Is There Any Way Home? A History and Analysis of the Legal Issues Surrounding the Repatriation of Artwork Displaced During the Holocaust

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I. Introduction

"There is an age old argument: which is more valuable, a work of art or a human life?"[1] It is impossible to compare the value of human life with that of a work of art, regardless of how great or unique that work may be. There is little debate that the systematic extermination of nearly six million Jews during the Holocaust was, by itself, one of the greatest humanitarian atrocities of all time.[2] This argument is not an attempt to diminish the human tragedy that defined the World War II era, but instead acts as a constant reminder that in myriad ways "[t]he Holocaust was not an event that ended in 1945—at least not for the survivors."[3]

This article presents a history and analysis of the legal issues surrounding the repatriation of artwork displaced during the Holocaust. Part II provides the reader with an historical background of the systematic and deliberate confiscation and displacement of art by the Nazi regime under Adolf Hitler from 1937 to 1945. It also includes some information regarding early post-war recovery efforts and the various practical and political barriers hindering these efforts. Part III discusses the development and application of certain major international conventions and repatriation agreements such as the Hague Convention of 1907, the 1970 UNESCO Convention on Cultural Property, the 1995 UNDROIT Convention on Stolen or Illegally Exported Cultural Objects, and the 1998 Washington Conference on Holocaust-era Assets. This discussion includes an evaluation of the inherent limitations of multilateral agreements in the successful repatriation of cultural property. Part IV focuses specifically on the United States' legislative repatriation efforts, including the Holocaust Victims Redress Act, the U.S. Holocaust Assets Commission Act of 1998, and the Nazi War Crimes Disclosure Act.

Part V introduces the reader to the legal issues surrounding Holocaust-era repatriation litigation in the United States. It unpacks the wide range of legal issues that must be addressed prior to reaching the merits of any repatriation claim. These issues include: (1) jurisdiction and the Foreign Sovereign Immunity Act, (2) the political question doctrine, (3) international comity and the act of state doctrine, and, most significantly, (4) the determination and application of state statutes of limitations. Part VI presents these legal issues through the lens of specific Holocaust-era repatriation claims that have been brought in United States courts.

Part VII analyzes *Vineberg v. Bissonnette*,[4] a recent case in which the Rhode Island District Court, and later the Rhode Island Court of Appeals, overcame the abovementioned hurdles and reached the merits of a highly publicized repatriation claim. The courts ultimately ordered the return of "Girl from the Sabiner Mountains," a painting sold under coercion as part of the Nazi program, to its rightful owner. The analysis shows that although some commentators have rightly deemed the case a noteworthy moment in the history of Holocaust-era repatriation claims, the underlying legal obstacles to a successful claim remain unchanged.

II. Historical Background

From 1937 to 1945, the Nazi regime under Adolf Hitler not only attempted to deliberately and systematically exterminate an entire race of individuals, but also succeeded in looting and confiscating nearly a quarter of a million pieces of art throughout conquered Europe.[5] According to some estimates, during World War II the Nazi party controlled between one-third and one-fourth of the art in Europe,[6] approximately "one-fifth of all Western art then in existence."[7] Described as "the greatest displacement of art in human history,"[8] the total value of art stolen or displaced as a result of Nazi policies has been estimated as high as $2.5 billion, or a present value of approximately $20.5 billion.[9]

The seizure of art was a fundamental aspect of Hitler's plan to create a purely Germanic empire. "Being associated with great works of art became another characteristic defining the Aryan conception of moral, intellectual and genetic superiority, and looted artworks were considered treasures."[10] In 1937, Hitler publicly declared that the Nazi regime would "lead an unrelenting war of purification…an unrelenting war of extermination, against the last elements which have displaced our Art."[11] As such, the systematic confiscation of European art "was carried out with typical German efficiency, planned beforehand and ruthlessly executed."[12] More specifically, Hitler had two main goals. First, he wanted to rid Europe of all "degenerate" art, works that he and his associates considered "barbarous methods of representation," "Jewish trash," and "total madness."[13] Second, Hitler was attempting to fulfill his dream of creating the *Fuhrermuseum*, a complex series of museums that would be the centerpiece of a redevelopment plan in his hometown of Linz, Austria, a city that was to become a standing testament to Hitler and The Thousand Year Reich.[14] Hitler initiated a three-

phase plan to achieve the *Fuhrermuseum*.[15] First, the Reich Chamber for the Visual Arts removed over 16,000 works from public and state collections in Germany.[16] Second, Hitler ordered the seizure or forced sale of all privately owned Jewish assets in Germany and Austria.[17] Finally, Hitler passed the Ordinance for the Registration of Jewish Property, which officially transferred ownership of all Jewish property to the Third Reich.[18]

Over the course of World War II, the Nazis expanded their efforts to consolidate all Jewish art that had not yet been seized on behalf of the Third Reich. Agencies, such as the *Einsatzstab Reichsleiter Rosenberg* (ERR) were created to seize and secure any work of art in conquered territories that appeared to have value.[19] To facilitate this effort, the ERR was provided with detailed lists of specific items that were to be confiscated and transported "back" to Germany.[20] When the art arrived in Germany, it was methodically distributed, with Hitler having first preference, high-ranking Nazi officers such as Reichstag President Hermann Göering having second preference, and the remainder of the art being relocated to Nazi-controlled German art museums.[21]

Due to the magnitude of the amount of art, the Nazis established mechanisms other than physical confiscation to transfer possession of art from the Jews and other "degenerate" individuals in conquered territories. The Reich Chamber of Culture (RKK) designated certain individuals as Nazi-approved art dealers and ordered Jewish art collectors to immediately sell all remaining inventory through these dealers, often for far below their actual market value.[22] Also, the RKK established "Jew auctions" as a convenient and efficient forum to sell Jewish art for the financial benefit of the Third Reich.[23] While the forced sale of art is fairly well documented, less clear is the number of individuals who sold their art and art collections in order to escape, survive, or as a general consequence of, the persecution of the Nazi regime.[24] Moreover, in many cases, this art may have changed hands multiple times over the course of the war, which complicated estimating the amount of coerced sales even further.

In the period immediately following World War II, the Allied forces attempted to discover, document, and process the thousands of pieces of art now scattered throughout Europe as a result of the Nazi hoard. As part of this effort, the Allied forces established approximately 1,400 art collection points that were monitored and maintained by officers of the Monuments, Fine Arts and Archive Services Unit of the United States Army.[25] Small groups of "Monuments men" were assigned to seek out and recover the large quantities of art that had been stored for safekeeping in vaults, castles, monasteries, and other makeshift repositories throughout Europe.[26] By 1951, the Allied effort resulted in the collection and processing of several million pieces of cultural property and artwork.[27] Despite such efforts, final repatriation of this art to the rightful owners was frustrated, in large part, by the actions of those entrusted to protect it.

Allied policy mandated the return of any recovered art to the respective government of the country from which the art was stolen.[28] These governments, focused primarily on the rehabilitation and reconstruction of their inhabitants and territories, were often less than thorough in their attempts to return displaced art to the rightful owners.[29] Furthermore, the government of the Soviet Union, which had accumulated a tremendous amount of public and privately owned art throughout its period of occupation, publicly declared all such art to be the property of the Soviet Union.[30] The Soviet government maintained that because Germany had control of the art at the time the art was seized, and because the Soviet Union was owed reparations for the destruction of its own cultural property throughout the war, the art now rightfully belonged to the Soviet Union.[31] More recently, though, the Russian government agreed to establish a database in which it will archive displaced art in its possession, and has asserted that "in Russia there exists no law which would stand in the way of just and legitimate restitution of cultural assets…if convincing evidence…is provided."[32]

III. International Repatriation Efforts

The period immediately following World War II was one of "blissful ignorance" with regard to the repatriation of displaced artwork.[33] Although the Hague Convention of 1907 explicitly forbids any occupying force from "destroy[ing] or seiz[ing] the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war,"[34] the atrocities of World War II and the actions of the Third Reich required revisitation of international law regarding the confiscation, destruction, forced sale, and subsequent repatriation of cultural property.

The first major discussion of the repatriation of cultural property displaced during World War II took place at the United Nations Education, Scientific and Cultural Organization (UNESCO) Convention on Cultural Property in November 1970.[35] As part of this Convention, 102 of the 190 United Nations member states,[36] including the United States, agreed to combat the illicit movement of art in times of war and peace by passing legislation, creating and maintaining government agencies, compiling and maintaining lists of culturally significant art, and developing cultural education programs.[37] Unfortunately, what was ultimately agreed upon was a rather broad and general responsibility of these member states to actively work to repatriate displaced art, rather than dictating any specific actions to be taken.[38] As a result, a wide, and often conflicting, range of legislative approaches developed among signatory states.[39] Furthermore, any potential benefits were limited by the number of signatories who

failed to ratify the Convention.[40] Finally, the Convention failed to institute any adequate means for establishing and adjudicating claims of Nazi-looted art and cultural property.[41]

Recognizing the shortcomings of the UNESCO Convention, the United Nations requested that the International Institute for the Unification of Private Law (UNIDROIT) host the 1995 Convention on Stolen or Illegally Exported Cultural Objects.[42] The resulting treaty, signed on June 24, 1995, expanded protection by giving private individuals the right to make a claim for repatriation but,[43] much like the UNESCO Convention, its effect remains limited by two significant factors.[44] First, as of June 2006, only 27 countries had joined the UNIDROIT Convention. Eleven others signed but did not ratify it.[45] Germany and the United States neither signed nor joined.[46] Second, under the UNIDROIT Convention, individual claims must be brought "within a period of [50] years from the time of theft."[47] Given the 50-year time lapse between the end of World War II and the signing of the UNIDROIT Convention, those individuals seeking repatriation of art displaced during World War II do not have a claim under this Convention.

In 1998, the international community once again revisited the issue of artwork displaced during World War II. The Washington Conference on Holocaust-Era Assets was attended by 44 countries and 13 non-governmental organizations.[48] Although no formal agreement was drafted at that time, those in attendance agreed upon 11 moral principles that would assist in the repatriation of art displaced during the war.[49] Recognizing the failure to previously address many issues surrounding repatriation, and summarizing the newly established "set of substantive principles," Stuart E. Eizenstat, then U.S. Under Secretary of State for Economic, Business, and Agricultural Affairs, stated that "the sale, purchase, exchange, and display of art from the [World War II period would] be addressed with greater sensitivity and a higher international standard of responsibility."[50] According to Eizenstat, "it is not enough to identify art that was stolen," the international community must also "establish a system to resolve issues of ownership and compensation."[51] This effort, he argued, would help to "restore that sense of individual dignity and personal humanity for those who amazingly survived and those who tragically perished."[52]

IV. United States Legislative Repatriation Efforts

Along with participating in, and actively applying, the covenants set forth in The Hague Convention of 1907, the UNESCO Convention of 1970, and the 1998 Washington Conference on Holocaust-Era Assets, the United States has passed legislation regarding the repatriation of art and cultural property displaced during the Holocaust. Beginning in April 1996, Congress held 14 hearings regarding Holocaust-era assets.[53] In 1998, largely as a result of those hearings, the 105th Congress passed three bills addressing issues relating to repatriation and restitution for survivors and heirs of those whose art was displaced as a result of Nazi persecution: the Holocaust Victims Redress Act,[54] the U.S. Holocaust Assets Commission Act of 1998,[55] and the Nazi War Crimes Disclosure Act.[56]

On February 13, 1998, in an effort "[t]o provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust,"[57] Congress passed the Holocaust Victims Redress Act (HVRA), a bill that reprimanded the Nazi looting during the War as a violation of the 1907 Hague Convention, and called upon

> all governments [to] 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.[58]

Furthermore, to "provide a measure of justice to survivors of the Holocaust all around the world while they are still alive,"[59] it authorized the transfer of up to $30,000,000 of seized assets to charitable organizations that aid Holocaust survivors.[60] Finally, the HVRA authorized the President of the United States to appropriate up to $5,000,000 for "archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust."[61] While some have argued that this appropriation was inadequate and unjust,[62] others, including then-President Clinton, recognized that while "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 [Holocaust victims] suffered will never be made whole,"[63] the HVRA remained a positive initial legislative attempt to "help provide some dignity and relief to those who were subjected to the ultimate barbarism of the Holocaust."[64]

On June 23, 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998.[65] This legislation provided for the establishment of a 21-member Presidential Advisory Commission on Holocaust Assets[66] that was to "conduct a thorough study and develop a historical record of the collection and disposition of the assets"[67] obtained by the United States "before, during, and after World War II."[68] In December 2000, the Commission presented its final report in which it made six recommendations: (1) the establishment of a foundation in order to "promote further research and education in the area of Holocaust-era assets and restitution policy and to promote innovative solutions to contemporary restitution policy issues;" (2) requiring all federal, state, and local institutions to review any assets in their possession; (3) increasing government preservation efforts of archival records and encouraging greater research into these records; (4) preparation by the Department of Defense to address similar issues that may arise as a result of future conflicts;

(5) utilize the position of the United States to pressure the international community in promoting and establishing effective repatriation policies; and (6) continue to pass legislation in order to remove any remaining impediments to Holocaust-era restitution.[69] Unfortunately, much like the principles developed at the Washington Conference, the majority of the recommendations set forth in this report have yet to be applied in any significant or productive manner.[70]

Finally, on October 8, 1998, Congress passed the Nazi War Crimes Disclosure Act.[71] This law created a new federal agency, the Nazi War Criminal Records Interagency Working Group (IWG), which sole purpose was to "locate, identify, inventory, recommend for declassification, and make available to the public…all classified Nazi war criminal records of the United States."[72] These records included those pertaining to any transactions believed to have "involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945," or "completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives."[73] Since its inception, the IWG has declassified and made available to the public nearly 8.5 million pages of records that could be used to help determine the location and ownership of art and other assets displaced as a result of Nazi persecution.[74]

V. Holocaust-Era Art Repatriation Litigation in the United States

Since the end of World War II, a relatively small number of Holocaust-era repatriation claims have been brought in the United States.[75] Nonetheless, the increasing availability of resources and databases that have resulted from recent federal legislation, funding and new technologies has provided the foundation for a resurgence in such claims. Despite this resurgence, however, procedural barriers that once completely prevented survivors and heirs from bringing repatriation claims remain a significant obstacle facing those attempting to reclaim possession of their displaced artwork.

Jurisdiction and the Federal Sovereign Immunities Act

Under United States law, the fact that an individual is a good faith purchaser will not preclude a claim of rightful ownership of a piece of art.[76] An action of replevin (recovery of goods) is available to any individual who can prove that his or her personal property was wrongfully taken or detained by another individual.[77] However, an individual claiming ownership rights to a work in the possession of a foreign government or government-owned museum must first establish subject matter jurisdiction over that foreign entity in United States federal courts.

The first obstacle in establishing jurisdiction is the fact that the United States has historically granted absolute immunity to foreign governments from claims brought in federal courts.[78] Over the past 50 years, however, as a result of increasing levels of globalization and commercial activity between private companies and foreign governments, the United States has limited the doctrine of sovereign immunity in order to enable the bringing of lawsuits against foreign governments engaged in commercial activities, as well as in certain other enumerated situations.[79] Although sovereign immunity does not present a significant obstacle with regard to a wide range of present-day repatriation claims, it continues to limit the justiciability of Holocaust-era claims in federal courts.

On January 6, 1999, Congress considered, but has yet to pass, the Justice for Holocaust Survivors Act. This act would establish federal jurisdiction over any claim made by a United States citizen against the Federal Republic of Germany relating to "personal injury…occurring in…Germany, or in any territories or areas occupied, annexed, or otherwise controlled…and caused by an act of genocide against that citizen during World War II."[80] While this proposed legislation is commendable, it focuses exclusively on personal injuries and provides no redress for those attempting to recover assets displaced during World War II. Instead, the only legal mechanism that may be used to establish jurisdiction in United States federal courts is discretional judicial interpretation of the exceptions to the Foreign Sovereign Immunities Act of 1976 (FSIA),[81] and a determination as to whether such exceptions should be applied retroactively.[82]

Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts in the United States" unless the claim fits into one of seven enumerated exceptions.[83] Under the "expropriation exception"[84] to the FSIA, a foreign state is not entitled to immunity when "rights in property taken in violation of international law are in issue."[85] Although post-war repatriation claims fit this exception, the question remains whether the FSIA applies to events that occurred prior to enactment. Although the preamble to the FSIA has been interpreted to suggest that the law was to be applied retroactively, the legislative history and text do not expressly prescribe any such application.[86] As a result of this ambiguity, courts have historically reached different conclusions when determining the retroactive effect of the FSIA.[87]

In June 2004, the Supreme Court settled any discrepancy in the interpretation of the retroactive application of the FSIA in *Republic of Austria v. Altmann*,[88] determining that the FSIA "applie[d] to conduct…that occurred prior to 1976 and, for that matter, prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity."[89] While the precedent set forth in *Republic of Austria* has yet to have a tremendous impact on the number of art repatriation claims brought against foreign governments, it may ultimately "represent a sea of change in the fortunes of Holocaust plaintiffs" as federal courts now maintain jurisdiction over any potential claims arising from the World War II era.[90]

The Political Question Doctrine

Early attempts to establish jurisdiction over foreign governments also failed because of the political question doctrine. The political question doctrine "restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutionally committed.'"[91] While the political question doctrine may limit the adjudication of issues committed to non-judiciary branches of the federal government, its application requires a "delicate exercise in constitutional interpretation,"[92] and does not prevent the adjudication of "every case or controversy which touches foreign relations."[93] Instead, courts apply a multi-factor test to determine when action is non-justiciable under the political question doctrine.[94]

The factors used in determining justiciability include the commitment of foreign policy issues to other branches, as well as the importance of adhering to previous political decisions and any potential embarrassment that may result from trying a particular case.[95] In determining the justiciability of Holocaust-era repatriation claims, several courts have determined that the adjudication of any such claims would be perceived as a "declaration to the Executive branch that more than [50] years of treaties, agreements, and other foreign policy determinations… are unacceptable or otherwise inadequate."[96] Claims specifically relating to property and other assets displaced during the Holocaust have similarly been dismissed as non-justiciable under the "safeguards of separation of powers."[97]

Furthermore, courts may consider whether there exists "a lack of judicially discoverable and manageable standards for resolving" a claim.[98] This factor, often applied in class action suits involving large numbers of claimants, remains largely irrelevant to repatriation cases due to the easily justiciable nature of individual claims concerning specific works of art.[99] While the political question doctrine may have played a significant factor in the dismissal of earlier Holocaust-era art repatriation claims, it has not seemingly played a determinative role in more recent justiciability determinations.

International Comity and the Act of State Doctrine

Complementing the political question doctrine are two similar doctrines that limit federal courts from adjudicating claims against foreign governments. International comity is a doctrine of abstention under which federal courts are to refrain "from examining the legitimacy of actions taken by another government in its territory."[100] The purpose of this doctrine is not to immunize foreign governments, but to provide deference to foreign administrative procedures when the United States is confident that the actions of foreign governments are sufficient.[101] As United States national interests, law, and policy may outweigh any comity interest in recognizing the sufficiency of foreign administrative tribunals, the international comity doctrine is a non-determinative factor of justiciability, but may, at times, be employed in tandem with the application of the political question doctrine.[102]

Similarly, the act of state doctrine is based on the idea that "the courts of one country will not sit in judgment on the acts of the government of another."[103] Supporting this with regard to property seized by foreign governments, the Supreme Court has stated that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit."[104] Since the Nazi regime has never been recognized as a legitimate state actor, and because most Holocaust-era art repatriation claims allege violations of international law, courts have regularly dismissed the act of state doctrine when determining justiciability.[105] Regardless, certain repatriation decisions made by the German government since the end of World War II have been viewed by federal courts as sovereign acts protected by the act of state doctrine and, as a result, related cases have been dismissed accordingly.[106]

The Statute of Limitations and Laches

Perhaps the greatest barrier to Holocaust-era art repatriation claims is state statutes of limitations. As the existence and location of displaced artwork may be unknown for many years, the statute of limitations on bringing such a claim will often "cut off any hope" for repatriation to the rightful owner of a work.[107] While most would agree that "there is no justified 'statute of limitation' for an eternal injustice that didn't have any limits,"[108] the reality is that "[i]n virtually all cases of stolen art, the specter of the statute of limitations must be confronted."[109]

Since most domestic repatriation claims are brought as a diversity action, federal courts must apply the substantive law of their states' jurisdiction.[110] In general, the period of statutory limitations begins when a cause of action accrues.[111] In the case of stolen property, the statute of limitations begins to run at the time the theft or forced sale occurred, unless the property has somehow been concealed.[112] In the case of Holocaust-era art, the individual in possession is often a good-faith purchaser who is unaware that the availability of the work for sale was the result of Nazi persecution and is therefore not knowingly concealing it.[113] Due to this multi-faceted complexity, and in order to avoid the dismissal of an otherwise meritorious claim for repatriation, courts must use some discretion in determining the starting point of the statute of limitations period.[114]

In a majority of states, including New Jersey, California, Indiana, Ohio, and Pennsylvania, the statute of limitations period for art displaced during the Holocaust begins when the plaintiff discovers, or should have discovered through reasonable diligence, the whereabouts of a work of art.[115] This rule presents obvious problems in that the definition of diligence may vary greatly based

on the knowledge, expertise, and resources available to an individual.[116] Similarly, it may be extremely difficult to pinpoint any specific time that the work of art "should" have been discovered. The ambiguity inherent in this rule has forced several courts to dismiss otherwise potentially meritorious causes of action after determining that the state statute of limitations period had expired.[117]

A minority of states, most notably New York, invoke the "demand and refusal" rule set forth by the New York Supreme Court in *Menzel v. List*.[118] The case involved a work of art stolen by the Nazi regime in 1941 that, despite a diligent search by the original owners, was not located until 1962.[119] According to the court, the statute of limitations period is based "not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand."[120] Applying this rule, the *Menzel* Court permitted the heirs of the original owner to bring the cause of action against the present owner.[121] Federal courts have similarly invoked this rule, stating that "[u]ntil demand and refusal, the purchaser in good faith is not considered a wrongdoer…even though this rule somewhat anomalously affords the owner more time to sue a good faith purchaser than a thief."[122]

Some courts that apply the "demand and refusal" rule have also allowed for a laches defense when a good-faith owner can prove there was an unreasonable and "unexcused lapse of time" in bringing a claim,[123] and that there was prejudice or harm as a result of that delay.[124] In *Solomon R. Guggenheim Foundation v. Lubell*,[125] the New York Court of Appeals encouraged the use of "demand and refusal" as the "rule that affords the most protection to the true owners of stolen property."[126] In doing so, the Court also recognized that "it would not be prudent to… impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found."[127] While the Court did not impose a duty of diligence similar to those utilizing the "discovery rule," under which consideration is given to when the owner *should* have discovered the missing work, it did state that when addressing the merits of a laches defense, courts should consider whether the owner conducted "a reasonably diligent search" for a missing work of art.[128] Although the "demand and refusal" rule may be considered "quite favorable to plaintiffs,"[129] it remains applicable in only a few jurisdictions.[130]

VI. Case Analysis: The Coerced Sale of Art and Repatriation

As discussed, there exists a wide range of legal concerns that must be addressed prior to reaching the merits of a Holocaust-era repatriation claim. In the absence of any all-encompassing legislative mandate regarding such claims, courts are continuously asked to weigh the rights of good faith purchasers against those of the original owners or heirs of displaced art while, at the same time, discouraging litigants from bringing stale or unjustifiable claims. Among Holocaust-era repatriation claims that have been brought since the end of World War II, few serve as a better example of the inherent difficulties in bringing such claims than those involving the coerced sale of art.

In *Orkin v. Taylor*,[131] perhaps the most highly publicized case regarding the repatriation of art displaced during the Holocaust, the United States District Court for the Central District of California was asked to determine whether a painting by Vincent Van Gogh, *Vue de l'Asile et de la Chapelle de Saint-Remy*, owned by actress Elizabeth Taylor, was the rightful property of the Orkin family, the great-grandchildren of Margarete Mauthner, a Jewish woman who fled Nazi Germany in 1939.[132] The Orkins claimed that their great-grandmother sold the painting under duress prior to fleeing the persecution of the Third Reich, a method of transfer that is the equivalent of confiscation under the laws of the United States.[133] Taylor countered that the painting was sold through Jewish art dealers and that there was no evidence of Nazi coercion in the transactional history of the work.[134] Furthermore, Taylor argued that the claim was untimely under the three-year statute of limitations in California.[135] Rather than addressing the extremely contentious, and potentially meritorious, claims, the court, applying the "discovery rule," dismissed the complaint, finding that because Taylor's acquisition was highly publicized, documented in a reputable art catalog, and later offered for public sale through Christie's auction house in London, the displaced work should have been discovered approximately 25 years before the claim was brought by the Orkin family.[136]

In 2006, a pair of coerced-sale Holocaust-era repatriation claims were brought against the Toledo Museum of Art and the Detroit Institute of Arts by the heirs of Martha Nathan, the widow of a wealthy art collector who was forced to flee Germany in 1937.[137] Attempting to expand the scope of justice beyond that of the traditional Holocaust-era repatriation claim, the heirs argued that although Nathan sold much of her collection to prominent European art dealers that she had known for many years, the sales remained a direct result of Nazi persecution and her need to flee Nazi Germany.[138] To support their claim for restitution and damages, the heirs presented both the original sale price as well as the re-sale price of the works as proof that the art was sold under duress.[139] A novel approach to repatriation litigation, the evidence in these cases was never considered as both the Eastern District Court of Michigan and the Northern District Court of Ohio dismissed the cases as time-barred under the statute of limitations in their respective jurisdictions.[140]

VII. *Vineberg v. Bissonnette*: A New Direction or More of the Same?

In *Vineberg v. Bissonnette*,[141] the District Court of Rhode Island, and later the Rhode Island Court of Appeals, considered whether a claimant can prove that the

sale of a work of art during the World War II period was coerced by comparing the sale and re-sale price of the work. This case was one of a series addressing the repatriation of art owned by Jewish gallery-owner Dr. Max Stern of the Galerie Julius Stern in Dusseldorf, Germany.

Under the Nuremberg Laws of 1935, all Jews were subject to official persecution, deprived of German citizenship, the ability to hold certain jobs, and, most significantly, the right to own any property.[142] Consequently, in August 1935, under the authority of these edicts, Stern received a letter from the Reich Chamber of Culture ordering him to dissolve his family art business.[143] A copy of this letter was forwarded to the German police, warning them that "[t]he person in question [was] non-Aryan."[144] A subsequent letter, sent directly to Stern, noted the finality of the decree, including "an ominous note" to the German authorities that "Stern is a Jew and holds German citizenship."[145] This message acted as a final reminder that because he was a Jew, Stern no longer had the right to own a private art collection.

In November 1937, after being denied the opportunity to transfer his collection to a German art professor, the Reich Chamber of the Fine Arts determined that "Dr. Stern lacked the requisite personal qualities to be a suitable exponent of German culture,"[146] and ordered him to sell his entire inventory and private collection to a Nazi-approved art dealer.[147] In response, Stern consigned the majority of his artwork to the Lempertz Auction House in Cologne, Germany where it would be sold as part of the infamous "Jew auctions"[148] to benefit the Third Reich.[149] After Stern fled to Paris in late 1937, the German government froze his assets, eliminating any possibility that Stern would receive additional proceeds or other compensation from the Lempertz sale.[150] Stern left Paris prior to the outbreak of World War II, moving to London temporarily, and ultimately emigrating to Canada where he would re-enter the art world as a respected collector and dealer.[151] Although he initially received some, albeit inequitable, payment from the Lempertz sale, most of this money was later spent on taxes the Reich had added to the cost of securing exit papers for his mother, an expense that Stern deemed a form of blackmail, "totally unjustified…and…out of thin air."[152]

Immediately following the end of World War II, Stern began the enormous task of locating and recovering his displaced art.[153] In doing so, he placed advertisements in several magazines and newspapers, filed restitution claims with the military government, and visited Europe to personally "hunt" for his missing artwork.[154] The specific painting in dispute in the *Vineberg* case was "Girl from the Sabiner Mountains." Although Stern had nearly no information regarding the location of this missing work,[155] he nevertheless "accessed diplomatic channels, personal resources, post-War claim procedures set up by the Allies and by West Germany, and the press in an effort to publicize and recover his [lost work]."[156] Upon his death, his estate continued the search by registering the work on the United States Art Loss Registry (ALR) and Germany's Lost Art Internet Database.[157] According to Stern Estate representative Clarence Epstein, to date, only 25 of the approximately 400 works of the original Stern collection have been located.[158]

In April 2003, "Girl from the Sabiner Mountains" appeared at the Estates Unlimited Auction House (Estates Unlimited) in Cranston, Rhode Island. The painting was on consignment for sale from Maria-Louise Bissonnette, who had inherited the painting from her mother.[159] It was originally purchased by her stepfather, Dr. Karl Wilharm, a member of the Nazi party, at the 1937 Lempertz Auction in Cologne for 4,140 Reichmarks (a present value of approximately $24,000).[160] Immediately prior to the auction, Estates Unlimited was notified by the ALR that the painting had been registered and claimed by the Stern Estate. Estates Unlimited then withdrew the painting from the auction pending resolution of the dispute.[161] Bissonnette also received a notification letter from the Holocaust Claims Processing Office of New York (HCPO) in which she was informed of the pending dispute, and was reminded that "[t]he art market does not look favorably at items with a potentially tainted past."[162]

In its consideration of the merits of the claim, the District Court of Rhode Island granted summary judgment for the plaintiffs (the Stern Estate), accepting evidence that the art in consignment was previously sold at the Lempertz Auction for "well below market value" as indicative that the art was sold under duress.[163] Although the *Vineberg* decision has been described as a "landmark" and "historic" turning point in the repatriation of Holocaust-era displaced artwork,[164] the claim itself may have been no more meritorious than other cases of art sold under duress during this period. Instead, the underlying reason the Rhode Island court was able to overcome the various procedural barriers that have prevented other courts from addressing the merits of Holocaust-era repatriation claims was that Bissonnette failed to present and develop the proper legal arguments that have historically precluded other courts from reaching the merits of similar cases. As such, the case presents a wonderful opportunity to apply and analyze the legal issues surrounding such claims. In doing so, it is clear that the *Vineberg* case, although ultimately resulting in the return of the painting to its rightful owner, was not a turning point, but rather an example of how the success of such a claim may be dictated entirely by the ability of a defendant to present and develop a range of well-established, although seemingly misplaced, legal doctrines.

Early efforts to dismiss the Stern Estate's claim for "Girl from the Sabiner Mountains" were based on the jurisdiction of the Rhode Island federal courts.[165] In her Motion to Dismiss, Bissonnette argued that because the plaintiffs were citizens of Canada, and because they had "no substantial contact with the State of Rhode Island,"

other than the fact that Bissonnette lived there, the Rhode Island Court's jurisdiction should be found to be defective.[166] Instead, Bissonnette argued that "Germany [should be] the focal point of the proof of ownership… [because] the subject events took place in Germany relative to ownership, sale and inheritance of the subject painting…[and] Germany [had] significant interest in the painting, its ownership and the parties."[167] In developing her *forum non conveniens* argument further, Bissonnette argued that because Stern had previously "availed himself of the German courts" in 1964, under the common-law doctrine of international comity, it would be prudent to permit the German courts, and the laws governing those courts, to determine the outcome of the *Vineberg* case.[168] Although this case may have been unique in that Stern had previously sought relief from German courts, the Rhode Island District Court dismissed the international comity argument and permitted the case to proceed based on diversity jurisdiction.[169]

In the introduction to her Brief in Opposition to Summary Judgment, Bissonnette set forth her chief defenses, "argu[ing] the equitable doctrine of laches and the legal defense of statute of limitations."[170] Ironically, though, the brief focused entirely on laches, never returning to any discussion of the statute of limitations.[171] The plaintiff's reply brief posited that this may have be a tactical maneuver in which "Bissonnette trie[d] to preserve her statute of limitations defense by mentioning it in passing…and mak[ing] no other effort to press her argument…[or] even clarify which of the Plaintiff's claims [were] untimely or what statute of limitations she relie[d] upon."[172] The plaintiff then went on to explain, in detail, why the claims were timely under Rhode Island law, seemingly attempting to diffuse any statute of limitations argument that may have been developed later.[173]

The Stern Estate began by reminding the court that "it has long been black-letter law in Rhode Island that a conversion claim does not accrue against one whose initial possession of an object is not considered wrongful until there has been a demand and refusal to turn over the property to the true owner."[174] Similarly, in regard to the replevin claim, the Stern Estate argued that "a cause of action in replevin does not accrue against one not in wrongful possession, and the statute of limitations does not begin to run until the true owner makes a demand for return and has the demand rebuffed."[175] The Stern Estate closed its discussion of the statute of limitations by reminding the court that "Bissonnette [had] not explained or supported her statute of limitations defense."[176] The court agreed, finding that "the Defendant failed to adequately develop and argue [and therefore waived] the affirmative defense of statute of limitations."[177]

It remains extremely curious why the statute of limitations defense was never developed by Bissonnette.[178] For hypothetical analysis purposes, it appears that had Rhode Island adhered to the widely applied "discovery rule," this case might have simply been dismissed under the statute of limitations. To do so, Bissonnette could have argued that Stern himself knew this work was missing, as exemplified by his efforts to retrieve it following the end World War II. Furthermore, despite Rhode Island's adherence to the traditionally plaintiff-favorable demand-refusal statute of limitations analysis, there is evidence in this case that Stern had previously made a demand, and had gone so far as to file suit in German courts, in connection with this work. Had Bissonnette presented a proper statute of limitations defense, or argued it at all, there is a possibility that the court would have considered dismissing this case in a manner similar to others coming before it.

Instead of developing the statute of limitations defense, one that has been extremely effective in the dismissal of previous Holocaust-era art repatriation claims, Bissonnette chose instead to focus on the weaker, and far more case-sensitive, laches defense. In fact, the only substantive legal question that was discussed on appeal was whether the doctrine of laches prevented an entry of summary judgment against the defendant.[179] In support of her argument, Bissonnette presented the court with the question of whether "Dr. Stern did everything one would expect a theft victim to do to reclaim his property."[180] Although this may have been a legitimate and probing first question, a successful laches defense "involves not only delay but also a party's detrimental reliance on the status quo."[181]

To show unreasonable delay and a lack of diligence on the part of Stern, Bissonnette emphasized the fact that Stern "was well-known, well-respected, and had the means, ability, knowledge and skills to contact individuals and/or entities that could have assisted him in his quest."[182] Furthermore, Bissonnette argued that Stern did not exhibit sufficient diligence in his search because he failed to include a picture or any specific reference to the painting in question when attempting to locate his lost works.[183] Despite these arguments, Bissonnette conceded that "due diligence should not be measured at the point that the plaintiff learned of the location of the lost work, rather, it should be viewed through a 'totality of the circumstances' lens."[184]

Embracing the "totality of the circumstances" argument, the Stern Estate presented the court with the variety of diplomatic and personal mechanisms with which Stern attempted to locate and retrieve his lost painting.[185] Using extremely moving language, the Stern Estate specifically reminded the court that "[a]s early as 1948, Dr. Stern, who—thanks to the efforts of Nazi Germany—came to this continent as an impoverished refugee, worked through Canadian and British authorities to pursue recoveries."[186] The court seemed to understand the unique nature of this particular "totality of the circumstances" analysis, asking "whether efforts to locate the Painting were 'reasonable' in a 'contextual analysis' of the chaotic

events of World War II in Europe and the perverse actions of the Nazi regime as directed against the Jewish population of Germany and other European countries."[187] Using this question as a guide, the court found that "[b]ased on the particular times and the circumstances Dr. Stern faced, he took 'substantial and meaningful' steps to locate his paintings as quickly as he was reasonably and safely able to do so."[188] For example, it noted that because "the Nazi regime moved to divest Dr. Stern of the inventory in his gallery in gross…to require Dr. Stern to list every item lost in any attempt he made to locate the artwork would be unreasonable."[189]

Bissonnette made two arguments with regard to the prejudice aspect of her laches defense. First, "as a result of the claim, she [was] involved in protracted litigation that ha[d] disparaged her family name."[190] Second, "she ha[d] changed her position because, but for the claim, it is likely that she would have sold the painting and benefited from the sale."[191] In opposition to these arguments, and throughout the course of the litigation, the Stern Estate reiterated the notion that any such prejudice "is not the fault of any alleged delay in Stern Estate making its claim, but is due to [nature of] the claim itself."[192] Any "disparagement" stemmed directly from the fact that Bissonnette was in possession of a work previously owned by Stern, later purchased by her stepfather, a member of the Nazi party, and now subject to an ownership dispute in which Bissonnette conceded Stern's previous ownership. Similarly, the fact that she could not sell the work at auction was a direct consequence of the questionable title of the work itself. The District Court agreed, finding that any claimed prejudice "[did] not rise to the level of material prejudice [in order to invoke the defense of laches]."[193]

Recognizing the weakness of her prejudice argument at the district court level, or perhaps acting in anticipation of the appellate level ruling, Bissonnette presented, on appeal, an entirely new prejudice argument based on the notion that "potential witnesses and evidence [were] likely unavailable at this late date."[194] The Court of Appeals overtly questioned this "deeply flawed" argument that had now been presented to the court "without the slightest elaboration," and, before rejecting the substance of this "belated reference," noted that "the court of appeals [was] not a place in which a party should be allowed to pull a rabbit out of a hat" by presenting new legal arguments.[195] The court went on to assert that a successful laches defense "requires more than the frenzied brandishing of a cardboard sword," and instead requires sufficient evidence of unreasonable delay resulting in "a loss of evidence, the unavailability of important witnesses, the conveyance of property in dispute for fair market value to a bona fide purchaser, or the expenditure of resources in the reliance upon the status quo ante."[196]

In determining why Bissonnette presented an entirely new prejudice argument on appeal, it should be noted that the only other issue on appeal was the District Court's refusal to re-open discovery after Bissonnette retained new counsel in the case.[197] In fact, the Stern Estate noted that "Defendant Bissonnette has had no shortage of lawyers to advise her with regard to this lawsuit and related matters."[198] Although the Stern Estate does not provide specific details why Bissonnette retained multiple attorneys, it did note "differences with [the] defendant [that] had existed for 'several months.'"[199] Over the course of the lawsuit, Bissonnette retained at least four different attorneys in both the United States and Germany.[200] Although not critical to the substantive legal analysis, the fact that Bissonnette retained this number of attorneys may explain why her legal arguments changed over time. With regard to the prejudice argument, and in assenting to replacement counsel, the Stern Estate specifically requested that "these proceedings not be unreasonably delayed thereby, and that defendant be required to engage substitute counsel promptly to minimize any prejudice to the Plaintiff that may be caused by [the lawyer's] withdrawal."[201]

Another speculative explanation for her weak and fluctuating legal arguments may be that Bissonnette was focused predominantly on the restoration of her family name rather than possession of the painting for any monetary or other purpose. It is possible that Bissonnette believed by winning this suit, and therefore clearing the tainted title of the painting, Bissonnette would somehow be able to vindicate the name of her stepfather, Dr. Karl Wilharm, a man who "gave [her] everything,…[provided] a good education,…[and] treated [her] actually as his own daughter."[202] To this end, Bissonnette asked others to "understand [her] position" that "[her] father was not a Nazi,"[203] but "a physician, who had joined the Nazi party (as did many, at the time)."[204]

While one may argue that all members of the Nazi party were not inherently evil, but were instead individuals caught up in the chaos of the day, it has been noted that Wilharm "was anything but a young, confused man who thought the Nazis could help him out finding a job."[205] In fact, there are records showing that Wilharm joined the paramilitary force *Sturmabteilung* (SA) as a doctor in 1932, rented a factory on his property to the SA during the war, and participated in at least one instance of questionable Nazi activities when, in 1933, he allowed for Nazi prisoners to be kept on his property.[206] Following the war, Wilharm was arrested and detained for 16 months and was later tried and convicted of low-level crimes for which he was fined and sentenced to one day of reconstruction service.[207] At trial, Wilharm asserted that throughout the war he "continued to care for all people, even Nazi victims and foreign prisoners[,]…tried to keep a Jewish dentist from being kicked off a local medical board[,] and wanted to quit the SA."[208] Despite any hope that her parents' name would be cleared through this litigation, or any potential impact such a desire might have on the litigation process, neither Rhode Island court considered it when making its final determination.

After consideration of these newly developed legal arguments, the Court of Appeals agreed with the District Court's determination that "Dr. Stern and the Stern Estate had exercised reasonable diligence in searching for the Painting and…the defendant had not been prejudiced by any delay."[209] On November 18, 2008, the Court of Appeals affirmed the District Court's ruling, powerfully concluding that "a de facto confiscation of a work of art that arose out of a notorious exercise of man's inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles."[210]

VIII. Conclusion

The inherent value of a work of art may be based on many factors, including age, creator, previous owner, and aesthetics. To some, value may be based entirely on how much a work may be sold for. To others, the value of a work of art is highly contingent on the memories associated with that work. There is no greater example of the sentimental value of art than works once decorating the homes and galleries of those persecuted or killed during the Holocaust. To survivors and victims' heirs, a work of art may act as the only lasting memory of loved ones, their homelands, or simply happier times. To such individuals unable to differentiate the aesthetic and monetary value of a work of art from those memories the work may represent, the argument that a work of art is as valuable as a human life becomes ever more compelling. In such a situation, "[w]orks of art take on a level of meaning that is not simply about their value or meaning as works of art."[211] As such, there must be special consideration given to the various repatriation mechanisms available to those in search of works displaced during this period.

Few would deny the extremely sensitive and complex nature of any Holocaust-era repatriation claim and the number of individuals or institutions that may be affected by any such claim: the heir of the rightful owner who has a sentimental and legal connection to the work; the museum that displays the work; the good-faith purchaser or collector with little or no knowledge of the transactional history of the work; the individual who inherited the work and may now learn that his or her loved ones were directly or indirectly involved in suspected Nazi activity; the auction house that did not uncover any questionable provenance when researching the work before sale; and/or the public at large who may benefit from the public display of a painting that has changed hands once or numerous times over the last 50 years. From each perspective comes a different set of moral, legal, and ethical considerations that must be addressed both privately and publicly.[212]

The United States and the courts of its various states have failed to recognize the underlying characteristics of a Holocaust-era repatriation claim. Most individuals lack the knowledge, resources, and expertise necessary to locate displaced art. Expecting a survivor or heir to conduct an exhaustive and expensive search for Nazi-looted art, much of which is still unaccounted for, imposes too arduous a duty for those with little expertise in such matters. In some cases, survivors and heirs, particularly descendents of those who lost their lives during the Holocaust, may be entirely unaware that they have a rightful claim to a work of art. Information regarding stolen art is, in many cases, only recently becoming available through greater discovery, disclosure, and developing technologies and databases. Finally, and most importantly, there is historical evidence that the atmosphere in post-War Europe was such that claimants justifiably feared the adverse results of making such claims.[213] Still today, some individuals may not be prepared to confront the atrocities of their past.

There are some who have put forth additional arguments for an all-encompassing statute of limitations for Holocaust-era art repatriation claims: "[t]he world should let go of the past and live in the present[;]…we should not be overly obsessive about the worst of the past—[because] it is not useful either to individuals or society as a whole[;]…[e]ach person should invent him or herself creatively in the present, and not on the back of the lost wealth of ancestors."[214] Dismissing for a moment the underlying characteristics of a Holocaust-era repatriation claim already discussed, there exists a fundamental basis for embracing, rather than rejecting, the past in regard for the future:

> Just as man cannot live without dreams, he cannot live without hope. If dreams reflect the past, hope summons the future. Does this mean that our future can be built on a rejection of the past? Surely such a choice is not necessary. The two are not incompatible. The opposite of the past is not the future but the absence of future; the opposite of the future is not the past but the absence of past. The loss of one is equivalent to the sacrifice of the other.[215]

Regardless of why repatriation claims may have been delayed, there is no adequate reason to enforce unreasonable procedural barriers, such as a laches defense or the "discovery rule" in determining the statute of limitations, on those who are rightful owners of artwork displaced during the Holocaust. While scholars have argued the need for an international tribunal,[216] an international mediation/arbitration commission,[217] and/or legally binding international agreements,[218] in the absence and unlikely development of such mechanisms, the United States legislature must address the current barriers to repatriation that exist for an individual bringing suit in the United States.

The sale and purchase of art is an inherently risky business. With regard to the provenance of artwork, a good-faith purchaser must always bear the responsibility of researching and verifying the source of a work. There is

no adequate rationale for upholding a purchaser's rights to a work that was not purchasable. This is particularly true in the case of artwork displaced as a direct result of persecution during the Holocaust. Notwithstanding a formal and explicit waiver by the rightful owner of a work of art, United States courts should have the ability to address the merits of any such claim for repatriation. In sustaining the legal mechanisms precluding access to justiciability, the United States and its courts are blatantly ignoring reality and, more significantly, the rights of those who were subjected to the horrors and barbarism of the Holocaust.

Endnotes

1. *The Rape of Europa* (Menemsha Films 2006).
2. Julia Parker, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT'L & COMP. L. 661, 665 (2005).
3. Irena Klepfisz, Dreams of an Insomniac: Jewish Feminist Essays, Speeches and Diatribes 65 (1993).
4. *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D.C. R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. (R.I.) 2008).
5. David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul-LCA J. Art & Ent. L. 39, 40 (2004); Howard Spiegler, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century*, 16 CONN. J. INT'L L. 297, 298 (2001).
6. Wissbroecker, *supra* note 5.
7. Spiegler, *supra* note 5.
8. *Id.*
9. *Id.* at 299.
10. Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 553 (1999).
11. Lynn H. Nichols, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War 20 (1994).
12. David Roxan & Ken Wanstall, The Rape of Art 11 (1964).
13. Nichols, *supra* note 11, at 21-22; *see also* Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DePaul-LCA J. Art & Ent. L. 27, 30-31 (1999).
14. *See* Parker, *supra* note 2, at 668-70; Nichols, *supra* note 11, at 41-45.
15. *See* Pell, *supra* note 13, at 30-33.
16. *Id.* at 31.
17. *Id.* at 32.
18. *Id.* at 32-33.
19. Nichols, *supra* note 11, at 125.
20. *Id.*; Pell, *supra* note 13, at 34. Hitler also ordered the creation of the Kummel Report, a 300-page document that listed all major works of art that had been removed from Germany since 1500. Hitler ordered that all works listed in this document be located, seized, and immediately returned to Germany. *Id.*
21. Parker, *supra* note 2, at 670; Pell, *supra* note 13, at 34.
22. Andrew Adler, *Expanding the Scope of Museums' Ethical Guidelines With Respect to Nazi-Looted Art: Incorporating Restitution Claims Based on Private Sales Made as a Direct Result of Persecution*, 14 Int'l J. Cult. Prop. 57, 59-60 (2007). The Reich Chamber of Culture was an umbrella organization to which all artists and art dealers were required to join in order to produce, purchase, and/or sell works of art. Those excluded from membership included Jews, Communists, and, later, any individual whose product and style did not conform to the standards set forth by the Nazi leadership. Nichols, *supra* note 11, at 9.
23. Sacha Pfeiffer, *Artwork Lost to Nazis at Center of Legal Battle*, The Boston Globe, Sept. 10, 2006, at A1. For an account of a 1939 "Jewish auction" in Lucerne, Switzerland, see NICHOLS, *supra* note 11, at 3-5.
24. Adler, *supra* note 22, at 58. For example, in 1938, Hitler issued a decree declaring that the German government would not pay compensation for confiscated art. This decree created a widespread panic within which owners and dealers hastily sold their works in an effort to retain some value for that which was soon to be taken from them. Nichols, *supra* note 11, at 17.
25. Pell, *supra* note 13, at 37.
26. Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 Case W. Res. L. Rev. 87, 95 (1999). *See also* Nichols, *supra* note 11, at 327-67 (describing the work and challenges of the Monuments men); Seymour J. Pomrenze, First Director, Offenbach Archival Depot, Address at the Washington Conference on Holocaust-Era Assets: Personal Reminiscences of the Offenbach Archival Depot, 1946-1949: Fulfilling International and Moral Obligations (April 1999) (presenting a personal account of the work and challenges of the Monuments men).
27. Pell, *supra* note 13, at 37.
28. Wissbroecker, *supra* note 5, at 43.
29. *Id.*
30. Parker, *supra* note 2, at 674-75.
31. *Id.*; *See also* Schlegelmilch, *supra* note 26, at 95.
32. Valeriy D. Kulishov, Chief of the Office of Restitution, Department for the Preservation of Cultural Assets, Ministry of Culture, address at the Washington Conference on Holocaust-Era Assets: Plenary Session on Nazi-Confiscated Art Issues (April 1999). For an interesting discussion on the current state of art seized by the Soviet Union, see Toby Axelrod, *Loss and Return*, ARTNEWS, Oct. 2008, at 90.
33. Wissbroecker, *supra* note 5, at 43.
34. Hague Convention Respecting the Laws and Customs of War on Land art. 23(g), Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.
35. Kelly Ann Falconer, *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, 388 (2000); *see also* Leah J. Weiss, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 Cardozo Arts & Ent. L.J. 837, 845-47 (2007).
36. Weiss, *supra* note 35, at 845.
37. Falconer, *supra* note 35, at 389.
38. *Id.*
39. *See* Weiss, *supra* note 35, at 847-58.
40. Onimi Erekosima & Brian Koosed, *Intellectual Property Crimes*, 41 Am. Crim. L. Rev. 809, 856 (2004).
41. Falconer, *supra* note 35, at 389.
42. Erekosima & Koosed, *supra* note 40, at 856.
43. Falconer, *supra* note 35, at 389.
44. Erekosima & Koosed, *supra* note 40, at 856-57.
45. UNIDROIT, Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects—Signatures, Ratifications, Accessions, *available at* http://www.unidroit.org/english/implement/i-95.pdf (last visited April 11, 2010).
46. *Id.*
47. UNDROIT Convention on Stolen or Illegally Exported Cultural

Objects art. 3(3), June 24, 1995, 34 I.L.M. 1322.

48. Stuart E. Eizenstat, Concluding Statements at the Washington Conference on Holocaust-Era Assets (last visited January 31, 2010), *available at* http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_conc.html (last visited April 11, 2010).
49. Falconer, *supra* note 35, at 390.
50. Eizenstat, *supra* note 48.
51. *Id.*
52. *Id.*
53. Greg Bradsher, Research, Restitution, and Remembrance: The Federal Government and Holocaust-Era Assets 1996-2001, address before the B'Nai Israel Synagogue (Apr. 20, 2002), *available at* http://www.archives.gov/research/holocaust/articles-and-papers/federal-government-and-holocaust-assets-1996-2001.html.
54. Pub. L. No. 105-158, 112 Stat. 15 (1998).
55. Pub. L. No. 105-186, 112 Stat. 611 (1998).
56. Pub. L. No. 105-246, 112 Stat. 1859 (1998).
57. Pub. L. No. 105-158, preamble, 112 Stat. 15 (1998).
58. *Id.* at § 202.
59. *Id.* at § 101(b)(1).
60. *Id.* at § 102(b).
61. *Id.* at § 103(b).
62. Parker, *supra* note 2, at 686.
63. Statement of President William J. Clinton on Signing the Holocaust Victims Redress Act (Feb. 13, 1998), *available at* http://www.presidency.ucsb.edu/ws/print.php?pid=55479 (last visited April 11, 2010).
64. *Id.*
65. Pub. L. No. 105-186, 112 Stat. 611 (1998).
66. *Id.* at § 2(b)(1). For more information, see Presidential Commission on Holocaust Assets in the United States, http://www.pcha.gov (last visited April 11, 2010).
67. *Id.* at § 3(a)(1).
68. *Id.* at preamble.
69. Presidential Advisory Commission on Holocaust Assets, Plunder and Restitution: Findings and Recommendations of the Advisory Commission on Holocaust Assets in the United States and Staff Report (Dec. 2000).
70. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Hous. L. Rev. 193, 206 (2006).
71. Pub. L. No. 105-246, 112 Stat. 1859 (1998).
72. *Id.* at § 2(c)(1).
73. *Id.* at § 3(a)(2).
74. Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, Final Report to the United States Congress, 1 (2007), *available at* http://www.archives.gov/iwg/reports/final-report-2007.pdf (last visited April 11, 2010). Of the 8,422,637 documents found to be relevant, 8,399,599, or 99.7 percent, have been declassified. *See id.* at 44.
75. Pollock, *supra* note 70, at 208. "'Only [10] [Holocaust-related] suits were filed in American courts from 1945 to 1995,' and less than a handful of cases concerning looted art have been brought since World War II." *Id.*
76. Walton, *supra* note 10, at 578.
77. Black's Law Dictionary 1325 (8th ed. 2004).
78. Vanessa A. Wernicke, *The "Retroactive" Application of the Foreign Sovereign Immunities Act in Recovering Nazi Looted Art*, 72 U. Cin. L. Rev. 1103, 1104 (2004). Sovereign immunity was first established in the United States following the holding in *The Schooner Exchange v. McFaddon*, in which the court recognized the importance of immunity as a matter of "grace and comity." *Id.* at 1104-05 (discussing and quoting *Schooner Exchange v. McFaddon*, 11 (7 Cranch) 116, 132 (1812)).
79. *Id.* at 1106.
80. H.R. 271, 106th Cong. § 2 (1st Sess. 1999).
81. 28 U.S.C. §§ 1602-11.
82. Wernicke, *supra* note 78, at 1122.
83. 28 U.S.C. §§ 1604-05.
84. *Republic of Austria v. Altmann*, 541 U.S. 677, 685 (2004).
85. 28 U.S.C. § 1605(a)(3).
86. *Republic of Austria v. Altmann*, 541 U.S. at 694.
87. *Compare Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (favoring the retroactive application of the FSIA for Holocaust-era art repatriation claims), *with Carl Marks & Co. v. USSR*, 841 F.2d 26 (2d Cir. 1988) (denying retroactive application of the FSIA because it would defy settled expectations of immunity).
88. 541 U.S. 677 (2004).
89. *Id.* at 700.
90. Pollock, *supra* note 70, at 212.
91. *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (Brennan, J. dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 211-213, 217 (1962)).
92. *Baker*, 329 U.S. at 211.
93. *Id.*
94. *See id.* at 217.
95. *Id.*
96. *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 389 (D. N. J. 2001).
97. *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1118 (C.D. Cal. 2003).
98. *Baker*, 369 U.S. at 217.
99. Pollock, *supra* note 70, at 218.
100. *Frumkin*, 129 F. Supp. 2d at 387.
101. Pollock, *supra* note 70, at 219.
102. *Id.*
103. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).
104. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).
105. Pollock, *supra* note 70, at 221-22; *see, e.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 816 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 24 N.Y.2d 91 (1969).
106. *See, e.g.*, *Wolf v. Fed. Republic of Germany*, No. 93 C 7499, 1995 WL 263471, at 14 (N.D. Ill. May 1, 1995) (denying plaintiff standing under the act of state doctrine to sue the Republic of Germany for war reparations as provided by the Conference on Jewish Material Claims Against Germany); *see also* Pollock, *supra* note 70, at 221.
107. Walton, *supra* note 10, at 579.
108. Carla Schulz-Hoffman, Deputy General Director, Bavarian State Paintings Collection, Address at the Washington Conference on Holocaust-Era Assets: Break-out Session on Nazi Confiscated Art Issues: Principles to Address Nazi-Confiscated Art (April 1999).
109. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Willamette J. Int'l L. & Dispute Res. 243, 258 (2006).
110. *DeWeerth v. Baldinger*, 836 F.2d 103, 106 (2d Cir. 1987).
111. Spiegler, *supra* note 5, at 303.
112. Walton, *supra* note 10, at 579.
113. *Id.*

114. Spiegler, *supra* note 5, at 303-04.

115. *Id. See, e.g.*, *O'Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980); *Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784 (Ct. App. 1996); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 377 (1991); *Charash v. Oberlin Coll.*, 14 F.3d 291 (6th Cir. 1994); *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23, 1995), *aff'd*, No. 95-1807, 1996 U.S. App. LEXIS 14999 (3d Cir. May 7, 1996). For a discussion of these cases, see Ralph E. Lerner & Judith Bresler, Art Law: The Guide for Collectors, Investors, Dealers, and Artists 236-40 (1998).

116. Spiegler, *supra* note 5, at 305.

117. *See, e.g.*, *Orkin v. Taylor*, 2005 U.S. Dist. LEXIS 43321 (C.D. Cal. Apr. 20, 2005), *aff'd*, 487 F.3d 734 (9th Cir. 2007) (determining that because the ownership of the art had been public for several years, and because the plaintiffs were aware that the cause of action was time-barred, the limitations period had expired) *id.* at 742; *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (determining that the plaintiff should have made inquiry into the provenance of a disputed painting following Congressional hearings on Nazi-era artworks and other indicators that they may have possessed a right to a work of art stolen during the Holocaust) *id.* at 807; *Detroit Inst. of Arts v. Ullin*, 2007 U.S. Dist. LEXIS 28364 (E.D. Mich. 2007) (determining that previous claims made by the original owner was adequate evidence that the heirs to the property should have been able to recover the stolen painting) *id.* at *10.

118. 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 24 N.Y.2d 91 (1969).

119. *Id.* at 806-07.

120. *Id.* at 809.

121. *Id*.

122. *DeWeerth*, 836 F.2d at 106-07.

123. *See, e.g.*, *id.* at 107.

124. Walton, *supra* note 10, at 581.

125. 77 N.Y.2d 311 (N.Y. 1991).

126. *Id.* at 318.

127. *Id.* at 320.

128. *Id.* at 315.

129. Falconer, *supra* note 35, at 409.

130. In addition to New York, Connecticut and South Carolina are among the "two or three other states" that have applied the "demand and refusal" requirement for establishing the starting point of the statute of limitations period. W. Page Keeton *et al.*, Prosser and Keeton on the Law of Torts 94 (5th ed. 1984).

131. 2005 U.S. Dist. LEXIS 43321 (C.D. Cal. Apr. 20, 2005), *aff'd*, 487 F.3d 734 (9th Cir. 2007).

132. *See generally*, Karen Gullo, *Liz Taylor Declared Owner of Van Gogh: Suit Claimed Nazis Forced Sale in 1939*, WASH. POST, May 19, 2007, at C3; Linda Greenhouse, *Elizabeth Taylor to Keep Van Gogh*, N.Y. Times, Oct. 30, 2007, at E0; Bob Egelko, *Elizabeth Taylor to Keep Van Gogh*, S.F. Chron., May 19, 2007, at B1.

133. *Orkin*, 487 F.3d at 737.

134. *Id.*

135. *Id.* at 738.

136. *Id.* at 741-42.

137. *Toledo Museum of Art*, 477 F. Supp. at 804; Detroit Inst. of Arts, 2007 U.S. Dist. LEXIS at *4.

138. *Toledo Museum of Art*, 477 F. Supp. at 804-05.

139. *Toledo Museum of Art*, 477 F. Supp. at 805; *Detroit Inst. of Arts*, 2007 U.S. Dist. LEXIS at *5. *See also* Arabella J. Yip & Ronald D. Spencer, *Untouched by Nazi Hands, but Still…*, WALL ST. J., Feb. 28, 2008, at D6, *available at* http://online.wsj.com/public/article_print/SB120416063008298329.html (last visited April 11, 2010).

140. *Toledo Museum of Art*, 477 F. Supp. at 809; *Detroit Inst. of Arts*, 2007 U.S. Dist. LEXIS at *12. For a detailed discussion of *Toledo Museum of Art v. Ullin*, see Andrew Adler, *supra* note 22, at 61-63.

141. *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D.C. R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir.(R.I.) 2008).

142. Arthur Gold & William Coulson, *The Nuremberg War Crimes Trials: 60 Years Later*, Chicago Bar Ass'n Record, Feb./Mar. 2006, at 40, *available at* http://gcjustice.com/PDF-Law-Chicago/The%20Nuremberg%20War%20Crimes%20Trials.pdf (last visited April 11, 2010).

143. Ray Henry, *Painting Dispute Raises Specter of Nazi Past*, USA TODAY, Feb. 02, 2008, *available at* http://www.usatoday.com/news/world/2008-02-02-painting_N.htm (last visited April 11, 2010).

144. *Id.*

145. *Id.*

146. *Vineberg*, 548 F.3d at 53; Henry, *supra* note 143.

147. *Vineberg*, 548 F.3d at 53.

148. Pfeiffer, *supra* note 23. For an account of a 1939 "Jewish auction" in Lucerne, Switzerland, see NICHOLS, *supra* note 11, at 3-5 (1994).

149. *Vineberg*, 529 F. Supp. 2d at 303.

150. *Id.*

151. *Id.*; Henry, *supra* note 143.

152. Henry, *supra* note 143.

153. *Vineberg*, 548 F.3d at 53.

154. *Id.*

155. From 1945 to 2003, the painting was unpublished and unexhibited, save a local exhibition that took place in Kassel, Germany in the 1950s. Stern Estate's Reply in Support of Its Motion for Summary Judgment, *Stern Estate v. Bissonnette*, 529 F.Supp.2d 300 (D.C. R.I. 2007) (No. 06-211), 2007 WL 4768103 (D.R.I.), at 6 [hereinafter Stern Estate's Reply].

156. *Id.*

157. *Vineberg*, 548 F.3d at 53. For more information about Dr. Max Stern, his gallery and private collection, and the repatriation efforts for his displaced artwork, see generally Max Stern Art Restitution Project, http://maxsternproject.concordia.ca/ (last visited January 31, 2010).

158. Melissa Eddy, *Jewish Estate Shows 2 Paintings Originally Stolen by the Nazis*, Huffington Post, Dec. 10, 2008, *available at* http://www.huffingtonpost.com/2008/12/10/jewish-estate-shows-2-pai_n_150018.html (last visited April 11, 2010).

159. *Vineberg*, 529 F. Supp. 2d at 303-04.

160. Defendant Maria-Louise Bissonnette's Memorandum in Support of Her 12(b) Motion to Dismiss and/or For Stay, *Stern Estate v. Bissonnette*, 529 F.Supp.2d 300 (D.C. R.I. 2007) (No. 06-211), 2006 WL 4055804 (D.R.I.), at 1 [hereinafter Bissonnette's Memorandum in Support of Her 12(b) Motion]; Henry, *supra* note 143.

161. *Vineberg*, 529 F. Supp. 2d at 304.

162. Henry, *supra* note 143. In the letter to Bissonnette, the HCPO intermediary seemed to recognize the delicate nature of the upcoming legal battle by stating "I am sure that you will also agree that there are moral considerations in this case." *Id.*

163. *Vineberg*, 529 F. Supp. 2d at 303-04, 307.

164. Yip & Spencer, *supra* note 139; Ray Henry, *RI Woman Loses Appeal in Nazi-Era Art Lawsuit*, Nov. 19, 2008, *available at* http://www.cfhu.org/node/573 (last visited April 11, 2010).

165. *See* Bissonnette's Memorandum in Support of Her 12(b) Motion, at 1-2.

166. *Id.*

167. *Id.* at 4-5.

168. *Id.* at 6-7.

169. *Vineberg*, 529 F. Supp. 2d at 304. In asserting jurisdiction, the court found that "[t]he named Plaintiffs are trustees of the Stern Estate and are citizens of Canada. Defendant is a citizen of the state of Rhode Island. Defendant does not dispute the parties' citizenship nor does she dispute that the amount in controversy exceeds $75,000. An exercise of this Court's diversity jurisdiction is, therefore, proper." *Id.*

170. Defendant, Maria Louise Bissonnette's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, *Stern Estate v. Bissonnette*, 529 F.Supp.2d 300 (D.C. R.I. 2007)(No. 06-211), 2007 WL 4768102 (D.R.I.), at 2 [hereinafter Bissonnette's Memorandum in Opposition Summary Judgment].

171. *See generally id.*

172. Stern Estate's Reply, at 8.

173. *See generally id.* at 8-10.

174. *Id.* at 8 (citing *Claflin v. Gurney*, 17 R.I. 195, 187, 20 A. 932, 933 (R.I. 1890); *Goodbody & Co., Inc. v. Parente*, 358 A.2d 32 (R.I. 1976)).

175. *Id.* at 9.

176. *Id.* at 10.

177. *Vineberg*, 529 F. Supp. 2d at 305-06.

178. According to the District Court opinion, Bissonnette also failed to develop, and therefore waived, defenses of collateral estoppel and *res judicata* in connection with this case. *Id.* at 306 n.10.

179. *Vineberg*, 548 F.3d at 55-58.

180. Bissonnette's Memorandum in Opposition Summary Judgment, at 2.

181. *Vineberg*, 548 F.3d at 56 (citing *Adam v. Adam*, 624 A.2d 1093, 1096 (R.I. 1993)).

182. Bissonnette's Memorandum in Opposition Summary Judgment, at 3.

183. *Vineberg*, 529 F. Supp. 2d at 309.

184. Bissonnette's Memorandum in Opposition Summary Judgment, at 3 (citing *Houle v. Collatos*, No. 77-1295, 1982 U.S. Dist. LEXIS 10693 at *12 (D. Mass. Feb. 2, 1982)).

185. Stern Estate's Reply, at 6.

186. *Id.* at 7.

187. *Vineberg*, 529 F. Supp. 2d at 309.

188. *Id.* at 310.

189. *Id.* at 309.

190. *Id.* at 311.

191. *Id.*

192. Stern Estate's Reply, at 7.

193. *See Vineberg*, 529 F. Supp. 2d at 311 (citing *Junkins v. Spinnaker Bay Condo. Ass'n*, 2002 Ohio 872, 2002 WL 337780 at *12 (Ohio Ct. App. 2002)).

194. *Vineberg*, 548 F.3d at 57.

195. *Id.*

196. *Id.* at 57-58.

197. *See id.* at 54-55.

198. Plaintiff's Objection to Motion to Modify Pretrial Order, *Stern Estate v. Bissonnette*, 529 F. Supp. 2d 300 (D.C. R.I. 2007) (No. 06-211), 2007 WL 4768100 (D.R.I.), at 3 n.1.

199. *Id.*

200. *Id.*

201. *Id.* at 3-4.

202. Henry, *supra* note 143.

203. *Id.*

204. Bissonnette's Memorandum in Support of Her 12(b) Motion, at 1.

205. Henry, *supra* note 143.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Vineberg*, 548 F.3d at 54.

210. *Id.* at 58-59.

211. Robin Cembalest, *The Trouble With Placing Time Limits on War-Loot Claims*, ARTNews, Mar. 2009, *available at* http://theartlawblog.blogspot.com/search?q=nazi (last visited April 11, 2010).

212. The Jewish Museum Berlin, as part of a recent exhibition, "Looting and Restitution: Jewish-Owned Cultural Artifacts from 1933 to the Present," created an epilogue activity titled "What Would You Decide" in which visitors to the museum are asked to weigh various interests when confronted with a Holocaust-era art repatriation claim. Basing their choices on "about 300 real-life cases," the creators present the visitor with genuine scenarios in which "[n]o one is the bad guy…but it is a bad situation." *See* Cembalest, *supra* note 212; *see also* Jewish Museum Berlin, What Would You Decide?, http://www.jmberlin.de/raub-und-restitution/en/spiel.html (last visited January 31, 2010).

213. Spiegler, *supra* note 5, at 305.

214. Sir Norman Rosenthal, *The Time Has Come for a Statute of Limitations,* Art Newspaper, Nov. 12, 2008, *available at* http://www.theartnewspaper.com/article.asp?id=16627 (last visited April 11, 2010).

215. Elie Wiesel, Nobel Lecture (Dec. 11, 1986), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html (last visited April 11, 2010).

216. *See generally* Jennifer Anglim Kreder, *Reconciling Individual and Group Justice With the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 Brooklyn L. Rev. 155 (2007).

217. *See generally* Pell, *supra* note 13.

218. *See generally* Falconer, *supra* note 35.

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