *available in* 1998 WL 16652549.
128 *See* David Buchan & William Hall, *Nazi Gold Inquiry to Target Stolen Art*, FIN. TIMES (London), Dec. 5, 1997, at 2.

and the U.S. Holocaust Memorial Museum, forty-four nations agreed to abide by a set of guidelines to facilitate the return of Nazi-looted art to its rightful owners.[129] Among the principles agreed upon, was a pledge to open archives and records and encourage potential claimants to come forward.[130] Although such an agreement is encouraging, it will take time for such guidelines to work in practice. The law must continue to influence countries to open their records by telling them that no amount of time will provide exoneration.

C. *Tainted Title is Not Certainty of Title*

Proponents of the statute of limitations, specifically in actions for replevin, argue that it serves an important public policy function.[131] In the world of commerce and trade, the statute promotes free trade of goods and stability in the marketplace: after a certain period of time, no one can bring an action and title vests in the present possessor. With certainty of title, the item in question can then circulate in the market.

A rule which allows title to remain with the present possessor would, in fact, maximize the marketability of stolen art—that is, no buyer would be urged to investigate title, and stolen art would move through the marketplace at a much faster pace.[132] The goal of the law, however, should not be merely to maximize marketability, but to do so by inducing buyers to investigate title.[133] If there is no question about title then there is no obstacle to the sale, and the market functions efficiently.[134]

From a policy standpoint, it is necessary to encourage these purchasers to investigate title in order to prevent the illicit trade of art. There is overwhelming evidence that art dealers, collectors and museum curators turn a blind eye to suspicious titles, or simply fail to investigate at all.[135] This negligence, coupled with the common knowledge in the art world that all art which emerged from Europe during the WWII era may have suspicious title, makes their actions even more egregious. Vesting title in the possessor by the

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129 *See* Lippman, *supra* note 22.
130 *See id.*
131 *See* Petrovich, *supra* note 62, at 1128.
132 *See* Drum, *supra* note 82, at 933-35.
133 *See* Bibas, *supra* note 79, at 2451.
134 *See id.*
135 Eli M. Rosenbaum, U.S. Department of Justice, remarked recently that members of the American Association of Museum Directors have "averted their gaze from the problem [of Nazi-looted art] for over half a century." Symposium, *Art Wars: International Art Disputes* (Mar. 15, 1998), N.Y.U. J. INT'L. L. & POL. (forthcoming) (author's notes on file with *Cardozo Arts & Entertainment Law Journal*).

mere passage of time facilitates art theft by allowing title to lie in a purchaser who did not research provenance.

Public policy should prescribe that owners of art, like owners of other commodities, be required to assure themselves and others that their possession is legitimate and lawful. It is time for a rule which would provide incentive for extensive title searches; only then will title be valid, and art circulate more efficiently.

D. *The Need for Incentives to Research Title*

There is overwhelming evidence that museums and auction houses are repeatedly negligent in checking the validity of title of their artwork. Functioning in "a worldwide art-hungry market not given to probing the origins of the art work it consumes," museums, collectors, art dealers, and auction houses often ignore investigations of provenance.[136] Art dealers involved in disputes over title rely upon the defense that "the ordinary custom in the art business is not to inquire as to title and that a duty of inquiry would cripple the art business . . . ."[137]

Works on the auction block or those donated to a museum have suspect characteristics: unexplained wartime ownership gaps, involvement of dealers or collectors who collaborated with Nazi looters, or a history of failure to inquire about ownership at all.[138]

For instance, an exhibit at the National Gallery of Art contained four works which were previously owned by the industrialist Emil G. Buhrle, the largest Swiss buyer of Nazi-looted art.[139] Experts argue that it would have been impossible for Buhrle not to have known the tainted history of his paintings.[140] Furthermore, the National Gallery is expected to be knowledgeable about the possibility of tainted title; Buhrle's name listed in a provenance history should have immediately alerted the National Gallery to that possibility, and should have prompted further investigation.[141]

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136 Petrovich, *supra* note 62, at 1124.

137 Porter v. Wertz, 421 N.E.2d 500, 502 (N.Y. 1981) (discussing Brief of Art Dealers Association of America as Amici Curiae in Support of Appellant); *see also* Menzel v. List, 246 N.E. 742, 745 (N.Y. 1969) (commenting on the defense that in the art world it is considered an "insult" to question an art dealer as to the validity of his title in a work of art).

138 *See* Maureen Goggin & Walter V. Robinson, *Murky Histories Cloud Some Local Art; The Art World's Spoils of War*, BOSTON GLOBE, Nov. 9, 1997, at A1.

139 *See Art Show of 1990 Now Draws Criticism*, DES MOINES REG., Nov. 18, 1997, at 4 (referring to a 1975 declassified report in Washington); *see also* FELICIANO, *supra* note 1, at 194-202 (describing Buhrle's collection containing several Nazi-looted works and his awareness of this fact).

140 *See Art Show of 1990 Now Draws Criticism*, *supra* note 139 (quoting Ori Soltes, Director, National Museum, Washington, D.C.).

141 *See id.*

A similar case implicates the Metropolitan Museum of Art, which accepted a painting from a principal benefactor but failed to investigate its prior ownership.[142] The painting, entitled *Le Repos Dans Le Jardin Arguenteuil,* by Claude Monet, was donated by Jayne Wrightsman, widow to Charles Wrightsman.[143] Wrightsman had purchased the painting from Alexander Ball, a wartime collaborator who helped Nazis locate prominent art collections to loot in exchange for pieces of the collections.[144] No title search was ever performed.[145]

The holdings of the Metropolitan Museum of Art also include a painting that has been, since 1948, listed by the Belgium government as a Nazi-looted work.[146] This 15th century Netherlandish painting was purchased by an agent for Hermann Göring, Hitler's aide.[147] The painting had belonged to Emile Renders, a Belgian collector, who had allegedly "sold" his collection to the Nazis, after he received a threatening letter from Göring.[148]

Such possession of these works underscores the common practice among museums to ignore the origins of donated works.[149] In fact, Thomas Hoving, former director of the Metropolitan Museum of Art, admits in his book, *King of the Confessors,*[150] that until recently museum directors have purchased art and artifacts which they had reason to believe had been stolen or smuggled illegally into the country.[151]

Auction houses are equally guilty, if not more so, of ignoring the signals that an acquired work may have been stolen: "[a]uction houses often fail to research the provenance and title of the pieces consigned to them, saying that to do so would be too expensive and time-consuming, and asserting that they merely are middlemen who make no claims about title to property they sell."[152]

The sale of Frans Hals's Portrait of *Pastor Adrianus Teglularius*

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142 *See Monet Donated to Met May Be WWII Plunder,* BOSTON GLOBE, July 25, 1997, at A4.
143 *See id.*
144 *See id.*
145 *See id.*
146 *See id.*
147 *See id.*
148 *See id.*
149 For example, in an investigation carried out by the *Boston Globe* of 71 pieces purchased or given to the Museum of Fine Arts in Boston between 1984 and 1987, 61 had no ownership history. *See* Judith H. Dobrzynski, *Museums Face Claims About Loot,* PORTLAND OREGONIAN, Jan. 2, 1999, at E9. For further criticisms and suggestions on how museums can improve their acquisition policies, see Linda F. Pinkerton, *Museums Can Do Better: Acquisitions Policies Concerning Stolen and Illegally Exported Art,* 5 VILL. SPORTS & ENT. L.J. 59 (1998).
150 THOMAS HOVING, KING OF THE CONFESSORS (1981).
151 *See* Alexander Stille, *Was this Statue Stolen?,* NAT'L L.J., Nov. 14, 1988, at 12.
152 JOHN E. CONKLIN, ART CRIME 141 (1994).

exemplifies an auction house's blatant disregard for the truth regarding title.[153] In 1967, the painting was being offered for sale at the Parke-Benet auction house.[154] The catalog listed a short description of the work followed by the notation "Schloss Collection in Paris."[155] The Schloss collection was one of the most expansive collections in Paris before it was looted by the Nazis.[156] Yet no one questioned the inclusion of the Schloss name in the catalogue description, nor notified the Schloss family to verify title.[157]

In 1972, the painting again appeared on the auction block with a vague description, this time at Christie's in London.[158]

Meanwhile, the Schloss family was completely unaware that their painting was circulating in the art market.[159] In 1974, the truth came out: Seymour Slive,[160] the author of the *Catalogue Raisonne*[161] of Hals' work, explained that the work had been stolen from the Schloss collection and had disappeared until 1967, when it was sold in New York.[162]

Although Sotheby's was aware that the work had been stolen, Sotheby's sold the painting again in 1979.[163] This time, however, the auction house catalog noted that the work was part of the Schloss collection and that it had been listed in the Catalog of French Property Stolen Between 1939-1945.[164]

Christie's sold the painting again in 1989 and described it as "in the Schloss Collection until the Second World War."[165] An art dealer purchased the painting and brought it back to Paris, the city from which it had originally been stolen.[166] Upon hearing the news, one of the Schloss heirs had it seized by the French police.[167] Christie's reimbursed the art dealer and is now involved in several legal disputes with the Schloss family.[168]

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153 *See* FELICIANO, *supra* note 1, at 175. Feliciano received the details of the story from documents given to him by Jean de Martini and Alain Vernay. Both are heirs of the French art collector, Adolphe Schloss; *see also* Feliciano Interview, *supra* note 125.

154 *See* FELICIANO, *supra* note 1, at 175.

155 *See id.*

156 *See id.*

157 *See id.*

158 *See id.*

159 *See id.*

160 Seymour Slive is a retired Harvard fine arts professor and former director of the Fogg Art Museum, Boston.

161 For a definition of *catalogue raisonne*, see *supra* note 90.

162 *See* FELICIANO, *supra* note 1, at 176.

163 *See id.*

164 *See id.* at 176-77.

165 *Id.* at 177.

166 *See id.*

167 *See* FELICIANO, *supra* note 1, at 177.

168 *See id.*

Despite obvious hints that a title may be tainted, buyers have few repercussions to fear, so they tend to ignore hints of tainted title and do not perform extensive title searches.[169]

The fine art industry is the only multi-billion dollar international business that is totally unregulated.[170] A rule allowing heirs to Nazi-looted art to bring their claims would provide incentive for all potential purchasers of art to perform extensive title searches.[171] In doing so, titles would be valid and the art market would no longer be affected by lengthy litigation regarding title. The only effective incentive is a rule that allows heirs of Holocaust victims to bring their claims whenever they locate the work of art and identify its present owner. Museums, art dealers and auction houses are in unique positions of power in the art market and need impetus to perform extensive title searches.[172] Private collectors, museum curators, and art dealers must be encouraged to realize that the short-term benefit of ignoring questionable title is outweighed by the long-term repercussions of legal hassles and poor publicity. With no incentive, the powers of the art world will continue to hide title information, and to perpetuate the illicit trade of art.

E. *The End of the Suspension: Wake the Sleeping Plaintiffs*

Statutes of limitations serve a punitive function by denying plaintiffs the right to sue if the claims are not promptly initiated in court.[173] This function serves to discourage "sleeping" plaintiffs who purposely or negligently postpone bringing a lawsuit.[174]

Without a statute of limitations, some argue, plaintiffs would

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169 *See, e.g.*, Porter v. Wertz, 416 N.Y.S.2d 254, 259 (N.Y. App. Div. 1979) (noting that the buyer did not inquire about the seller's reputation nor about his title to the painting, in keeping with custom among buyers that it "deemed poor practice to probe" into title).

170 *See* Gail Russell Chaddock, *Art World Wary of New Rules*, CHRISTIAN SCI. MONITOR, Feb. 10, 1998, at C1 (quoting Willie Korte, a leading expert in the identification and repatriation of artwork looted during WWII).

171 *See* Hoover, *supra* note 26, at 450 ("The most effective incentive for investigating title before purchasing art . . . is the potential for losing an art work to the owner from which it was stolen . . . ."). For a list of suggested steps to take to assure valid title see Johnson, *supra* note 24, at 35-40.

172 As the executive director of the International Foundation of Art Research commented, by increasing the risks in buying works that may have been stolen, "people will be less likely to buy stolen art, and more likely to ask questions." Sam H. Verhovek, *Guggenheim May Sue For Chagall, Court Says*, N.Y. TIMES, Feb. 15, 1991, at C7 (quoting Constance Lowenthal, Executive Director, International Foundation for Art Research).

173 *See* Burnett v. N. Y. Cent. R.R., 380 U.S. 424, 428 (1965); Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390 (1868); *see also Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

174 *See* Phoebe v. Jay, 1 Ill. 268, 273 (1820) (noting that statutes of limitations "favor the diligent and not the slothful"); *see also* Eisen, *supra* note 49, at 1072-73.

undoubtedly be lazy about bringing claims promptly. In cases over Nazi-looted art, this accusation fails for two reasons.

As a practical matter, it is doubtful that a plaintiff, upon discovering artwork which had belonged to his ancestors more than fifty years ago, would not bring a timely claim. In all of the cases that have been filed, claimants have filed suit as soon as they located the art and the proper party to sue.[175]

Those plaintiffs that do sleep on their rights, actually have a limited time to bring a claim, since the suspension on the statute of limitations at some point will come to an end. A pronouncement of such a policy, coupled with the recent publicity surrounding these claims and the opening of archives will make plaintiffs aware of the need to act promptly. Once the State Department makes a finding that the circumstances surrounding Nazi-looted art have returned to a state closer to that of typically stolen art, the court's application of the state's statute of limitations will return. This limit on the suspension of the statute, combined with the time it takes to locate stolen art, will discourage plaintiffs from sleeping on their rights.

III. The Moral Justification

In addition to the policy arguments which support the suspension of the statute of limitations, there is a moral justification based on the unique circumstances under which this art was stolen. "The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage."[176] This inextricable link between the Holocaust and art looted by the Nazis during World War II creates a moral obligation to help survivors of the Holocaust, the heirs of those who perished, and any victims of Nazi looting, to recover stolen artwork. This moral obligation surpasses any black letter law to the contrary.

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[175] *See, e.g.*, *DeWeerth v. Baldinger*, 658 F. Supp. 688, 691 (S.D.N.Y.) (stating that after 35 years of searching, plaintiff retained counsel and filed a claim within months of discovering the whereabouts of the painting), *rev'd*, 836 F.2d 103 (2d Cir. 1987); Menzel v. List, 267 N.Y.S.2d 804, 807 (N.Y. Sup. Ct. 1966) (stating that after 20 years of searching, plaintiff filed claim within months of discovering the whereabouts of the painting); O'Keefe v. Snyder, 416 A.2d 862, 866 (N.J. 1980) (stating that plaintiff filed claim within months of discovering the whereabouts of the painting); Solomon R. Guggenheim Found. v. Lubell, 569 N.E. 2d 426, 428 (N.Y. 1991) (stating that plaintiff filed claim within months of discovering the whereabouts of the painting).

[176] Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 17 (1998). As historian Daniel Goldhagen states, "[n]o analysis of German society, no understanding or characterization of it, can be made without placing the persecution and extermination of the Jews at its center." Daniel Jonah Goldhagen, Hitler's Willing Executioners: Ordinary Germans and the Holocaust 8 (1996).

"The transfer of works of art from vanquished to victor is as old as wartime itself."[177] However, the displacement of art during World War II was unprecedented. Never before had there been such a massive amount of artwork removed from so many countries during wartime: millions of artistic objects of every description were systematically confiscated.[178] The seizing of art work from Jewish collections all over Europe and Asia was part of a "process of persecution, dehumanization and eventual annihilation."[179]

This massive appropriation of artwork during World War II was spearheaded by a military effort within the Nazi regime. It was the first time in history that art specialists were appointed within the military to secure and preserve looted works of art.[180] Several directives, initiatives and laws were implemented by Nazi officials to coordinate this massive seizure of Jewish property.[181] In addition, Nazi leaders implemented aesthetic policies to articulate the tenets of their ideology that the Aryan race was the preeminent leader of culture.[182] The artistic spoils reflected the military strength and biological superiority of the Nazi regime.[183]

As early as 1933, Adolph Hitler, then the director of the Nazi affiliated Combat League for German Culture,[184] spoke of the con-

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177 Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property, in* THE SPOILS OF WAR 39, 39 (Elizabeth Simpson ed., 1997) [hereinafter THE SPOILS OF WAR].

178 *See id; see generally* LYNN H. NICHOLAS, THE RAPE OF EUROPA (1995).

179 PETROPOULOS, supra note 12, at 123.

180 *See* Nicholas, *supra* note 177, at 39. In an interview, Jonathan Petropoulos, author of *Art as Politics in the Third Reich, supra* note 12, commented that the Nazis not only delighted in taking the art from the aristocracy but "they took great pleasure in hiring aristocrats in subordinate roles, having aristocrats as their consultants and art dealers, having aristocrats lead plundering brigades." John Dorsey, *The Nazis and the Art of Theft; History: Loyola College Professor Explores Blurred Line Between Art and Politics in the Eyes of the Third Reich,* BALTIMORE SUN, May 1, 1996, at E1.

181 For instance, Ordinance for the Registration of Jewish Property required Jews to give lists of their property and then "secured" this property in accordance with the dictates of the German economy; Ordinance for the Attachment of the Property of the People's and State's Enemies facilitated confiscation of property belonging to Jews as well as non-Jewish enemies of the regime; Ordinance for the Employment of Jewish Property enabled government authorities to "Aryanize" Jewish businesses; Nuremberg Decrees of 1935 defined who was a Jew and deprived these individuals of German citizenship and certain civil rights; Ordinance of 1936 forbade Jewish art dealers or purveyors of culture from being members of the Reich Chamber of Culture ("RKK"); First Ordinance on the Exclusion of Jews from German Economic Life prohibited Jews from entering theaters, museums or attending cultural events; and Suhneleistung ("atonement tax") required Jews to pay 20% of their assets as a penalty for "inciting" violence during Kristallnacht. *See* PETROPOULOS, *supra* note 12, at 84-85, 92-93; *see also* Jonathan Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich, in* THE SPOILS OF WAR, *supra* note 177, 106, 107.

182 *See* PETROPOULOS, *supra* note 12, at 84-85, 92-93.

183 *See id.*

184 Formed by the Nazi Party, the Combat League, Kampfbund fur Deutsche, was designed to protect German art and culture. The Combat League had several chapters throughout Germany. *See* NICHOLAS, *supra* note 178, at 7-25.

nection between the political revolution and cultural annihilation:

> [I]t is a mistake to think that the national revolution is only political and economic. It is above all cultural . . . . We stand in the first stormy phase of revolution . . . . Art is not international . . . . If anyone should ask: what is left of freedom? He will be answered: there is no freedom for those who would weaken and destroy German art . . . there must be no remorse in uprooting and crushing what was destroying our vitals.[185]

In 1937, under the direction of the Reich Chamber for the Visual Arts, Hitler began his conquest by "cleansing" all state collections of "degenerate art" and "Jewish-inspired Bolshevik art."[186] Even among the officials carrying out the directives, there was aesthetic confusion as to what constituted "degenerate art," but all art that was modern, abstract, or did not conform to nature, was targeted.[187] Whatever did not represent "pure Nordic German art" was considered "valueless to the German people."[188]

Hitler's propagandistic speeches regarding the purification of Germany's culture were prophetic of his plan to exterminate people along with their art:[189] "[w]e will, from now on, lead an unrelenting war on purification, an unrelenting war of extermination, against the last elements which have displaced our Art."[190]

After the "degenerate art" was removed from state collections, the Nazis began to confiscate private art collections belonging to the Jews.[191] Although several artworks were attached and stolen before any legal ordinances were passed, Hitler began to enact stat-

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185 Alfred H. Barr, *Art in the Third Reich—Preview 1933*, MAG. OF ART, Oct. 1945, at 213, *in* NICHOLAS, *supra* note 178, at 6.

186 PETROPOULOS, *supra* note 12, at 106.

187 In 1937, Nazi officials organized an exhibition of "degenerate art." Examples included paintings by Piet Mondrian, Henri Matisse, Vincent Van Gogh, and Paul Gaugin. Works by Oskar Schlemmer and Ernst Kirshner were illustrations of "barbarous methods of representation," and an entire room of the exhibition was "a representative selection from the endless supply of Jewish trash that no words can adequately describe." NICHOLAS, *supra* note 178, at 21. Abstract and Constructivist pictures by Jean Metzinger, Willi Baumeister, and Kurt Schwitters were simply called "total madness." *Id.* at 22. Other "degenerate" artists included Paul Klee, Emil Nolde, and Wassily Kandinsky. *See id.* at 7-25.

188 CHARLES DE JAEGER, THE LINZ FILE: HITLER'S PLUNDER OF EUROPE'S ART 32 (1981); *see also* ROBERT ATKINS, ART SPOKE: A GUIDE TO MODERN IDEAS, MOVEMENTS AND BUZZWORDS, 1848-1944 146 (1993). Depictions of poor or bohemian lifestyles were examples of suppressible subjects. *See id.* at 146. Permissible scenes were those that "glorified the Nazi ideals of the Aryan superman and superwoman." *Id.*

189 For a complete history on the systematic extermination of the Jewish people under the Nazi regime, see RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 1030-60, 1202-20 (1985).

190 NICHOLAS, *supra* note 178, at 20 (quoting & translating P.O. RAVE, KUNSDUNSTDIKTATUR IM DRITTEN REICH 55-56 (1949)).

191 *See* Petropoulos, *supra* note 181, at 106.

utes which legalized this appropriation.[192] One of the first laws was the Ordinance for the Registration of Jewish Property.[193] It required that all Jewish possessions be registered and that all "objects would be secured in accordance with the dictates of the German economy."[194] The enactment of the Ordinance for the Attachment of the Property of the People's and State's Enemies and the Ordinance for the Employment of Jewish Property enabled Nazi officials to legally seize Jewish artwork.[195]

While 1937 brought the confiscation of state collections, and 1938 saw the expropriation of private property, the Nazi policies of plundering art became even more radical in 1939.[196] With the attack on Poland, Hitler continued to issue orders to exploit Jewish wealth and take property belonging to enemies of the Reich.[197] To fulfill this goal, Nazi officials set up special looting commandos staffed with art historians and other scholars.[198] These *Erfassungskommandos* were established to pursue "the confiscation of objects from Polish and Jewish possessions that are of cultural, artistic or historic value."[199]

Similarly, in France, Nazis continued to seize state museums and private Jewish collections.[200] Einsatzstab Reichsleiter Rosenberg ("ERR") was the government branch empowered to confiscate artwork in France.[201] The ERR became one of the most dominant plundering agencies, eventually seizing over 21,000 objects.[202] The collections of the richest Jewish collectors in France, such as the Rothschilds, David-Weill, the Schlosses, Rosenberg, and Bernheim Jeune, were all looted.[203]

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192 *See id.*

193 *See id.* at 107 & 257 n.8.

194 *Id.* at 107.

195 *See id.* at n.12.

196 *See* Petropoulos, *supra* note 181, at 107.

197 *See id.*

198 *See id.*

199 *Id.* These commandos swept into designated areas and confiscated any art they deemed valuable. A March 1941 report of one commando in Poland listed an inventory of 1100 paintings, 25 sculptures, coins, artifacts, and weapons. They had targeted 74 castles, 15 museums, and three galleries. *See* Petropoulos, *supra* note 181, at 107-08 (citing the German Federal Archives, NS21/240, Mar. 28, 1941).

200 *See* PETROPOULOS, *supra* note 12, at 112-13.

201 *See id.* at 109. The World Jewish Congress has estimated that the Nazis stole more than 100,000 pieces of art from Jews and others in France alone. More than 55,000 works have not been returned to their rightful owners. *See Museum Criticized on Art Stolen in WWII: Accused of Keeping it Through 'Legal Fictions,'* SAN DIEGO UNION-TRIB., Feb. 9, 1998, at A5.

202 *See* PETROPOULOS, *supra* note 12, at 109.

203 For a complete history of the confiscation of the collections of these five families, see FELICIANO, *supra* note 1. Recently, the Austrian government has announced that 250 art objects stolen by the Nazis from the Rothschild family will be returned. *See* Adam LeBor, *Treasures Looted by Nazis Returned to Rothschilds*, THE INDEPENDENT (London), Feb. 13, 1999, at 13.

In addition, since Paris was the art capital of the world, "special brigades scoured the city to quench Hitler's appetite for art."[204] Those who were deported to concentration camps were considered to have fled and their possessions were "legally" confiscated.[205]

The Jeu de Paume Museum in Paris was used as a warehouse where German art historians would stamp the works with a swastika declaring them "Property of the Third Reich."[206] By 1942, more than 70,000 dwellings had been looted in Paris alone.[207]

Another systematic confiscation was directed by the Sonderauftrag Linz.[208] This program was established to amass a collection of fine art for a "supermuseum" that Hitler intended to build in his hometown of Linz, Austria.[209] Hitler had a 300 page inventory of art works, entitled the Kummel Report, listing every name of every work of art that had left Germany since the year 1500.[210] He intended to collect every item on that list and pay tribute to them at Linz.[211] By the end of 1944, the Nazi warehouses contained more than 8000 items that were to be hung in the Linz museum.[212] The Kummel Report was the ultimate proof that Hitler's military conquest was intertwined with a massive appropriation of fine artwork.[213]

"By taking what these people had, they were really taking over the soul of what these people were. They were not only annihilating them physically, they were also annihilating them culturally."[214] A total of 400 anti-Jewish measures, each containing some economic import, were signed during the Third Reich.[215] Hitler's looting commandos swept through France, Germany, Belgium, the Netherlands, Russia, Austria, Poland, and the Baltics seizing works of art.[216] An estimated $2.5 billion dollars worth of artwork was

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204 *CNN Early Prime: Searching for "The Lost Museum,"* (CNN television broadcast, Dec. 25, 1997) [hereinafter *CNN Early Prime*].

205 *See id.*

206 FELICIANO, *supra* note 1, at 15.

207 *See* Nicholas, *supra* note 177, at 42.

208 *See id.* at 41.

209 *See id.*

210 *See id.*

211 *See id.* The purpose of regaining possession of all these works was to erase the humiliation of the Treaty of Versailles in 1919, which ended World War I, and to restore German culture. *See* FELICIANO, *supra* note 1, at 26.

212 *See* FELICIANO, *supra* note 1, at 23 (citing "Records Group (RG) 260," boxes 387, 388, 438, National Archives (NA), Washington, D.C.).

213 *See id.* at 30.

214 *CNN Early Prime*, *supra* note 204 (quoting Hector Feliciano).

215 *See* Petropoulos, *supra* note 181, at 107; *see also* HILBERG, *supra* note 189, at 81-144.

216 For a history, by country, of Nazi wartime looting, see PETROPOULOS, *supra* note 12, at 75-176.

plundered by the Nazis and used to help finance the war.[217]

Only recently have these looted works resurfaced, consequently notifying heirs of their lost heritage. A whole culture and several generations of people were annihilated during World War II. Such a historical anomaly and moral atrocity creates a moral obligation to prevent "the eternal silence created by the destruction of culture" and warrants a suspension of the statute of limitations for plaintiffs in actions to recover Nazi-looted art.[218]

IV. International Laws as Justification

Additional reasons to suspend the statute of limitations for actions to reclaim Nazi-looted art find justification in international conventions devoted to directing the return of looted property. The shared theme of all of this legislation is that wartime looting violates international law[219] and that the return of property[220] plundered during wartime is an international priority from which there is no exoneration.

The U.S. concern over Nazi looting restitution first emerged in 1943[221] with the creation of the Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (also known as the Roberts Commission).[222] Monuments, Fine Arts and Archives ("MFA&A"), a "military group" staffed with museum cura-

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217 *See* Jay Rayner, *Document on Nazi Art Trade Sheds New Light on Looting*, The Milwaukee Sentinel, Jan. 24, 1999, at 7. The value of the art looted was $2.5 billion at 1945 prices, equivalent to $25 billion today. *See id.*

218 Stephen Lachs, *The Defense of Culture*, 37 Museum 167, 168 (1985). The looting of personal property was such a serious offense that it was included as a war crime in the indictments against the Nazi officials in the Nuremberg Military War Tribunal. *See* Feliciano Interview, *supra* note 125; *see also* Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 3 Bevans 1239, 1341.

219 In 1907, the Hague Convention expressly stated that "private property will not be confiscated" and that "pillage is formally forbidden." The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 36 Stat. 2279, 249 U.N.T.S. 215 [hereinafter Hague Convention]; *see also* Menzel v. List, 267 N.Y.S.2d 804, 807 (N.Y. Sup. Ct. 1966) (noting that since the Hague Convention of 1907 outlawed pillage and plunder of personal property, Nazi looting does not extinguish title of the original owner).

220 The international conventions all contain a definition of "cultural property." The most basic definition defines cultural property as those objects which "are of importance for archeology, prehistory, history, literature, art or science." UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, 1331 [hereinafter UNIDROIT Convention]. I have chosen not to use the term "cultural property" when speaking of individually owned property because "cultural property" is more commonly used to denote nationally owned property.

221 All of the Allies made an effort to work together to return property looted during World War II, but much of it was bogged down by politics and fundamental disagreements over its effectiveness. For a detailed account of the Allied response to WWII wartime looting see Michael J. Kurtz, Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945-1955 141-62 (1985).

222 *See* Nicholas, *supra* note 178, at 222.

tors and art professionals, was created to implement the policies and decisions of the Roberts Commission.[223] The officers of MFA&A uncovered over 1400 repositories in churches, mines, castles, barns, and monasteries in which millions of items were hidden.[224] From 1945 until 1949, the MFA&A troops inventoried and returned millions of items to governments and individuals.[225]

Although major programs were implemented to return property that was looted during the war, only a fraction of it was actually returned.[226] In response to the failure to rectify this massive looting, a proliferation of international declarations, resolutions, and treaties were signed, evidencing that the protection of pillaged property and looted treasures is an international priority.

Since World War II, there have been four major international conventions, none of which have been widely accepted and, consequently, all of which remain ineffective.[227] Moreover, the primary purpose of these conventions has been to protect nationally owned cultural property, providing no recourse to individuals who want to reclaim private property looted during wartime.[228]

A. *The Hague Convention of 1954*

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954[229] ("The Hague Con-

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223 *See* Brian Bengs, Note, *Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 J. TRANSNAT'L L. & CONTEMP. PROBS., 503, 510 (1996). For a first hand account from an art intelligence officer for the MFA&A, see Bernard Taper, *Investigating Art Looting for the MFA & A*, *in* THE SPOILS OF WAR, *supra* note 177, 135, 135-38.

224 *See generally* KURTZ, *supra* note 221, at 141-62.

225 *See id.* at 182.

226 Due to growing Cold War antagonisms in 1947, art began to be returned only to those owners who could be found, and not to countries of origin from where people had been deported for religious or ideological reasons. This change in policy symbolized the final failure of restitution efforts. *See* Michael J. Kurtz, *The End of the War and the Occupation of Germany 1944-52. Laws and Conventions Enacted to Counter German Appropriations: The Allied Control Council*, *in* THE SPOILS OF WAR, *supra* note 177, 112, 116.

227 For a detailed critique of all the conventions, see Jennifer N. Lehman, Note, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*,14 ARIZ. J. INT'L & COMP. L. 527 (1997); *see also* Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT'L & COMP. L. 23 (1996); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993).

228 The Hague Convention of 1954 defined cultural property as movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; archeological sites; groups of buildings which, as a whole are of historic or artistic interest; works of art manuscripts, books, and other objects of artistic, historical, or archeological interest; as well as scientific collections and important collections of books or archives, or collections of reproductions of the property defined above. *See* Hague Convention, *supra* note 219, art. 1, 249 U.N.T.S. at 242.

229 *Id.*

vention") was the first significant international attempt to implement laws primarily for the protection of cultural property stolen during wartime.[230] It was built on the Hague Conventions Respecting the Laws and Customs of War on Land of 1899[231] and 1907[232] which outlawed, but ultimately failed to prevent, the seizure and destruction of cultural property during wartime.[233]

Although the Hague Convention of 1954 imposed a responsibility on all signatories to prosecute violators, it allowed each country to enforce its own sanctions and penalties.[234] This requirement resulted in inconsistent enforcement and precedent.[235] In addition, the provisions of the Hague Convention failed to include a mechanism for the settlement of any disputes.[236]

The Hague Convention was an important first step in publicizing the problem of looting during times of armed conflict.[237] It boosted the world's respect for cultural property,[238] but failed to provide workable solutions, coherent law or protection for individually owned property.[239]

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230 *See* David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993); Jason C. Roberts, Comment, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States*, 4 TULSA J. COMP. & INT'L L. 327, 336 (1997).

231 Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1903), 1 Bevans 247.

232 Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. *See generally* Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws, in* THE SPOILS OF WAR, *supra* note 177, 100, 100-05.

233 *See* Hague Convention, *supra* note 219, 249 U.N.T.S. at 240.

234 *See id.* art. 3., 249 U.N.T.S. at 242.

235 *See* Lehman, *supra* note 227, at 535.

236 The only attempt at resolving disputes is in Article 22, which requires a meeting between the parties to a conflict through their representatives if such a session is proposed by one of the powers, and if there is a dispute over the interpretation of the provisions of the Convention. *See* Hague Convention, *supra* note 219, 249 U.N.T.S. at 256-258.

237 *See* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986) (noting that the Hague Convention recognized the importance of cultural property for people all over the world and the importance for this property to receive international protection).

238 The Preamble of the Hague Convention states:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes it contribution to the culture of the world; Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive protection.

Hague Convention, *supra* note 219, 249 U.N.T.S. at 240. *See generally* Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235, 244 (1996) (asserting that the responsibility to halt the illicit art trade should be collectively shared by all nations since the importance of cultural property is worldwide).

239 *See* Lehman, *supra* note 227, at 535 (noting that although many countries accepted the philosophy of the Hague Convention, it remained ineffective as an international legal vehicle since several countries failed to ratify it, and because of the inconsistency of its application among all the those who did ratify it); *see also* Arlene Krimgold Fleming, *A Shield From Marauders; The US Can Help Stop Wartime Destruction of the World's Heritage*, WASH.

B. *The UNESCO Convention*

The Convention of the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970[240] ("UNESCO Convention") increased international protection of cultural property by extending such protection beyond times of war and including provisions to curb international trafficking of stolen national treasures.[241]

The UNESCO Convention was based on a principle of governmental action: imposing an obligation on all nations to take steps to ensure the protection of their own cultural property.[242] Each government was required to set up agencies, enact laws, list works of major cultural importance, supervise excavation and establish cultural education programs.[243] Such a nationalist approach however did not provide for individual protections and restitution because unless a government designates an object as belonging to the state, UNESCO does not apply.[244] Since UNESCO failed to provide recourse for individuals or private institutions, it was not widely accepted.[245] Furthermore, since several nations do not support government involvement in cultural affairs, they never ratified the convention.[246] Consequently, individuals who wish to regain possession of art looted by the Nazis have no remedy under the UNESCO Convention.

POST, July 5, 1992, at C4 ("Critics claim the [Hague] Convention has been ineffectual, pointing out that even nations bound by it have damaged or destroyed protected property during armed conflict.").

240 The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (1971) [hereinafter UNESCO Convention].

241 *See id.* Article 6 requires each country that allows exportation of cultural property to provide the appropriate documentation; Article 7(a) prohibits cultural institutions from acquiring cultural property that has been "illegally removed from another country." *Id; see also* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995).

242 *See* UNESCO Convention, *supra* note 240, 823 U.N.T.S. at 231-52, 10 I.L.M. at 289-93.

243 *See id.*, arts. 5, 14, & 23, 823 U.N.T.S. at 238-48, 10 I.L.M. at 290-93.

244 *See* Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIFORM L. REV. 59, 69 (1996).

245 *See* UNESCO Convention, *supra* note 240, art 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 291; *see also* Prott, *supra* note 244, at 62 (discussing the scope of the UNESCO Convention); Spencer A. Kinderman, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457, 469-76 (1993) (discussing the deficiencies of the UNESCO Convention).

246 *See* UNESCO Convention, *supra* note 240, art. 7(b)(i), 823 U.N.T.S. at 240, 10 I.L.M. at 291. Although over 80 nations participated in the drafting process, a very low percentage have actually enacted the provisions of UNESCO. *see* Nina R. Lenzner, *Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide and Effective Remedy for the Shortcomings of the UNESCO Convention?* 15 U. PA. J. INT'L BUS. L. 469, 478 (1994) (explaining that the main weakness of the UNESCO Convention is the failure of art-importing nations to have signed and implemented it).

C. *The Cultural Property Implementation Act of 1983*

The Cultural Property Implementation Act of 1983[247] ("CPIA") was the U.S. implementing legislation of significant provisions of the UNESCO Convention.[248] The CPIA, however, is even more limited than UNESCO in assisting in the return of cultural property.[249] The CPIA affords redress to State parties but does not does not provide for private causes of action.[250] Further, it requires an object be documented as inventory in a museum, religious monument or similar institution, in order to receive protection.[251] With all the additional omissions and limitations contained in the CPIA, victims of Nazi-looted art have no recourse under this act, which is "limited to an extremely small . . . subset of potential claims."[252]

D. *The UNIDROIT Convention*

The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects[253] ("UNIDROIT Convention"), or "One-law" in French, is the latest international effort to settle disputes over stolen or illegally traded cultural property. It is broader in scope than the existing agreements in that it is the first agreement to offer restitution for the looting of privately owned property.[254]

The UNIDROIT Convention focuses on the rule that would most discourage the illicit art trade: a preference for the original owner over the present possessor.[255] The present possessor will receive just compensation, but only where due diligence was prac-

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247 19 U.S.C. §§ 2601-2613 (1988 & Supp. 1994).

248 In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 270 (7th Cir. 1990), the court stated:

> The UNESCO Convention although ratified by Congress in 1972, was not formally implemented in the United States until the enactment of the Cultural Property Implementation Act in 1983 . . . . [T]he delay in the enactment of the Cultural Property Implementation Act apparently was caused[ ] in part by pressure from art dealers and traders, who argued that if the United States undertook unilateral import controls, illegal cultural property would simply be sold to those art market countries lacking similar import controls.

Id. at 297.

249 *See* Bengs, *supra* note 223, at 523-24. The limitation of the CPIA was due to the pressure of lobbying efforts of art dealers and collectors. *See id.*

250 Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613.

251 *See id.* § 2607.

252 Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 83 (1995).

253 *See* UNIDROIT Convention, *supra* note 220.

254 *See id.* For a detailed analysis of the UNIDROIT Convention, see Kinderman, *supra* note 245.

255 *See* UNIDROIT Convention, *supra* note 220, art. 3, 34 I.L.M. at 1331.

ticed in checking title when first obtaining possession.[256] In addition, this convention extends the scope of previous conventions by offering protection to individuals.[257]

The main problem, however, preventing the UNDROIT Convention from being an effective means under which Nazi-looted art can be returned, is that a majority of the countries have refused to ratify it.[258] The United States is also hesitant to ratify it.[259] An official of the U.S. State Department wrote: "most U.S. commentators have stated that unless a sufficient number of market States . . . ratify the UNIDROIT Convention, it is premature to consider in detail the possible benefits or drawbacks of the Convention for the United States."[260]

The UNIDROIT Convention and its fourteen-year road to completion have brought to the forefront the problems related to the settling of art disputes and have offered some creative solutions.[261] Moreover, it is the only convention that addresses the rights of individuals whose property was looted.[262] The Convention, however, as one journalist noted, is "highly virtuous, excellent in theory, but a disaster in practice."[263]

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256 *See* UNIDROIT Convention, *supra* note 220, art. 4, 34 I.L.M. at 1332. The due diligence requirement creates an incentive for buyers to do an extensive title search before purchasing a work of art and for sellers to provide ownership documentation.

257 The UNIDROIT Convention is interpreted as providing for private causes of action since its definition of "cultural property" does not require states to designate the property in order for the convention to protect it. *See* UNIDROIT Convention, *supra* note 220, art. 2, 34 I.L.M. at 1331; Jennifer Sultan, Comment, *Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork*, 18 NW. J. INT'L L. & BUS. 759, 794 (1998).

258 Of the 70 nations that participated in the writing of the law, only three have enacted it. *See* Janet Kutner, *Conventional Thinking Upsets Staechlin*, DALLAS MORNING NEWS, Oct. 5, 1997, at C4 (noting that only Paraguay, Lithuania and China have ratified the UNIDROIT Convention).

259 *See* Sylvia L. Depta, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany*, 10 TEMP. INT'L & COMP. L.J. 371, 391-93 (1996) (arguing against U.S. ratification of the UNIDROIT Convention). *But see* Claudia Fox, Comment, *The Unidroit Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L & POL'Y 225 (1993) (arguing for U.S. ratification of the UNIDROIT Convention).

260 Harold S. Burman, *Introductory Note to the UNIDROIT Convention of International Return of Stolen or Illegally Exported Cultural Objects*, 34 I.L.M. 1322 (June 24, 1995).

261 *See generally* Fox, *supra* note 259.

262 *See* Sultan, *supra* note 257, at 794.

263 Laura Stewart & Godfrey Barker, *The Arts: Canova—Who's Going to Pay the Taxman, Then?*, DAILY TELEGRAPH, Aug. 6, 1996, at C2; *see also* Monique Olivier, *The Unidroit Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627 (1996) (discussing the ineffectiveness of the UNIDROIT Convention to prevent theft of looted art).

V. THE CONSTITUTIONALITY OF CONGRESSIONAL SUSPENSION OF THE STATUTE OF LIMITATIONS

A. *The Commerce Clause*

"The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ."[264] This constitutional authority grants Congress the power to impose a law on the States provided that the activity being regulated "substantially affects" interstate or international commerce.[265] One may ask how individual property rights in art "substantially" affect commerce or the economy as a whole. Moreover, if claims for Nazi-looted art are merely about property rights, property rights are governed by state law.[266] Modern Commerce Clause jurisprudence, however, includes within Congress's regulatory powers all activities which together affect interstate commerce, even when, if taken alone, the activities would only have a minor effect.[267] "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."[268]

The billion dollar art trade is irrefutably "commerce."[269] The regulation offered in this proposal does not merely affect individual property rights, but rather several claims which taken together have a "cumulative effect" on interstate and international trade of art. Claims to regain possession of Nazi-looted art affects the ownership rights of museums, art dealers, auction houses and hosts of individuals.[270]

Furthermore, Congress's powers include the power to prohibit trade of stolen goods. That is, a congressional regulation may assume the form of prohibition in order to "prevent the pollution of commerce by noxious articles."[271] The legislature has repeatedly enacted legislation which closes the channels of commodities

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264 U.S. CONST. art. I, § 8, cl. 3.

265 *See* United States v. Lopez, 514 U.S. 549 (1995); Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985); Maryland v. Wirtz, 392 U.S. 183 (1968); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

266 *See* Campbell v. Bagley, 276 F.2d 28, 32 (5th Cir. 1960).

267 *See, e.g., Wickard*, 317 U.S. at 111; United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100, 118 (1941); NLRB v. Fainblatt, 306 U.S. 601 (1939); *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

268 United States v. Women's Sportswear Ass'n, 336 U.S. 460, 464 (1949).

269 The World Jewish Congress estimates that between $10 and $30 billion dollars worth of art is still missing from the Holocaust era. *See* Carole Landry, *US, Europeans Agree on Plan for Returning Nazi Looted Art*, AGENCE FRANCE-PRESSE, Dec. 3, 1998, *available in* 1998 WL 16651727.

270 U.S. officials state that confusion over artwork looted by the Nazis restricts trade in fine art and blocks international exchanges. *See* Richard Wolffe, *Unsolved Nazi Era Problems Threaten Art Trade, U.S. Warns*, FIN. TIMES (London), Nov. 25, 1998, at 6.

271 BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 100 (1972).

which are illegal.[272] The suspension of the statute of limitations for claims on Nazi-looted art will curtail the illegal trafficking of stolen art and, in the end, will help to prevent art theft in the future—whether the art is specific to Holocaust-era spoliation or not.[273]

Finally, the Commerce Clause provides Congress with the authority to "regulate any activity that has a 'real and substantial' relation to the national interest."[274] Reparations for Nazi looting during World War II are of national and international importance.[275] Such an issue affects our commerce with foreign nations as well our role as a leader among those nations. As it has done in the past, Congress must now exert its authority to control commerce in these cases, even when doing so would be contrary to majoritarian views.[276]

The last factor that must be considered when Congress implements a law pursuant to its Commerce Clause authority is whether the means employed in the law has a rational relationship to the ends.[277] The legislative intent to help victims of the Holocaust in regaining possession of their property looted by the Nazis during World War II is clearly stated in the recently enacted Holocaust Victims Redress Act.[278] Holocaust survivors and heirs of those who died are entitled to a restoration of a "remedy lost through the mere lapse of time."[279] The suspension on the statute of limita-

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272 *See, e.g.*, Brooks v. United States, 267 U.S. 432 (1925) (upholding regulations prohibiting the transportation of stolen cars); Hoke v. United States, 227 U.S. 308 (1913) (upholding regulations prohibiting the transportation of women for immoral purposes).

273 *See Prepared Testimony of Ori Z. Soltis before the House Banking and Financial Services Committee*, FEDERAL NEWS SERVICE, Feb.12, 1998, *available* in 1998 WL 8992060. Stuart Eisenstadt, U.S. Undersecretary of State, stated that free commerce in the multibillion dollar art industry is impossible if issues surrounding Nazi-looted artwork remain unclear. *See* Richard Wolffe, *supra* note 270, at 6.

274 Heart of Atlanta, Inc. v. United States, 379 U.S. 241, 255 (1964); *see also*, United States v. Lopez, 514 U.S. 549, 556 (1995); Wickard v. Filburn 317 U.S. 111, 125 (1942); United States v. Darby, 312 U.S. 100, 119-20 (1941).

275 This global priority is evidenced by all of the international conventions, *see supra* Part IV, and recent international conferences in November 1997 and 1998 attended by over 40 nations. These recent conferences were convened solely for the purpose of deciding how to make reparations to victims of Nazi looting. *See supra* Part II.B.

276 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (upholding legislation to suppress child labor).

277 *See Lopez*, 514 U.S. at 556; Hodel v. Virgnia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); *Heart of Atlanta*, 379 U.S. at 262.

278 *See* Holocaust Victims Redress Act, Pub. L. No.105-158, § 202, 112 Stat. 15, 17-18 (1998) ("*[I]t is the sense of the Congress that . . . all governments should undertake good* faith efforts to facilitate the return of . . . works of art to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule.").

279 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 316 (1945); *see also* International Union of Elec. Workers v. Robbins & Myers, Inc. 429 U.S. 229, 243-44 (1976) (holding that Congress has the authority to revive a cause of action that is time-barred); Kaye, *supra* note 232, at 105. 1997).

tions will allow these claims to be heard on their merits and offer restitution.

B. *Separation of Powers*

Another constitutional challenge to Congressional intervention in this area is that it violates the separation of powers doctrine. That is, a Congressional amendment mandating a uniform suspension of the statute of limitations for specific types of claims commands the court to decide cases in a certain manner, thereby usurping the judiciary's power to decide cases.[280]

Although it is rare that Congress will alter a statute of limitations, such legislation has precedent in the field of securities law.[281] In 1991, Congress added section 27A to the Securities Exchange Act of 1934 which altered the statute of limitations for actions brought under the Act.[282] The amendment effectively overturned a limitations period set by Supreme Court.[283] As appellate courts have observed, Congress did not make factual findings or impose a rule of decision, but merely changed the law regarding which claims may be heard.[284] The constitutionality of this amendment also finds authority in *United States v. Sioux Nation of Indians*.[285] In this case, the Supreme Court held that it was constitutional for Congress to enact legislation which prevented the use of the "technical" defense of *res judicata*.[286] The Court held that such an enactment did not interfere with the judicial function to decide the merits of a claim and, therefore, did not encroach on the powers of the judicial branch to adjudicate claims.[287]

Furthermore, "legislation to alter such a technical defense . . . goes far less to the heart of judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question."[288] The proposal offered in this Note is a mere elimination of a technical defense so that the courts can perform their judicial function by hearing disputes on their merits.

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280 *See* Anixter v. Home-Stake Production Co., 977 F.2d 1533, 1544 (S.D.N.Y. 1992).
281 *See* 15 U.S.C. § 78aa-1 (1994).
282 *See id.*
283 *See* Lampf v. Gilbertson, 501 U.S. 350 (1991).
284 *See Anixter* 977 F.2d at 1545; *see also* Axel Johnson Inc. v. Arthur Anderson & Co., 790 F. Supp. 476 (S.D.N.Y. 1992).
285 448 U.S. 371 (1980).
286 *Id.* at 395; *see also* United States v. Cherokee Nation, 202 U.S. 101 (1906); Nock v. United States, 2 Ct. Cl. 451 (1867).
287 *See Sioux Nation of Indians*, 448 U.S. at 395.
288 *Axel Johnson*, 790 F. Supp. at 483.

C. *Due Process*

The Due Process Clause of the Fifth Amendment to the Constitution[289] presents the third major challenge to the proposal set forth in this Note. Although there are only a limited number of cases pending, such a challenge is based on the question of whether or not the amendment can be applied retroactively to affect cases already filed or on appeal.[290]

Such an analysis is based on the "vested rights" doctrine.[291] This doctrine asserts that Congress is not empowered to deprive parties of property rights they have acquired by judgment.[292] Thus the question raised in due process analysis is whether the congressional amendment changing the statute of limitations has affected a "remedy" or a "right."[293]

The Supreme Court, in *Campbell v. Holt*,[294] rejected the contention that a statute of limitations is a vested right for defendants.[295] The plaintiff, Campbell, brought a suit to recover a debt after the statute of limitations had run.[296] While an appeal was pending, the legislature revised the statute of limitations, making the action timely and eliminating the time bar as an available defense.[297] The Court here held that, because the running of the statute did not vest any property rights in the defendant, there was no violation of due process.[298] The Court has stated that, "as a matter of constitutional law, statutes of limitations go to matters of remedy, not destruction of fundamental rights,"[299] and that no right has been destroyed when the law restores a remedy that had

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289 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law.").

290 The author does not propose that the legislation supported in this Note be applied retroactively to reopen cases which have reached final judgment. Retroactive application to final judgment of a congressionally amended statute of limitations is unconstitutional. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 211-12 (1995).

291 *See* Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988); *see also* Jeffrey O. Himstreet, *Section 27A and the Statute of Limitations in 10B-5 Claims: Section 27A Is Necessary, It's Proper, But It's Probably Unconstitutional*, 30 WILLAMETTE L. REV. 151, 175 (1994).

292 *Georgia Ass'n*, 855 F.2d at 810 (quoting McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (holding that the congressional implementation of a statute of limitations may not require federal courts to reopen final judgments entered before its enactment).

293 *See* Himstreet, *supra* note 291, at 174.

294 115 U.S. 620 (1885).

295 *See id.* at 623.

296 *See id.* at 621.

297 *See id.*

298 *See id.* at 632.

299 Chase Sec. Corp v. Donaldson, 325 U.S. 304 (1945) (construing Campbell v. Holt, 115 U.S. 620 (1885)).

been lost.[300]

In *Chase Securities Corporation v. Donaldson*,[301] the Supreme Court reaffirmed its holding in *Campbell*. The Court interpreted statutes of limitations as pragmatic devices that exist only due to the will of the legislature, and are therefore subject to congressional control.[302] The Supreme Court held that statutes of limitations represent a "privilege to litigate" which has never been regarded as a fundamental right.[303]

D. *Precedent*

It is important to note that, as a matter of precedent, those occasions on which Congress has enacted legislation to lift a bar or to eliminate a technical defense have been extremely unique situations, in favor of a unique class of people. The congressional enactment of Section 27A to the Securities and Exchange Act was made in order to prevent the dismissal of several claims involving the largest known insider trading ring in the history of the securities industry.[304] Without the congressional amendment several suits would have been dismissed, barring scores of individual suits against financial figures, such as Michael Milken and Charles Keating, who were responsible for the financial wreckage of the 1980s.[305] The congressional amendment was a timely response to a unique situation in order to avoid gross injustice.

In addition, the congressional action taken in removing a defense to claims brought by the Cherokee and Sioux Nations was for the unique predicament of the Native Americans.[306] The Native Americans had lost their land and Congress removed the bar on their claims for compensation, allowing their cases to be heard.[307]

Similarly, the class of people affected by Nazi looting of art during World War II are calling upon these precedents for a similar legislative response.

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300 *See Campbell*, 115 U.S. at 628.

301 325 U.S. 304 (1945).

302 *See id.* at 314.

303 *Id.*

304 *See* HAROLD S. BLOOMENTHAL, EMERGING TRENDS IN SECURITIES LAW § 1.01 (1992)

305 *See* 137 CONG. REC. 1182 (daily ed. Nov. 27, 1991) (remarks of Rep. Edward J. Markey, D. Mass.). Senator Byran (D. Nev.) further noted that the decision which allowed for the dismissal of these claims, "in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they have swindled." 137 CONG. REC. 518, 624 (daily ed. Nov. 27, 1991).

306 *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); *see also* United States v. Cherokee Nation, 202 U.S. 101 (1906); Nock v. United States, 2 Ct. Cl. 451 (1867).

307 *See Sioux Nation*, 448 U.S. at 374-375.

E. *Setting the End of the Limitations Period*

This proposal entails the participation of the U.S. State Department to decide when the suspension on the statute of limitations should come to an end.[308] The most common challenge, when Congress delegates responsibility to the Executive branch or an administrative agency, arises under the nondelegation doctrine.[309] The nondelegation doctrine holds that Congress may not abdicate its constitutional powers to any other agency or branch of the government.[310]

Congressional delegation is considered proper, however, if instrumental to legislative policy.[311] Such delegation is not explicitly authorized by the Constitution but, rather, is brought under the auspices of the "necessary and proper" clause of Article I.[312] That is, such delegation is necessary and proper for Congress to exercise its constitutional powers.

The role of the State Department under this proposal is that of an investigator or fact-finder.[313] The Supreme Court has consistently upheld congressional delegation of fact-finding power to the executive and administrative agencies.[314] In all of these cases, the

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308 The State Department is considered part of the Executive branch, therefore I will address the nondelegation challenge in terms of delegation to the Executive, or an Executive agency, rather than an administrative agency. The nondelegation argument, however, is very similar.

309 *See generally* James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

310 "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." Field v. Clark, 143 U.S. 649, 692 (1892). The nondelegation doctrine finds its origin in Article I of the Constitution, which states that all legislative power of the federal government shall be vested in the Congress. *See* U.S. CONST. art I, § 1. Nothing in the Constitution directly prohibits the delegation of congressional authority to the executive branch. For a detailed discussion of the nondelegation doctrine and its history, see John Evan Edwards, *Democracy and Delegation of Legislative Authority: Bob Jones University v. United States*, 26 B.C. L. REV. 745 (1985).

311 *See* Freedman, *supra* note 309, at 309.

312 The power of Congress "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8; *see also* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

313 For the purposes of this discussion, the State Department is considered part of the Executive Branch.

314 *See* Buckley v. Valeo, 424 U.S. 1, 137 (1976) (per curiam) (holding that Congress may delegate investigative powers to agencies); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (holding that constitutional delegation of the power to prohibit exports of arms based on presidential findings); Hampton & Co. v. United States, 276 U.S. 394 (1928) (holding that delegation to President to audit and fix tariffs upon findings was constitutional); Buttfield v. Stranahan, 192 U.S. 470 (1904) (holding that Congress may delegate fact-finding powers to Secretary of Treasury); The Brig Aurora v. United States, 11 U.S (7 Cranch) 382, 388 (1813) (holding that revival of law conditioned upon presidential finding was constitutional).

executive branch acts as a "mere agent of the lawmaking department to ascertain and declare the event upon which [Congress's] express will was to take effect."[315]

The Supreme Court demands that in order for delegation to be constitutional, Congress must lay down an "intelligible principle" to which the Executive must conform.[316] This "intelligible principle" provides the officials of the Executive branch with a clear standard upon which to base their actions and policies.[317] Moreover, the existence of the "intelligible principle" standard implies a choice between alternative standards and, hence, reflects a congressional policy decision.[318] In this proposal, the State Department's role is to make the finding that the circumstances surrounding Nazi-looted art have become more similar to the circumstances of typically stolen art. They are not determining the "what" but rather the "whether" and the "when."[319]

The main purpose of delegation is for necessity and efficiency. The necessity of this delegation is based on the fact that the Executive branch often has the necessary resources and expertise to keep current with developments in the circumstances surrounding Nazi-looted art. Although Congress has several resources dedicated to gathering information, these resources are insignificant compared to the network of agencies at the disposal of the Executive and the State Department.[320] Since the Second World War, the State Department has played an active role in directing the restitution effort.[321] Recently, the State Department has held international conferences on Nazi-looted property.[322] Stuart Eisenstadt, the U.S.

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315 *Field*, 143 U.S. at 693.

316 *See, e.g., Hampton & Co.*, 276 U.S. at 409 (noting that if Congress has laid down by legislative act an intelligible principle to which the person or body authorized to take action is directed to conform, "such legislative action is not a forbidden delegation of legislative power."). *But see* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding transfer of congressional power to President without restrictions is "delegation running riot" and unconstitutional); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (finding delegation of power to President without sufficient guidance or standards unconstitutional).

317 *See* Industrial Union Dep't v. American Petrol. Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

318 *See* Freedman, *supra* note 309; *see also Field*, 143 U.S at 693 ("Legislative power was exercised when Congress declared the suspension should take effect upon named contingency.").

319 This process was suggested in *Panama Ref. Co.*, 293 U.S. at 430.

320 Congress has committees, staff members, the General Accounting Office, the Library of Congress Congressional Research Center, the Congressional Budget Office, and the Office of Technology Assessment. *See* Note, *supra* note 32, at 2315-16.

321 *See* Ely Maurer, *The Role of the State Department Regarding National and Private Claims for the Restitution of Cultural Property, in* THE SPOILS OF WAR, *supra* note 177, 142, 142-144.

322 In December 1997, 41 nations participated in an international conference on Nazi gold. Russia's participation was contingent on the conference not focusing on stolen art. The Vatican participated only as an observer and still refused to open its wartime archives.

Undersecretary of State, is the leader of the U.S. team which attends and hosts international conferences which analyze the problems of Nazi-looted property.[323] This department has the resources and experts to keep abreast of any current developments.

A final reason in favor of this delegation is that it eliminates the need for constant statutory amendments.[324] In his treatise,[325] Kenneth Davis stresses the need for delegation due to the ponderous mechanism by which legislation is enacted, and Congress's consequent inability to respond to situations rapidly.[326] Without the participation of the Executive branch to implement the will of Congress, its will may not be felt: "[d]elegation by Congress has long been recognized in order that exertion of legislative power does not become a futility."[327]

The Court has repeatedly recognized the utility of congressional reliance on the assistance of agencies and the Executive in making factual determinations: "[t]he essentials of the legislative function . . . are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency [or the Executive], it ordains that its statutory command is to be effective."[328]

VI. IMPLEMENTATION: A CONGRESSIONAL AMENDMENT TO THE HOLOCAUST VICTIMS REDRESS ACT

Implementation of the suspension of the statute of limitations would be in the form of an amendment to the Holocaust Victims Redress Act ("HVRA").[329] The HVRA mandates the return of possessions confiscated by the Nazis to their rightful owners.[330] The proposed amendment suspending the statute of limitations on

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See Buchan & Hall, *supra* note 128. In November 1998, at a conference sponsored by the U.S. State Department and the U.S. Holocaust Memorial Museum, 44 nations agreed to guidelines for assisting the return of Nazi-looted art to its rightful owners. *See* Lippman, *supra* note 22.

[323] *See* Thomas Abraham, *Open Archives On Nazi Gold, Vatican Told*, THE HINDU, Dec. 6, 1997.

[324] *See* Mary H. Strobel, *Delegation and Individual Rights*, 56 S. CAL. L. REV. 1321, 1329-32 (1983). *But see* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 21-24 (1982) (arguing that delegation of powers combined with unanticipated change in the society will inevitably lead to the need for sweeping legislative amendments anyway).

[325] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 150 (2d ed. 1978).

[326] *See id.*

[327] *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940).

[328] Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 145 (1941).

[329] *See* Holocaust Victims Redress Act, Pub. L. No.105-158, 112 Stat. 15 (1998).

[330] *See* Michael Kilian, *Help Sought in Sorting Claims on Nazi Art Loot*, SAN DIEGO UNION-TRIB., Feb. 14, 1998, at A24, (paraphrasing Rep. James Leach, Chairman, House Banking Committee, and Benjamin Gilman, Chairman, House International Affairs Committee, who introduced the bill).

these claims is within the legislative intent and purpose of the HVRA.[331] The HVRA stands for the proposition that all governments have an obligation to take the appropriate action to return artwork confiscated or extorted by the Nazis to their original owners or their heirs.[332] James Leach, the Chairman of the House Banking Committee who introduced the bill, noted that "[t]he operative principle [of the Act] is simple: stolen property must be returned. Pillaged art cannot come under a statute of limitations."[333]

This suspension of the statute of limitations is also in accordance with all of the findings and purposes that Congress had in enacting the HVRA.[334] One of the main purposes of the HVRA is "[t]o provide a measure of justice to survivors of the Holocaust all around the world while they are still alive."[335] The HVRA also recognizes the enormous administrative difficulties in proving legal ownership of gold and other World War II assets.[336]

In the words of President Clinton on the day he signed the bill: "There can be no way to deliver full justice for the many millions of victims of Nazi persecution, and we know that the unspeakable losses of all kinds that they suffered will never be made whole . . . yet . . . we can . . . hasten the restitution they undeniably deserve."[337]

What is still needed is for Congress to amend the HVRA to specify the suspension of the statute of limitations for claims to regain possession of Nazi-looted art. Under the amendment, plaintiffs in a Nazi-looted art claim could bring suit in federal court under the HVRA. This amendment to the HVRA would install a uniform suspension of the statute of limitations and eliminate the application of various state statutes. The statute of limitations in each state would be reinstated once the State Department decides

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331 *See* Holocaust Victims Redress Act §§ 101, 201-202.

332 Section 202 of the HVRA states that all

> governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Holocaust Victims Redress Act § 202.

333 Statement on World War II Era Looted Artworks and Insurance Policies, GOVERNMENT PRESS RELEASES, Feb. 12, 1998, *available in* 1998 WL 7321749.

334 *See* Holocaust Victims Redress Act §§ 101, 201-202.

335 *Id.* § 101(b)(1).

336 *See id.* § 101(a)(4) (recognizing "the enormous administrative difficulties and cost involved in proving legal ownership of such assets, by victims of the Holocaust, and proving the existence or absence of heirs of such victims . . . ."). Congress appropriated large sums of money to aid these victims. *See id.*

337 *The White House: Statement of the President*, M2 PRESSWIRE, Feb. 18, 1998, *reprinted in* 1998 WL 10217031.

the unique circumstances surrounding Nazi-looted art have subsided.

VII. CONCLUSION

It is curious that fifty years after the Holocaust, restitution efforts are just being made to compensate victims for stolen assets and looted art. With the end of the Cold War, however, a new generation of people and governments are scrutinizing the history within their own borders. "'By tracking these works down and bringing their stories back to life, the shadows created by all these years of oblivion will dissipate at last.'"[338] A suspension on the statute of limitations is necessary in order for these stories to be told and for the victims of Nazi looting to receive restitution for their losses.

There are no simple solutions in delving out ownership rights in something as precious as fine art. However, the current legal landscape makes these cases neither predictable nor just, and fails to protect the rights of Holocaust victims and their heirs seeking recovery of what is rightfully theirs. The suspension on the statute of limitations will force governments to open their files, force purchasers to research title, and force a chapter of history to be examined.

*Stephanie Cuba**

338 Nancy Seideman, *Tracking 'Lost' Art of World War II*, ARIZ. REPUBLIC, Aug. 10, 1997, at F12 (quoting Hector Feliciano).

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