

“If You Could Say It In Words,  
There’d Be No Reason to Paint”:  
Recovering Beloved Works of Art Through  
Civil Forfeiture

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## I. INTRODUCTION

During the 1938 German occupation of Austria, Lea Bondi, an Austrian Jew and art lover, was forced to sell her gallery to a non-Jew under German “Aryanization” laws.<sup>1</sup> The purchaser, Friedrich Welz,<sup>2</sup> came to her apartment, saw the Portrait of Wally<sup>3</sup> by Egon Schiele hanging on her wall, and demanded that she give him the painting, despite her protests that it was part of her private collection and not part of the gallery sale.<sup>4</sup> As Welz’s demands continued, Bondi’s husband reminded her that Welz could prevent their escape from Austria, and she submitted.<sup>5</sup> Bondi was not compensated for the painting.<sup>6</sup>

Over the next sixty years, the Portrait of Wally came into the possession of several different individuals before ending up in New York City’s Museum of Modern Art in 1997, on loan from Austria’s Leopold Museum.<sup>7</sup> The United States government seized the painting on behalf of Lea Bondi’s estate, marking the first use of civil forfeiture on a piece of Nazi-looted art.<sup>8</sup> For more than a decade, New York courts have been challenged with the task of determining the applicability of civil forfeiture to a case as complicated as *United States v. Portrait of Wally*.<sup>9</sup>

One of the most famous and influential cases of Nazi-looted artwork, *United States v. Portrait of Wally*,<sup>10</sup> ended in the summer of 2010 in a highly publicized settlement after more than ten years of litigation in New York courts.<sup>11</sup> While the full consequences of the litigation are still to be deter-

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1. *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 238 (S.D.N.Y. 2009).

2. Welz subsequently became an official member of the Nazi Party. *Id.* at 238.

3. The Portrait of Wally was painted by Egon Schiele in 1912. The painting portrays Valerie Neuzil, Schiele’s one-time mistress. The Leopold Museum paid a \$19 million settlement for the portrait, a sum that nears the \$22.4 million record sum paid for a work by Schiele. See Emma Allen, *At Last, a \$19 Million Settlement for Schiele’s Nazi-Looted “Portrait of Wally,”* ARTINFO (July 21, 2010), <http://www.artinfo.com/news/story/35269/at-last-a-19-million-settlement-for-schieles-nazi-looted-portrait-of-wally>. The portrait may be viewed online at, ARTCYCLOPEDIA, <http://www.artcyclopedia.org/art/egon-schiele-portrait.jpg> (last visited December 9, 2011).

4. *Portrait of Wally*, 663 F. Supp. 2d at 238.

5. *Id.*

6. *Id.*

7. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE 226-30 (2003).

8. *Id.* at 230.

9. *Id.* at 229-30.

10. See *Portrait of Wally*, 663 F. Supp. 2d 232.

11. Press Release, Department of Justice, U.S. Attorney for the S. Dist. of N.Y., United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July

mined, the final opinion entered in the *Portrait of Wally* series has shed some light on the intricacies of civil forfeiture proceedings in Nazi-era restitution cases.

A hybrid of civil and criminal law, civil forfeiture allows victims of Nazi looting to bolster their claims for restitution with the power and influence of the United States government.<sup>12</sup> It is also making significant progress toward righting some of the injustices undertaken as a result of the Holocaust by circumnavigating issues of statutes of limitation and encouraging restitution for long-missing artwork without requiring any specific wrongdoer to be put on trial.<sup>13</sup> Civil forfeiture gives the best chance of restitution to victims of Nazi looting and should be adopted as the standard in Nazi-era restitution cases, as it is more in line with due process and affords victims of Nazi looting better relief than do the causes of action used by the majority of courts.

Part II of this Comment will discuss the history of Nazi looting and the extent to which litigation for the restitution of stolen property still thrives today. Part III will, first, delve into the doctrinal defenses and legal technicalities that keep plaintiffs from having the chance to present the merits of their cases to United States courts and, second, discuss the National Stolen Property Act<sup>14</sup> and the opportunities and obstacles it presents to victims of Nazi looting. Part IV will explain civil forfeiture generally, compare the benefits for looting victims under civil forfeiture with those resulting from the other causes of action, and argue that civil forfeiture should be adopted as the standard cause of action for cases involving Nazi looting. Part IV will also address the objections made against civil forfeiture as a method of returning stolen artwork to victims of Nazi looting and dispel these objections with policy arguments.

## II. HISTORY OF NAZI LOOTING

In a method similar to how Adolph Hitler schemed to eliminate the Jewish population of Europe, Hitler was determined “to establish Germany as the world’s dominant cultural center.”<sup>15</sup> Between 1933 and 1945, the

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10, 2010) [hereinafter U.S. Attorney Press Release] (on file with author), available at <http://www.justice.gov/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf>.

12. Derek Fincham, *Why U.S. Federal Criminal Penalties for Dealing in Illicit Cultural Property are Ineffective, and a Pragmatic Alternative*, 25 CARDOZO ARTS & ENT. L.J. 597, 622-23 (2007).

13. *Id.* at 623.

14. 18 U.S.C. §§ 2314-2315 (2006).

15. Shira T. Shapiro, Note, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1150 (2008).

Nazi party took possession of approximately 600,000 pieces of art—including paintings, sculpture, tapestries—from both museums and private collections.<sup>16</sup> The number jumps into the millions once rare books, stamps, coins, and fine furniture are added to the count.<sup>17</sup> As Hitler's power grew, so did the market for works stolen by Nazis.<sup>18</sup> European and American art dealers did not hesitate to trade in Nazi-looted artwork.<sup>19</sup> Even works considered to be “degenerate art,” such as works of Jewish artists, modern art not favored by Hitler, and art representing Jewish subjects, were not destroyed, but sold to obtain valuable foreign currency.<sup>20</sup>

Although the Allies helped reunite a number of looted objects with their original owners after the war, the artwork had changed hands so many times that determining the true owners of each work was impossible.<sup>21</sup> The chairman of the Museum of Modern Art in New York, Ronald Lauder, estimates that more than 100,000 pieces of art, worth at least \$10 billion total, are still missing as a result of Nazi looting.<sup>22</sup> More than sixty years after the end of World War II, the number of lawsuits for restitution of looted property is increasing and will inevitably continue to increase.<sup>23</sup>

The problem of returning looted artwork to original owners is rooted in the traditional, though admittedly less than ideal, practices of the art trade. Buyers and sellers of art often fail to verify the provenance of cultural property.<sup>24</sup> There are few procedures required by law that aid in the showing of a legitimate chain of title.<sup>25</sup> Thus, it is highly common for stolen artwork to “[resurface] on the legitimate market with the purchaser unaware of its illicit background.”<sup>26</sup>

Despite general knowledge that Nazi-looted art is being traded freely in the art market, many current possessors are hesitant to investigate the provenance of artwork dating back to World War II or earlier.<sup>27</sup> Current possessors' hesitation is more likely than not rooted in the fact that such investigations tend to be very expensive—as well as the fact that conduct-

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16. BAZYLER, *supra* note 7, at 202.

17. *Id.*

18. *Id.*

19. *Id.* at 203.

20. *Id.* at 202-03.

21. BAZYLER, *supra* note 7, at 204.

22. Jessica Grimes, Note, *Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act*, 15 ROGER WILLIAMS U. L. REV. 521, 524 (2010).

23. *Id.*

24. Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1207 (2005).

25. *Id.*

26. *Id.*

27. *Id.* at 1200-01.

ing the investigation could possibly end with the possessor having to turn over the artwork without receiving compensation.<sup>28</sup> Additionally, technicalities of property law can result in multiple parties having good faith, colorable claims to title.<sup>29</sup> It is out of these issues of property law that Nazi-era restitution cases often arise.

### III. RESTITUTION ROADBLOCKS AND A CLEAR PATH TO REGAINING POSSESSION OF NAZI-LOOTED ARTWORK

Looking at the history of Nazi-era restitution cases, it may seem at first glance that United States courts are the last place an original owner would want to pursue restitution. The basis for dismissal of civil restitution claims often comes in one of five forms: political question doctrine, international comity, act of state doctrine, statutes of limitation, or the laches defense.<sup>30</sup> The National Stolen Property Act,<sup>31</sup> which has significant potential for gaining victories for victims of Nazi-era looting, complicates proceedings by requiring criminal mens rea and the very high burden of proof, “beyond a reasonable doubt.”<sup>32</sup> It is civil forfeiture that allows plaintiffs in Nazi-era restitution cases the best chance to regain possession of their stolen property, even when issues such as the political question doctrine and statute of limitations bar restitution, and even when it is difficult to prove subsequent possessors had the requisite mens rea to satisfy a criminal statute.<sup>33</sup> Thus, it is civil forfeiture that should be adopted as the standard in pursuing relief from Nazi-era looting.

#### A. DOCTRINAL DEFENSES, STATUTES OF LIMITATION, AND THE LACHES DEFENSE: GREAT BARRIERS TO RESTITUTION

##### 1. *The Foreign Affairs Power and the Political Question Doctrine*

Many Nazi-era restitution claims have been dismissed by courts who have ruled that claims for war reparations, according to the political question doctrine, are the sole domain of the United States government.<sup>34</sup> While

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28. *Id.* at 1200-01.

29. Kreder, *supra* note 24, at 1205.

30. See Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 213-24 (2006).

31. 18 U.S.C. §§ 2314-2315 (2006).

32. See Fincham, *supra* note 12, at 612.

33. See Kreder, *supra* note 24, at 1233-34.

34. Pollock, *supra* note 30, at 214 (citing *Frumkin v. J.A. Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D. N.J. 2001) (“Claims for war reparations arising out of World War II have

courts continue to dismiss Nazi-era restitution cases on foreign policy grounds, the Southern District of New York has held that “adjudication of [ownership] claims is squarely within the parameters of what is entrusted to the judiciary.”<sup>35</sup>

These cases have also been dismissed because of the potential embarrassment judicial review would cause for the political branches, as well as the potential for showing a lack of respect for the political branches’ power to make these decisions.<sup>36</sup> It has been argued that “[b]ecause the political branches have not resolved many potential claims of looted art, there is little danger of disrespect or embarrassment if a court were to adjudicate them.”<sup>37</sup> Yet, courts continue to dismiss Nazi-era restitution cases on the grounds of potential embarrassment and lack of respect.<sup>38</sup>

## 2. *International Comity*

Courts also continue to dismiss Nazi-era restitution claims on the grounds of international comity, which prohibits United States courts “from examining the legitimacy of actions taken by another government in its [own] territory.”<sup>39</sup> The principle of international comity is not codified in law, so U.S. law may trump a comity argument in the event that the two conflict.<sup>40</sup> United States courts have used the doctrine of international comity to avoid examining the merits of Nazi-era restitution claims,<sup>41</sup> but the doctrine should only be applied when there exist foreign or international laws to which the United States courts may defer.<sup>42</sup>

In *Portrait of Wally*, the Leopold Museum argued that the court was required to abstain from adjudicating the issue and defer to the authority of the Austrian restitution system, which the museum argued had a larger stake in the case.<sup>43</sup> The court disagreed, finding that the museum did not identify any action, proceeding, or decree of the Austrian government to which

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always been managed on a governmental level . . .”). However, “many looted art cases do not fall within [the category of war reparations].” Pollock, *supra* note 30, at 214-15.

35. United States v. Portrait of Wally, No. 99 Civ. 9940 (MBM), 2002 WL 553532 at \*11 (S.D.N.Y. Apr. 12, 2002).

36. Pollock, *supra* note 30, at 215.

37. *Id.* at 215-16.

38. *See id.* at 216.

39. *Id.* at 218-19 (quoting *In re Nazi-era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 387 (D.N.J. 2001)).

40. *Id.* at 219.

41. *See, e.g., In re Nazi-era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 447 n.11 (D.N.J. 2002). The court aimed “to make it absolutely clear that it will not entertain any independent actions directed to the conduct of the [German] Foundation.” *Id.*

42. Pollock, *supra* note 30, at 219.

43. United States v. Portrait of Wally, 663 F. Supp. 2d 232, 249 (S.D.N.Y. 2009).

United States courts should defer, that the Austrian courts did not have exclusive jurisdiction over Holocaust-era property claims, and that there had not been any formal or purposeful act of the Austrian government regarding the case that would implicate international comity.<sup>44</sup> Thus, in order for a court to defer adjudication to another nation's government or judiciary, there must be some concrete action or law to which the court can grant deference.<sup>45</sup>

### 3. *The Act of State Doctrine*

The act of state doctrine is another tool employed by United States courts to dismiss Nazi-era restitution claims.<sup>46</sup> The act of state doctrine allows courts to give deference to acts of foreign states such that “the courts of one country will not sit in judgment on the acts of the government of another.”<sup>47</sup> Unlike international comity, the act of state doctrine is “not some vague doctrine of abstention but a ‘principle of decision’”—“a federal choice of law rule,” rather than a question of immunity or justiciability.”<sup>49</sup>

Courts faced with some Nazi-era restitution suits have dismissed these claims on the basis that movements toward reparations made after World War II are to be considered sovereign acts of the current German government.<sup>50</sup> However, some argue that courts deciding Nazi-era restitution cases should hesitate to apply the act of state doctrine, even when it is technically applicable, especially when the sovereign act in question is “closely associated with the atrocities of [World War II].”<sup>51</sup>

44. *Id.* The court also cited the United States’ “strong interest in enforcing its own laws as applied to conduct on its own soil.” *Id.*

45. *See id.*

46. *See, e.g.,* Wolf v. Fed. Republic of Germany, No. 93 C 7499, 1995 WL 263471, at \*14 (N.D. Ill. May 1, 1995).

47. Pollock, *supra* note 30, at 220 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

48. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964)).

49. *Id.* (citing Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2138 (1995) (stating that most courts utilizing the act of state doctrine “choose[] to apply the foreign state’s law rather than international or United States law”).

50. *See id.* at 221 (referencing Wolf v. Fed. Republic of Germany, No. 93 C 7499, 1995 WL 263471, at \*14 (N.D. Ill. May 1, 1995) (declining to “revisit Germany’s decisions not to pay Wolf reparations”).

51. *Id.* (quoting Altmann v. Republic of Austria (Altmann II), 317 F.3d 954, 965 (9th Cir. 2002), *aff’d on other grounds*, 541 U.S. 677 (2004)). *See also* United States v. Portrait of Wally, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at \*9 (S.D.N.Y. Apr. 12, 2002) (declining to invoke the act of state doctrine before even considering whether the “act” or “state” elements were met).

In the *Portrait of Wally* case, the Leopold Museum asked the court to use the act of state doctrine to disregard three rulings by the Austrian government that were detrimental to the museum's case.<sup>52</sup> The court declined to disregard the Austrian rulings, holding that the court was not being asked to invalidate the rulings, but only to determine the effects of the rulings on Wally's ownership.<sup>53</sup> Thus, the act of state doctrine does not prevent United States courts from interpreting the laws of other states as part of the legal analysis of a case—it only prevents United States courts from making rulings that undo the effect of another nation's own laws or rulings.<sup>54</sup>

#### 4. *Statutes of Limitation*

Even once a Nazi-era restitution claim makes it into a United States court, the jurisdiction's statute of limitations rules can bar an original owner's chance at regaining possession.<sup>55</sup> In most cases, whether the court applies the discovery rule,<sup>56</sup> the demand and refusal rule,<sup>57</sup> or the due diligence rule,<sup>58</sup> the statute of limitations is "often the greatest barrier to Holocaust plaintiffs' claim of ownership."<sup>59</sup> This is especially true as "holders of stolen art treasures often operate under the assumption that, if secrecy is

52. United States v. *Portrait of Wally*, 663 F. Supp. 2d 232, 248 (S.D.N.Y. 2009).

53. *Id.*

54. *See id.*

55. Pollock, *supra* note 30, at 224-25.

56. In applying the discovery rule, the Supreme Court of New Jersey stated: Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner.

*O'Keeffe v. Snyder*, 416 A.2d 862, 874 (N.J. 1980).

57. Under the demand and refusal rule, "a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes a demand for return of the chattel and the person in possession of the chattel refuses to return it." *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (N.Y. 1991).

58. Under the due diligence rule, "[b]y diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property." *O'Keeffe*, 416 A.2d at 873.

59. Pollock, *supra* note 30, at 225 (quoting Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 408 (2000)).



maintained for a long enough time, the statute of limitations will ultimately protect them.”<sup>60</sup>

However, the use of civil forfeiture as a means of recovering Nazi-looted property eliminates the relevancy of when the art was stolen, as it creates a new statutory period depending on when the stolen property crossed state or national lines.<sup>61</sup> Civil forfeiture’s effect on statutes of limitation is addressed later in this Comment.<sup>62</sup>

### 5. *The Laches Defense*

Some states, like New York, do not require that a plaintiff initiating a claim of replevin show evidence that they acted with due diligence in attempting to recover their stolen property.<sup>63</sup> The plaintiff’s due diligence, however, may be relevant to the defendant’s use of the laches defense.<sup>64</sup> This defense is applied “where it is clear that a plaintiff unreasonably delayed in initiating an action and a defendant was unfairly prejudiced by the delay.”<sup>65</sup> In cases of restitution of stolen cultural objects, the United States District Court for the Southern District of New York has protected the good faith purchaser from dispossession, explaining that the laches defense “safeguards the interests of a good faith purchaser of lost or stolen art . . . by weighing in the balance of competing interests the owner’s diligence in pursuing his claim.”<sup>66</sup>

In *Portrait of Wally*,<sup>67</sup> the Leopold Museum sought to assert the defense of laches in order to bar the civil forfeiture action, arguing that neither Bondi, the original owner of the Wally painting, nor her heirs, attempted to regain possession of the painting in the forty years between the last letter from Bondi’s attorney to the museum’s proprietor and the painting’s impor-

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60. Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 658-59 (1998).

61. See Fincham, *supra* note 12, at 623.

62. Please refer to subsections IV(B)(2) and IV(C)(1) of this Comment for arguments surrounding civil forfeiture’s effect on statutes of limitation.

63. Susan E. Brabenec, Note, *The Art of Determining “Stolen Property:” United States v. Portrait of Wally, A Painting by Egon Schiele*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), 69 U. CIN. L. REV. 1369, 1381 (2001).

64. See, e.g., *Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc.*, No. 98 Civ. 7664(KMW), 1999 U.S. Dist. LEXIS 13257, at \*24 (S.D.N.Y. Aug. 30, 1999). See also *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 274 (S.D.N.Y. 2009).

65. *Greek Orthodox Patriarchate of Jerusalem*, 1999 U.S. Dist. LEXIS 13257, at \*24 (quoting *Robins Island Pres. Fund, Inc. v. Southold Dev. Corp.*, 959 F.2d 409, 423 (2d Cir. 1992)).

66. See Brabenec, *supra* note 63, at 1383 (quoting *Greek Orthodox Patriarchate*, 1999 U.S. Dist. LEXIS 13257, at \*24).

67. See *Portrait of Wally*, 663 F. Supp. 2d at 274.

tation to New York.<sup>68</sup> The museum argued that “its ability to defend against forfeiture has been substantially prejudiced by this delay because many witnesses to the events at issue” had been long dead.<sup>69</sup> The court held, however, that the Leopold Museum had not provided any legal basis for a laches defense against the government, nor had the museum offered any authority indicating that the laches defense can even be applied to a civil forfeiture action.<sup>70</sup> In fact, “Supreme Court precedent makes this a dubious proposition.”<sup>71</sup> In Nazi-era looting cases, it is clear why a civil forfeiture action may be the best chance an original owner of stolen artwork has to gain restitution, as it is the federal government that the defendant would claim the defense of laches against—not the original owner—and, thus, the timeliness of the original owner’s actions are not relevant.<sup>72</sup>

#### B. THE NATIONAL STOLEN PROPERTY ACT

The National Stolen Property Act<sup>73</sup> is a criminal statute under which time in jail or fines may be imposed as a penalty for transporting stolen

68. *Id.*

69. *Id.*

70. *Id.* at 275.

71. *Portrait of Wally*, 663 F. Supp. 2d at 275 (quoting *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not . . . subject to the defense of laches in enforcing its rights.”)).

72. *See Portrait of Wally*, 663 F. Supp. 2d at 275.

73. 18 U.S.C. §§ 2314-2315 (2006). The language of § 2314 is as follows:

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security tax stamps, or any part thereof--

goods across state or national lines.<sup>74</sup> The Act “establishes a felony offense for those who knowingly sell, transport, receive, or conceal goods whose value exceeds \$5,000 in interstate or foreign commerce.”<sup>75</sup> A violation of the National Stolen Property Act consists of three elements: (1) the transportation in interstate or foreign commerce of property, (2) valued at \$5,000 or more, (3) with knowledge that the property was stolen, converted, or taken by fraud.<sup>76</sup>

The National Stolen Property Act can be used to regain possession of looted artwork, especially in cases such as *Portrait of Wally*, in which foreign museums possessing looted artwork loan the pieces to American museums.<sup>77</sup> The element of knowledge, however, “can be extremely difficult to establish in the context of cultural property because of the shroud of secrecy surrounding art and antiquities transactions.”<sup>78</sup> Thus, in the case of Nazi-looted art objects, which undoubtedly have changed hands numerous times before crossing state lines, this element can be the difference between winning and losing.<sup>79</sup>

### 1. Determining Mens Rea Based on Defendant's Actions

*United States v. Hollinshead*<sup>80</sup> was the first case to apply the National Stolen Property Act to cultural property.<sup>81</sup> American archaeologists were charged in conspiracy to transport stolen goods across state lines.<sup>82</sup> The nation of Guatemala had passed a law nationalizing Mayan antiques found within the country and asserted ownership over these artifacts.<sup>83</sup> One of the defendants, Hollinshead, cut a Guatemalan stele, which was discovered in a site of Mayan ruins, into pieces and shipped the objects to himself in California in a box marked “personal effects.”<sup>84</sup> The court held that “bribing

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Shall be fined under this title or imprisoned not more than ten years, or both.

Under § 2315 of the National Stolen Property Act, the same penalties are imposed onto persons who either sell or receive any of the aforementioned objects with knowledge of the objects' stolen, converted, forged, counterfeited, falsely made or altered status. See 18 U.S.C. § 2315 (2006).

74. Fincham, *supra* note 12, at 611. Thus, the commission of the crime is not the stealing of the property, but the transportation of stolen property. *Id.*

75. *Id.*

76. 18 U.S.C. §§ 2314-2315 (2006).

77. See *Portrait of Wally*, 663 F. Supp. 2d at 250.

78. Fincham, *supra* note 12, at 611-12.

79. See *id.*

80. *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

81. See Fincham, *supra* note 12, at 612.

82. *Id.*

83. See *id.*

84. See *id.* at 613.

officials, cutting the [stele] into easily disguised pieces[,] and using false information on the packaging showed beyond a reasonable doubt that [the defendants] knew they were transporting stolen property into the United States.”<sup>85</sup>

In *Hollinshead*,<sup>86</sup> the defendants’ mens rea was relatively easy to determine under the National Stolen Property Act,<sup>87</sup> as the people who stole the stele were the same people who attempted to bring the stolen object across state lines.<sup>88</sup> In cases like *Portrait of Wally*, although the court easily finds that the painting was stolen from Bondi, the original owner, the difficulty in obtaining a criminal conviction is in showing beyond a reasonable doubt that the Museum of Modern Art knew that the painting was stolen when it brought the painting into the United States on loan from Austria’s Leopold Museum.<sup>89</sup>

Establishing the mens rea of a defendant can also prove difficult when the cultural objects were taken in a country where the law governing the dispossession differs from that of the United States. The defendants in *United States v. McClain*<sup>90</sup> were convicted under the National Stolen Property Act<sup>91</sup> for stealing pre-Columbian artifacts from Mexico and transporting them into the United States for sale.<sup>92</sup> In doing so, the defendants gave the Mexican Archaeological Institute false papers in an effort to give the artifacts clean provenance.<sup>93</sup> The defendants then transported the artifacts across the border into California to be sold.<sup>94</sup> The conviction was overturned because the court deemed the Mexican law establishing national ownership to be an “unclear pronouncement[] by a foreign legislature.”<sup>95</sup> Thus, although the United States government wants to give deference to the laws of cultural objects’ source nations, sometimes the law is so vague or confusing that to impose criminal liability would go against the jurisprudential standards of the United States.<sup>96</sup>

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85. *Id.*

86. *See* *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

87. 18 U.S.C. §§ 2314-2315 (2006).

88. *See* *Hollinshead*, 495 F.2d 1154.

89. *See* *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 271 (S.D.N.Y. 2009).

90. *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

91. 18 U.S.C. §§ 2314-2315 (2006).

92. *See* *Fincham*, *supra* note 12, at 614.

93. *Id.*

94. *Id.* at 614-15.

95. *McClain*, 593 F.2d at 671.

96. *See* *Fincham*, *supra* note 12, at 615.

## 2. *Determining Mens Rea When Objects Were Stolen in a Country with Differing Laws*

*United States v. McClain*<sup>97</sup> exemplifies a problem of ascertaining a defendant's mens rea under the National Stolen Property Act—determining whether the defendant had the requisite mens rea for a criminal conviction under the law of the art object's nation of origin.<sup>98</sup> Just as many nations have established laws asserting ownership over their cultural property, the nations involved with World War II have all established legislation to deal with the effects of the war.<sup>99</sup> United States courts must tread cautiously in interpreting foreign law in the proceedings of United States criminal cases in order to preserve due process rights for both the victims and the defendants, as an object that seems to be stolen in the United States may not actually have been stolen under the laws of the nation of origin.<sup>100</sup> However, just as some courts have conceded that “when necessary, our courts are capable of evaluating foreign patrimony laws[,]”<sup>101</sup> the United States courts should also be able to evaluate foreign restitution laws to aid in reestablishing possession of valuable looted objects in original owners.<sup>102</sup>

### IV. CIVIL FORFEITURE: THE SAVING GRACE OF NAZI-ERA RESTITUTION CASES

For the original owners of Nazi-looted artwork attempting to regain possession of their prized objects, civil forfeiture is the best chance for the restitution of their stolen property and should become the standard cause of action in Nazi-era restitution cases. Civil forfeiture is the most beneficial course of action for victims of Nazi looting, as it bears significant advantages over pressing charges in a criminal trial under the National Stolen Property Act or pursuing restitution in an independent civil proceeding. Unfortunately, civil forfeiture has been criticized for its apparent ignorance of due process, as well as its potential for government interference with the legal system. This section will argue that civil forfeiture is the best method for gaining restitution by explaining civil forfeiture generally, outlining the beneficial characteristics of civil forfeiture as a means of gaining restitu-

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97. *McClain*, 593 F.2d 658.

98. *Id.*

99. *See* *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 240 (S.D.N.Y. 2009). For example, Austria established its Restitution Commission to attempt to reinstate possession of looted objects to Austrian Jews. *See id.*

100. *See McClain*, 593 F.2d at 671.

101. *United States v. Schultz*, 333 F.3d 393, 410 (2d Cir. 2003).

102. *See id.*

tion, and by both addressing and dispelling the due process concerns of critics of civil forfeiture of Nazi-looted artwork.

A. A USEFUL HYBRID OF CIVIL AND CRIMINAL LAW

Civil forfeiture, when used in conjunction with the broad scope of the National Stolen Property Act, is the best opportunity a victim of Nazi looting has to regain possession of stolen art objects.<sup>103</sup> A hybrid of criminal and civil proceedings, civil forfeiture has no specific basis in statute—each federal crime has its own forfeiture provision.<sup>104</sup> “A civil forfeiture proceeding is initiated by the government’s filing of a complaint that names a specific object as the defendant, as opposed to a person who may have committed a crime to obtain the property.”<sup>105</sup> The object in question is seized by the Department of Treasury, the Federal Bureau of Investigation, or another appropriate federal agency before the U.S. Attorney initiates a civil proceeding.<sup>106</sup> The proceeding continues like a typical civil trial, except that any person or entity with a legal interest in the property can contest its forfeiture and are entitled to a jury trial to determine the property’s legal ownership.<sup>107</sup>

In proceedings for the restitution of Nazi-looted artwork, civil forfeiture is usually, and most effectively, used in conjunction with the National Stolen Property Act.<sup>108</sup> In these cases, a stolen object must be transported, imported, or received in violation of the statute.<sup>109</sup> Each time the object is transported, imported, or received in violation of the statute, a new statute of limitations period begins—thus, the most recent violation governs the statutory period for forfeiture.<sup>110</sup> Once the government seizes the artwork, it must “show, by a preponderance of the evidence, that the artwork is subject to forfeiture because it was imported, transported, or received in violation of [the National Stolen Property Act].”<sup>111</sup>

In the forfeiture proceeding, the government does not need to put the wrongdoer on trial, but only needs to prove by a preponderance of evidence that a crime occurred and that the object in question was involved in that crime in order to prevail.<sup>112</sup> “Those who claim ownership of the art—regardless of whether they possessed it immediately prior to the seizure—

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103. See Kreder, *supra* note 24, at 1204-05.

104. See Fincham, *supra* note 12, at 622.

105. Kreder, *supra* note 24, at 1222-23.

106. *Id.* at 1223.

107. *Id.*

108. *Id.* at 1204.

109. Fincham, *supra* note 12, at 611.

110. See *id.* at 623.

111. Kreder, *supra* note 24, at 1204.

112. *Id.* at 1223.

may assert that the art should not be forfeited to the government, but rather should be awarded to them.”<sup>113</sup>

## B. THE BENEFITS OF CIVIL FORFEITURE PROCEEDINGS

Civil forfeiture can be the saving grace of Nazi-era restitution cases, as the nature of civil forfeiture circumvents the technicalities that often bar claims from victims of Nazi looting.<sup>114</sup> Civil forfeiture should become the standard cause of action for original owners of looted artwork, as civil forfeiture proceedings require a lower burden of proof than a criminal proceeding,<sup>115</sup> allow for older claims based on the National Stolen Property Act’s method of determining statutes of limitation,<sup>116</sup> and bolster plaintiff’s claims with abilities of the United States government.<sup>117</sup>

### 1. *Requires a Lower Burden of Proof Than Pure Criminal Proceedings*

First, although the passage of time wipes away evidence that may help to convict a thief, transporter, or seller of Nazi-looted artwork in a criminal proceeding under the National Stolen Property Act, civil forfeiture allows for a lower burden of proof and a better chance of restitution.<sup>118</sup> Attempting to recover stolen cultural property under the National Stolen Property Act alone requires the “beyond a reasonable doubt” standard, but civil forfeiture allows these types of cases to proceed under the laws of the National Stolen Property Act with only a “preponderance of the evidence” standard.<sup>119</sup> As recently as 1999, the government needed only to show probable cause of an unlawful act involving the stolen object, but with the advent of the Civil Asset Forfeiture Reform Act (CAFRA),<sup>120</sup> safeguards were put into place to ensure that the current possessor of the object, whether he or she is a good faith purchaser, is not dispossessed of the object without due process.<sup>121</sup>

Along the same lines, an original owner of Nazi-looted artwork can pursue restitution through civil forfeiture even if he or she does not know of

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113. *Id.* at 1205.

114. *Id.* at 1233-34.

115. *See id.* at 1204.

116. *See Kreder, supra* note 24 at 1234-35.

117. *See Fincham, supra* note 12, at 623.

118. *See Kreder, supra* note 24, at 1204.

119. *See id.*

120. 18 U.S.C. § 983 (2010).

121. *See Kreder, supra* note 24, at 1232. CAFRA establishes an innocent-owner defense that prevents innocent owners from losing their property under any civil forfeiture statute. *Id.* An innocent owner is a person who, “(i) was a bona fide purchaser or seller for value; and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.” 18 U.S.C. § 983(d)(3)(A)(i)-(ii) (2000).

a specific person who stole his or her property, or if the wrongdoer is missing or has passed away.<sup>122</sup> Because the government only needs to prove that a crime occurred, but does not need to put a specific offender on trial, evidentiary problems are much easier to bypass.<sup>123</sup> Thus, civil forfeiture can be used to penalize defendants in cases in which the defendant's bad actions do not call for a criminal conviction.<sup>124</sup> This characteristic of civil forfeiture proceedings is especially beneficial in Nazi-era restitution cases, such as *Portrait of Wally*, in which the looted artwork has changed hands so many times over the years and the initial wrongdoer was long out of the picture.<sup>125</sup> By pursuing civil forfeiture as opposed to undertaking a criminal conviction or a civil claim of replevin, an original owner of Nazi-looted artwork has the ability to gain restitution, even if the original owner cannot name the specific person who wrongfully took the artwork from his or her possession.<sup>126</sup>

## 2. *Allows for Older Claims*

Applied in conjunction with the National Stolen Property Act, civil forfeiture also allows the government to overcome issues of statutes of limitation.<sup>127</sup> “[S]tatutes of limitation issues in traditional civil litigation often favor the defendant when the defendant has possessed the artwork for a long time.”<sup>128</sup> This is particularly true in cases where the artwork was purchased in a country with civil laws protecting the rights of bona fide purchasers.<sup>129</sup> However, when original owners of looted artwork seek restitution in a civil forfeiture proceeding under the National Stolen Property Act, the statutory period begins at the stolen property's most recent crossing of state or national lines—instead of beginning when the object was originally stolen.<sup>130</sup> Thus, notions of adverse possession<sup>131</sup> do not stand in the way of an original owner regaining his or her looted artwork.<sup>132</sup>

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122. See Kreder, *supra* note, 24 at 1223.

123. See *id.*

124. *Id.* at 1234.

125. See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 237-46 (S.D.N.Y. 2009).

126. See *id.*

127. Kreder, *supra* note 24, at 1233.

128. *Id.*

129. *Id.*

130. See Fincham, *supra* note 12, at 623.

131. Adverse possession is the running of the statute of limitation on a claim for replevin, in which the possessor of a converted object may gain colorable title to that object. See *Belotti v. Bickhardt*, 127 N.E. 239, 241 (N.Y. 1920). The court states:

There are five essential elements necessary to constitute an effective adverse possession: First, the possession must be hostile and under claim of right; second, it must be actual; third, it must be open and notorious;



Some opponents of civil forfeiture as a means of restitution for Nazi-looted artwork criticize civil forfeiture as a violation of due process because of the use of the National Stolen Property Act's ability to determine a more recent statutory limitation period.<sup>133</sup> However, the typical statute of limitation "generally only bars the remedy of direct action for affirmative relief."<sup>134</sup> That is, the limitation only "extinguishes the remedial action, but not the underlying right" to undertake an action.<sup>135</sup> This underlying right is still available to serve as the basis for remedies other than the direct action barred by the statute.<sup>136</sup>

The purpose of statutes of limitation is not to protect wrongdoers or provide wrongdoers with "peace of mind regarding potential liability."<sup>137</sup> Statutes of limitation are meant to prevent stale claims for which lost evidence and faded memories pose a constraint on the fair adjudication of the claims.<sup>138</sup> Statutes of limitation are meant to ensure that evidence is not outdated and that those with firsthand knowledge are still available to testify.<sup>139</sup> However, many cases of Nazi-looted artwork are not stale claims since much of the evidence has only been discovered recently, as "[g]overnment 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."<sup>140</sup> Thus, bringing criminal charges or a claim of replevin, which would bar looting victims' claims as a result of the running of the statutory period, withholds relief from these victims unnecessarily.<sup>141</sup> Civil forfeiture should become the standard in pursuing restitution for victims of Nazi-looting, as it allows for victims to gain relief without the arbitrary application of a long-gone statutory period.

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fourth, it must be exclusive; and fifth, it must be continuous. If any of these constituents is wanting, the possession will not effect a bar of the legal title.

*Id.*

132. *See id.*

133. *See supra* Part IV.C.1 (discussing the statute of limitation argument against civil forfeiture).

134. Harvard Law Review, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950).

135. *Id.*

136. *Id.*

137. Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 461 (1999).

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

### 3. *Bolsters Original Owners' Claims with the Abilities of the Government*

There are also significant benefits to original owners when their restitution cases are undertaken by the government.<sup>142</sup> Often, original owners do not have the resources to bring a civil claim against current possessors of their Nazi-looted artwork.<sup>143</sup> With civil forfeiture, restitution proceedings are backed by the government and all of the financial and investigative resources it has to offer.<sup>144</sup>

The government also has the power to bring criminal charges in conjunction with the civil forfeiture proceedings, which can lead to a quick settlement by increasing pressure on the current possessor of looted artwork.<sup>145</sup> It is also significantly easier for the government to seize the cultural object in question.<sup>146</sup> The government must only show probable cause in order to gain possession of a looted object, while a civil claimant would need to show “irreparable harm[ ] and a likelihood of success on the merits to obtain a temporary federal injunction.”<sup>147</sup> Thus, civil forfeiture proceedings allow civil claimants to earn a greater chance of success against individuals and well-known museums alike.

#### C. DUE PROCESS OBJECTIONS AND THE MORAL OBLIGATIONS THAT TRUMP THEM

Criticism of civil forfeiture as a means for remedy to victims of Nazi-looting comes hand-in-hand with criticism of the restitution movement as a whole.<sup>148</sup> Those who criticize civil forfeiture tend to do so on the basis that it too easily grants original owners restitution of looted artworks. These opponents cite the ease with which civil forfeiture allows for the circumventing of statute of limitations, the chilling effect civil forfeiture has on the art industry, and the burden it puts on bona fide purchasers who have no knowledge of the artwork’s looted status as reasons for their dispositions.<sup>149</sup> This section will explain these objections to civil forfeiture, address the policy reasons for dispelling them, and explain why civil forfeiture is more in line with due process than any other cause of action in pursuing restitution of Nazi-looted artwork.

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142. See Fincham, *supra* note 12, at 623.

143. *Id.*

144. *Id.*

145. *See id.*

146. *Id.* at 624.

147. Fincham, *supra* note 12, at 624.

148. See *infra* Part IV.C.1-3 (discussing the criticism of the use of civil forfeiture in such cases).

149. *Id.*

### 1. *Circumventing Statutes of Limitation Violates Due Process*

The return of looted artwork to original owners is often the object of opposition, as many believe that traditional application of the statute of limitation on these claims should bar restitution, despite the hardship endured during World War II.<sup>150</sup> Sir Norman Rosenthal, a child of Jewish refugees during the Holocaust, has expressed the views held by many opposing the restitution movement.<sup>151</sup> Those who lost art collections were generally wealthy, he argues, and the majority of those wronged during World War II do not “have art treasures that their children and grandchildren can now claim as compensation.”<sup>152</sup> Rosenthal argues that the restitution movement is a “market-driven hypocrisy” that blows out of proportion the losses of the wealthy few in order to “drum up trade [of Nazi-era art.]”<sup>153</sup> Thus, Rosenthal argues there must be a statute of limitation barring restitution of Nazi-looted art. In support of this assertion, he states:

The world should let go of the past and live in the present. Of course, the best of the past needs to be looked after, but we should not be overly obsessive about the worst of the past—it is not useful either to individuals or society as a whole. Each person should invent him or herself creatively in the present, and not on the back of the lost wealth of ancestors.<sup>154</sup>

However, those who criticize the restitution movement often feel that those seeking repossession, usually the heirs of the original owners, are doing so in hopes of receiving a financial benefit.<sup>155</sup> In reality, most claimants’ initial decision to make a claim is often not at all based on monetary desire, but deep emotion.<sup>156</sup> Seeking restitution becomes “an almost sacred duty” to some claimants who have promised their parents or grandparents

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150. See Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 42 (2009).

151. *Id.* at 43.

152. *Id.* (quoting Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30, available at <http://www.theartnewspaper.com/article.asp?id=16627>).

153. *Id.* (quoting Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30, available at <http://www.theartnewspaper.com/article.asp?id=16627>).

154. *Id.*

155. See Kreder, *supra* note 150, at 43-44.

156. *Id.* (citing Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 139, 139 (Int’l Bureau of the Permanent Court of Arbitration ed., 2004)).

that they would pursue recovery.<sup>157</sup> Many also believe “that the recovery of property, particularly that which demonstrates the education and taste of their forebears, allows present and future generations to connect to an ancestral world that was disrupted and destroyed by Hitler.”<sup>158</sup> Ultimately, restoring possession of looted artwork to original owners is a matter of moral justice and memory: “Our chance to do today that which we will not be able to do even a few years from now—to gather all the pieces of the puzzle.”<sup>159</sup> Civil forfeiture should be adopted as the standard for pursuing restitution in Nazi-era looting claims, as it will most effectively allow family members to fulfill their honorable duties toward their loved ones who suffered as a result of the actions of the Nazi Party.

## 2. *Civil Forfeiture Creates a Chilling Effect on the International Art Trade and Museum Industry*

Other objections to the use of civil forfeiture as a tool for encouraging restitution of Nazi-looted artwork come from members of the art community who argue that granting claimants more ease in restitution proceedings puts a chilling effect on the trade of art, as well as international art loans among museums.<sup>160</sup> Following the seizure of the Portrait of Wally from the Museum of Modern Art in New York, art adviser Ashton Hawkins stated,

I think that people who would have previously considered lending now simply don't consider it . . . I know from my colleagues who arrange these exhibitions in New York and in other cities that lending to the United States . . . has been more of a problem than it used to be.<sup>161</sup>

Some proponents of protecting the art trade from the apparent burden of verifying title justify the protection of artwork from seizure by emphasizing “the invaluable attributes of the artworks themselves.”<sup>162</sup> One proponent of protecting artwork from seizure wrote, “Art enhances the human expe-

157. *Id.* at 44 (quoting Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 139, 139 (Int'l Bureau of the Permanent Court of Arbitration ed., 2004)).

158. Kreder, *supra* note 150, at 44.

159. Hector Feliciano, *Nazi Plunder: Seeking Moral Justice by the Return of Looted Art*, L.A. TIMES, Jan. 11, 1998, at M1.

160. See Fincham, *supra* note 12, at 626.

161. *Id.* (quoting David D'Arcy, *MoMA in Battle over Painting Seized by Nazis*, NPR ALL THINGS CONSIDERED (December 27, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4246589>).

162. See, e.g., Ronen Sarraf, Note, *The Value of Borrowed Art*, 25 BROOK. J. INT'L L. 729, 741 (1999).

rience by providing examples of humanity's greatest achievements; it offers testimony . . . to the diversity and scope of our species; and, it provides a tangible means of identifying with one's past."<sup>163</sup> Each piece of artwork is a trove of historic and cultural information that can enrich its viewers in innumerable ways.<sup>164</sup> "Thus, the exchange of artworks increases the visibility of these sources of knowledge and benefits the public greatly. Taken to its intellectual extreme, the exhibition of even stolen art may be justified."<sup>165</sup>

Even with the advent of the restitution movement, and "[d]espite fears that this process would lead to the emptying of museum storerooms and display cases," Dr. James Cuno, the former director of the Harvard Art Museums, claims that there have not been many actual restitutions of looted artwork to their original owners.<sup>166</sup> As of February 2002, only about one thousand out of fourteen million of the art objects exhibited in United States museums have "questionable gaps in their provenance."<sup>167</sup> Of those approximate one thousand pieces of art, only eight have been claimed by original owners, and of those eight, three of them remain on display—the other five having been returned to the possession of original owners or their heirs.<sup>168</sup> As of February 2002, only twelve claims have been brought against American museums, resulting in only four works of art being returned to the claimants, with eight remaining in museum collections.<sup>169</sup>

Furthermore, the concept of allowing good faith owners to quietly enjoy possession of stolen artwork creates even more of a problem when applied to museums in their role of trust in society.<sup>170</sup> "Considering the high ethical standards to which museums must hold themselves," wrote one proponent of provenance investigation, "a standard that goes beyond the mere avoidance of illegality but rather to the maintenance of their integrity and furtherance of the public's trust, no museum would knowingly display stolen artwork."<sup>171</sup> Theoretically, no museum would want to suffer the shame that would likely arise as a result of borrowing, owning, or displaying art with knowledge that it may be stolen.<sup>172</sup> The importance of determining whether a piece of art is stolen is vital when attempting to decide whether to exhibit the artwork; this applies whether the object is part of a temporary

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163. *Id.*

164. *Id.*

165. *Id.*

166. Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *CARDOZO J. INT'L & COMP. L.* 409, 438 (2003).

167. *Id.*

168. *Id.*

169. *See id.* at 438-39.

170. *See Sarraf, supra* note 162, at 743.

171. *Id.*

172. *Id.*

display, or whether it is intended to be a permanent part of the museum's collection—in which case some would say the duty applies even more.<sup>173</sup>

In Nazi-era restitution cases, it is foreseeable that the public may be forced to give up the ability to view and enjoy valuable pieces of artwork.<sup>174</sup> However, “justice and public trust in the sanctity of museums command restitution of looted art.”<sup>175</sup> As a response to critics such as Rosenthal, it has been argued that “[t]he public interest must surely be in upholding the rule of law, rather than promoting an international free-for-all through the unrestricted circulation of tainted works of art.”<sup>176</sup>

Refusing to allow redress to original owners by giving superior title to current possessors would “maximize the marketability of stolen art . . . .”<sup>177</sup> There would be no incentives for buyers and sellers of artwork to investigate title, “and stolen art would move through the marketplace at a much faster pace.”<sup>178</sup> Some opponents of civil forfeiture as a means for restitution would argue that it is the goal of the law to promote free trade of goods and marketplace stability.<sup>179</sup> However, the law should, instead, strive to increase the marketability of artwork by encouraging buyers to investigate title, such that buyers will not hesitate to purchase art in fear that they are not acquiring good title.<sup>180</sup> In other words, if there are no questions about whether a sale actually results in colorable title, there are no obstacles to sale, and the market will function efficiently.<sup>181</sup>

Supporters of the restitution movement challenge critics by asking, “Do we really wish to educate our children to have no respect for history, legality and ethical values by providing museums with the opportunity freely to exhibit stolen property?”<sup>182</sup> Increasingly, it appears that the art community, as well as the United States government, is beginning to reconcile with the idea that statutes of limitation should not be the justification for dismissing otherwise valid claims for the restitution of looted artwork, especially in cases where a museum is holding looted artwork in the public trust.<sup>183</sup>

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173. *See id.*

174. *See Kreder, supra* note 150, at 45.

175. *Id.*

176. *Id.* (quoting Leon Symons, *No Time Limit for Art Claims*, JEWISH CHRON. (London), Dec. 18, 2008, at 3, available at <http://www.thejc.com/articles/no-time-limit-art-claims>).

177. Cuba, *supra* note 137, at 464.

178. *Id.*

179. *See, e.g., id.*

180. *See id.*

181. *Id.* at 464-65.

182. *See Kreder, supra* note 150, at 45 (quoting *Stolen Art Works*, SUNDAY TIMES (U.K.), Nov. 28, 2006, at 18).

183. *See id.* at 41.

The United States joined with forty-three other nations in signing the Washington Conference Principles on Nazi-Confiscated Art in December 1998.<sup>184</sup> The Washington Principles “called on museums, governments, commercial galleries, and auction houses to cooperate in tracing looted artwork through more stringent research into the provenance of every item’ and ‘provide[d] international attention and legitimacy to the return of [Nazi-looted] artwork.’”<sup>185</sup> Despite the international effort to reach “‘just and fair’”<sup>186</sup> solutions, the Washington Principles are not binding on those nations who have signed on, and there is still opposition to the return of art from museums to original owners.<sup>187</sup> The intentions of the government, as well as the art world, to aid in relieving the victims of Nazi looting are clear. The adoption of civil forfeiture as the standard for Nazi-era looting cases can only further the intent of both groups to aid in correction of the injustices of the Holocaust.

### 3. *Civil Forfeiture is Burdensome on Bona Fide Purchasers of Looted Artwork*

Civil forfeiture is also criticized for being burdensome to the innocent purchasers of Nazi-looted artwork, as they are often the ones who tend to be dispossessed as a result of restitution proceedings.<sup>188</sup> Some critics argue that United States prosecutors should limit forfeiture proceedings to cases in which the art object to be forfeited appears to have been stolen recently, or when there appears to be a pattern of abuse by the violator.<sup>189</sup> To do otherwise would be to favor the rights of the claimants above the rights of the innocent purchasers.<sup>190</sup>

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184. *Id.*

185. *Id.* (quoting Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, 198-99 (Pub. Affairs 2003)) (alteration in original).

186. Kreder, *supra* note 150, at 42 (quoting Am. Ass’n of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, §§ 1-3 (amended Apr. 2001), available at [http://aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm)). If the pre-war owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case. See U.S. State Dep’t, Washington Conference Principles on Nazi-Confiscated Art, Washington Conference on Holocaust-Era Assets Proceedings 971, 971 (1998), available at <http://www.state.gov/www/regions/eur/holocaust/heacappn.pdf>.

187. See Kreder, *supra* note 150.

188. See Fincham, *supra* note 12, at 632.

189. *Id.*

190. *Id.*

Some argue that the eventual shift, “in favor of theft victims suggests that current rules protecting buyers of art and other chattels are unsatisfactory.”<sup>191</sup> One argument supporting this shift is that protecting the sale of stolen artwork encourages theft.<sup>192</sup> If the statute of limitation limits the amount of time in which an original owner can lay claim to stolen artwork, buyers are less likely to undertake a provenance search to determine whether they are obtaining good title to an art object.<sup>193</sup> Thus, “[b]uyers often rely on a gallery’s reputation [when purchasing art,] without requesting any other evidence of title.”<sup>194</sup>

However, “[e]ven reputable auction houses such as Sotheby’s have been known not to investigate title,”<sup>195</sup> so it should be up to the law to create incentives for buyers to ensure that they are not purchasing stolen artwork and investigate provenance.<sup>196</sup> Because purchasers have the opportunity to investigate provenance, if a purchaser chooses to take a chance and skip the investigation, he or she should also take a chance with the possibility that the artwork will be returned to its original owner without compensation.<sup>197</sup>

Some have argued that requiring sellers and buyers of artwork to conduct title and provenance searches would place too much of a burden on any good faith possessor.<sup>198</sup> Thus, only potential new purchasers should be responsible for conducting an investigation into the authenticity and provenance of the artwork in question.<sup>199</sup> However, this argument fails, as it places a large burden on potential buyers while allowing current possessors, “to quietly continue to retain title wrongfully.”<sup>200</sup>

To require current possessors and potential new buyers to conduct investigations and establish good title, “is as much for the benefit of the possessor as it is for the true owner.”<sup>201</sup> Without requiring due diligence investigation, current possessors are unprotected from any claims that may arise, and, “once a claim is made, the burden of proving good title and right to

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191. See, e.g., Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2451 (1994).

192. *Id.*

193. *See id.*

194. *Id.* at 2451-52.

195. *Id.*

196. *See* Bibas, *supra* note 191, at 2453.

197. *See id.* at 2453-54.

198. Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1153 (2002).

199. *Id.*

200. *Id.*

201. *Id.*



possession rests inequitably on the shoulders of the plaintiff.”<sup>202</sup> Proponents of requiring a due diligence investigation argue that this imposes too high of a burden on both the current possessor and the true owner of the artwork.<sup>203</sup> Thus, requiring current and potential possessors to undertake such an investigation would reduce or eliminate any potential burden imposed upon good faith buyers by the application of civil forfeiture in cases of Nazi-looted artwork.<sup>204</sup>

Despite arguments against protecting bona fide purchasers, there are due process safeguards in place to help protect them from being dispossessed of the artwork by civil forfeiture. The Civil Asset Forfeiture Reform Act (CAFRA)<sup>205</sup> establishes a new innocent owner defense, which imposes on the current possessor the burden to prove by a preponderance of the evidence that he or she did not know or have reasonable cause to believe that the object in question was subject to forfeiture.<sup>206</sup> CAFRA defines an “innocent owner” as one

who obtains an interest in property *after* the conduct giving rise to the forfeiture has occurred as a person who, at the time of acquiring the interest in the property “(i) was a bona fide purchaser or seller for value; and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.”<sup>207</sup>

Thus, civil forfeiture still allows original owners of Nazi-looted artwork a heightened chance at restitution without disregarding the rights of bona fide purchasers.

## V. CONCLUSION

Despite the Holocaust having ended more than sixty years ago, the repercussions of the acts of unlawfulness by the Nazi Party are still becoming more and more prevalent today.<sup>208</sup> While original owners of Nazi-looted artwork and their heirs may have been experiencing anguish from the loss of treasured works of art for these past decades, only now, with the gradual

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202. *Id.*

203. Henson, *supra* note 198.

204. *See id.*

205. Civil Asset Forfeiture Reform Act, 18 U.S.C. § 983 (2006 & Supp. 2009).

206. Kreder, *supra* note 24, at 1232.

207. *Id.* (quoting 18 U.S.C. § 983(d)(3)(A)(i)-(ii) (2006 & Supp. 2009) (emphasis in original)).

208. *See* Grimes, *supra* note 22, at 542.

unsealing of Nazi records detailing the locations of this loot, are many of these families able to finally take a stand and pursue restitution.<sup>209</sup>

However, the laws of the United States have not all been formulated with the Holocaust in mind, and much of the relief offered to victims of the Holocaust has not been sufficient.<sup>210</sup> The special circumstances of that era call for special considerations in the law, and the application of civil forfeiture to Nazi-era restitution cases should be adopted as the standard.

Civil forfeiture can allow victims of Nazi looting to gain the relief they deserve without the adoption of laws specific to Nazi-era restitution and without ignoring the due process rights of the parties involved.<sup>211</sup> Up until recently, the majority of Nazi-era restitution cases have been pursued as either civil replevin actions or criminal actions under the National Stolen Property Act.<sup>212</sup> Unfortunately, claimants in these cases have been barred from restitution by roadblocks, such as the foreign affairs power, the international comity and act of state doctrines, statutes of limitation, and the laches defense.<sup>213</sup>

Unlike pure civil and criminal proceedings, civil forfeiture acts as a hybrid of both and allows the original owners of looted artwork to pursue restitution with the benefits of both civil and criminal law.<sup>214</sup> Like a civil proceeding, civil forfeiture allows for a lower burden of proof than criminal proceedings,<sup>215</sup> but, like a criminal proceeding, allows for older claims.<sup>216</sup> And, much like a criminal proceeding, civil forfeiture allows the claimants of stolen artwork to bolster their cases with the abilities of the United States government.<sup>217</sup>

Despite criticisms from those uncomfortable with the benefits that civil forfeiture affords the victims of Nazi-era looting, with more support for correcting the injustices suffered by the victims of the Holocaust, comes a noticeable shift toward accepting civil forfeiture as the standard for restitution.<sup>218</sup> The issues with civil forfeiture's creation of a new statutory limitation period for Nazi-era restitution claims are beginning to be met with an understanding that allowing these claims to come forward is not contrary to the purpose of a limiting period,<sup>219</sup> as well as the feeling that slight techni-

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209. See Cuba, *supra* note 137.

210. See *supra* Part III.A.1-5.

211. See *supra* Part IV.C.3.

212. 18 U.S.C. §§ 2314-2315 (2006).

213. See *supra* Part III.A.1-5.

214. Fincham, *supra* note 12, at 622.

215. See *id.* at 622-23; see also Kreder, *supra* note 24, at 1223.

216. See Kreder, *supra* note 24, at 1234-35; see also Fincham, *supra* note 12, at 623.

217. See Fincham, *supra* note 12, at 623.

218. See, e.g., Bibas, *supra* note 191.

219. See Cuba, *supra* note 137.

calities can be overlooked in favor of granting ownership of stolen property back to the victims of Nazi-looting.<sup>220</sup>

It is also clear that the art market is becoming more concerned with upholding the legitimacy of the art trade, rather than favoring illicit trade over whatever slim effects restitution may have on the trade and lending of art objects in both the market for purchase and the museum industry.<sup>221</sup> Furthermore, it is becoming clearer that the burdens originally thought to have been imposed upon the bona fide purchasers of looted art are lightened by the safeguards implemented by the Civil Asset Forfeiture Reform Act,<sup>222</sup> as well as the opportunities held by bona fide purchasers for ensuring good title by undertaking a provenance investigation.<sup>223</sup>

With the lucrative and highly publicized settlement of *Portrait of Wally*, the art world has become more exposed to the benefits of civil forfeiture as a means of gaining restitution of Nazi-looted artwork.<sup>224</sup> It seems that it is only a matter of time before the true owners of looted artwork and their advocates realize that civil forfeiture is the best alternative to traditional civil and criminal proceedings in gaining restitution of treasured belongings.

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220. See Feliciano, *supra* note 159.

221. See Kreder, *supra* note 150, at 45.

222. 18 U.S.C. § 983 (2006 & Supp. 2009).

223. See Henson, *supra* note 198.

224. See U. S. Attorney Press Release, *supra* note 11.

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