ART AS A WEAPON♦

INTRODUCTION

Imagine being content in your career, enjoying your financial freedom, and being able to pursue your love for the fine arts with your hard-earned wealth. You begin collecting pieces of considerable value—sculptures, jewelry, paintings—and grow your private collection with works from renowned and obscure artists alike. This is your life dream, as the child of art aficionados, and this is precisely what you have worked so hard your entire life for.

One morning, you open a letter from the attorney of an individual claiming to be the descendant of the rightful owner of one of your most prized paintings. He demands for its return on the grounds that it was stolen from his family during the Holocaust. Naturally, you have an attachment to this piece (especially after paying such a large sum for it, which you were willing to fork over because of the subject's resemblance

to your wife) but now question whether or not you even have good title, despite purchasing it from a reputable Manhattan gallery. Moreover, you are mortified by the thought of the potentially violent history behind the gorgeous piece hung in the living room where you watch old film noirs every Saturday night with your wife and cat, war being the last thing on anyone's mind. The thought of someone else loving the painting just as much as you, only to have it stolen in such a horrific way, fills you with sadness and guilt. You also wonder if it is even possible for this person, generations removed from the original owner, to claim superior ownership rights to *your* painting over *seventy years* after the war has ended. The legality of your own actions and those of the gallery creep into your mind, even though you had no idea that you were purchasing a potentially stolen painting, and the gallery surely would not have sold you something like that. Whose fault is it really? What do you do now?

Contrast this point of view to that of the grandson of a Holocaust victim—a victim who happened to be quite a lover of the arts himself. You lost many of your ancestors, most tangible memories of your family from that era, and virtually all hope of ever having the opportunity to see your grandfather's beloved art collection—all to World War II atrocities. That is, until one day, as you sip your morning cold brew before going about your life as usual, you stumble upon an article on a *very* expensive painting sold at the gallery across town. You immediately recognize the image pictured as one of the paintings your family spoke of when reminiscing about your grandfather's lost art collection. Your heart drops and the anger sets in, knowing that the painting rightfully belongs in your family, and that it is one of the last tangible links to the grandfather you always wished you had known. Should you say something to the purchaser? If so, should you retain counsel first? *Can you even afford a lawyer?* Is it possible that you still have property rights to the painting after all this time? There certainly have been others in your situation, and some have actually succeeded in having their art returned. You believe that, despite the complications, it is still worth a shot, at least for the sake of honoring your grandfather's memory and what you assume he would have wanted if he were here now.

These starkly contrasting scenarios demonstrate the complex interests at stake in claims for the restitution of stolen art, only further complicated by the sensitive context in which these issues arise. The precise extent of the damage done to families, property, and culture as a whole because of unfathomable Holocaust atrocities will likely never be known. Lingering effects of this systematic wartime plunder have been felt by victims, their families, and art-lovers alike across borders. Be it cultural or pecuniary grievances, the looting of art under Adolf Hitler's oppressive regime has had complicated legal ramifications stretching

well into the present, though most Holocaust survivors have now passed. Questions frequently arise regarding how the law, morality, and ethics interact on this topic, and whether they should be far more intertwined than they are presently.

Why exactly is it so difficult to simply return stolen, beloved property to genocide victims? It would seem like common sense. At least, one ought to consider ways to somehow make amends to a group who has been made to suffer in such a notoriously heinous fashion. However, considering the interests of parties involved in these transactions—such as good faith purchasers and beneficiaries (perhaps completely unaware of their possession of viciously stolen property)—can shed a much different light on that question. Unfortunately, the law is not always centered around morality, whether or not it should be in the face of war, genocide, stolen property, and priceless artifacts. This fact, along with legal principles that militate issues such as the passage of time, duties of involved parties, and loss of evidence, has shaped the way victims have been made to suffer the residual effects of the Holocaust long after the end of World War II.

This Note analyzes how property rights can shift during wartime, in addition to examining the question of whether or not they should. Part I examines the historical background underlying government-organized art theft and the looting and destruction of cultural property, including contributing ideological factors, how restitution efforts have developed over time, and the legal landscape governing the outcomes of proceedings involving stolen art and antiquities. Part II analyzes the ramifications of these legal developments, particularly how the law has affected victims' property rights and answered to the lingering effects of the Holocaust. Further, Part II compares the laws addressing Holocaust-era art claims to treaties governing the ongoing crisis of ISIS-looted cultural property. Part III proposes five reform factors for the newly-implemented HEAR Act to take into consideration in order to allow victims the broadest opportunity to seek restitution: (1) the shifting of the due diligence analysis onto the current possessor of afflicted art, (2) the complete removal of the Act's federal statute of limitations, (3) alternatively, the substitution of a more favorable demand and refusal rule, (4) providing attorneys' fees for claimants, and (5) the removal of the Act's sunset provision. Additionally, this Note advocates for the similar removal of the 1995 UNIDROIT Convention's three-year statute of limitations and fifty-year window from the time of the theft for cultural property restitution claims, or alternatively, the substitution of a demand and refusal rule. These fair improvements would allow for a far more lenient legal landscape that incorporates more robust ethical and moral considerations, which appear to have been long neglected when victims (the individual, the institution,

or the state) of war and conflict are involved. All things considered, a final overarching question remains as to whether, in this context, the law and its largely symbolic developments have only succeeded in sweeping the past and the lessons to be learned from it under the rug—all the while adding insult to injury.

I. BACKGROUND

Hitler's endeavor to destroy an entire culture is critical context for the ancillary legal disputes. Art, regardless of the medium, not only showcases the inner lives of those who share it with society, but ultimately chronicles human achievement. It undoubtedly can be controversial, and not all will appreciate it, but art nonetheless evokes a dialogue that all can benefit from, regardless of political, religious, or social affiliations. It is near unimaginable that anyone would seek to destroy something so beneficial, even if they did want it all for themselves. And yet, that is precisely what occurred under the Third Reich,[1] and priceless art, culture, and history took the fall as a result of an attempt to make an extremist cultural reform.

A. *Degenerate Art, Aryanization, and Government-Organized Theft*

It is estimated that the Nazi Party stole as much as one-fifth of all artwork in Europe in the decade leading up to 1945.[2] This highly organized and determined governmental effort aimed not only to deprive individuals and institutions of priceless cultural artifacts, but to eradicate any art subjectively deemed to be "degenerate."[3] Hitler failed to succeed as an art student himself—perhaps offering further insight into an obsession with looting and destroying art; he sought to rid Germany of

[1] "Meaning 'third regime or empire,' the Nazi designation of Germany and its regime from 1933-[19]45." *Third Reich*, TCHR.'S GUIDE TO HOLOCAUST, https://fcit.usf.edu/holocaust/DEFN/third.htm [https://perma.cc/35EP-B72K].

[2] Sophie Gilbert, *The Persistent Crime of Nazi-Looted Art*, ATLANTIC (Mar. 11, 2018), https://www.theatlantic.com/entertainment/archive/2018/03/cornelius-gurlitt-nazi-looted-art/554936/./ [https://perma.cc/88KU-AF49]. "Under the leadership of Adolf Hitler . . . , the National Socialist German Workers' Party, or [the] Nazi Party, grew into a mass movement and rule[d] Germany through totalitarian means from 1933 to 1945." *Nazi Party*, HIST. (Nov. 9, 2009), https://www.history.com/topics/world-war-ii/nazi-party [https://perma.cc/ Z76N-EKAN]. The Nazi Party "promoted . . . anti-Semitism, and expressed dissatisfaction with the terms of the Treaty of Versailles, the 1919 peace settlement that ended World War I and required Germany to make numerous concessions and reparations. After Germany's defeat in World War II . . . , the Nazi Party was outlawed and many of its top officials were convicted of war crimes related to the murder of [approximately] 6 million European Jews during the Nazis' reign." *Nazi Party*, *supra*.

[3] Emily A. Maples, *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look at Art Stolen During the Third Reich*, 9 TULSA J. COMP. & INT'L L. 355, 358-60 (2001), https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1008&context=tjcil [https://perma.cc/F24R-UZHQ].

all modern and abstract works, as well as any works by Jewish artists, works depicting Jews, and works that could somehow be construed as critical of Germany or his regime.[4] This was effectively an attempt to erase the history, culture, and ultimately the legitimacy of the Jewish people, along with anyone else deemed to be inferior to the Aryan race or in conflict with Hitler's ideologies.[5]

Among the vast numbers of artistic styles labeled degenerate were works depicting forms of Dadaism, Futurism, Cubism, Expressionism, and Impressionism, and even those by prominent artists, including Van Gogh and Picasso.[6] Art created during the Weimar Republic[7] particularly angered Hitler, so much so that he began closing art schools soon after rising to power in 1933.[8] Pieces were stolen from national collections and, in 1937, many were publicly displayed in Munich as propaganda of what type of art was no longer acceptable.[9] Despite being a display of "degenerate" work, two million people were drawn to the exhibition, where Hitler proclaimed the end of such distaste and degeneracy.[10] Additional contributing ideologies that may have motivated this widescale art looting operation were matters such as the sense of victimization prevalent in Germany post-World War I, but Hitler's overall scheme aimed to reform Germanic culture to his liking through propaganda, obliteration of anything contrary to Nazi values, and fear-mongering.[11]

The looting of public institutions was justified by Hitler's regime with a 1938 retroactive law stating that degenerate art could be taken by the Reich without any compensation whatsoever.[12] While some of this art

4 *Id.*

5 *See generally* Mark V. Vlasic & Helga Turku, *Protecting Cultural Heritage as a Means for International Peace, Security and Stability: The Case of ISIS, Syria and Iraq*, 49 VAND. J. TRANSNAT'L L. 1371, 1373-74 (2016) ("Obliterating cultural heritage allows the enemy to orphan future generations and severely damage their understanding of who they are as a people. Degrading victims' histories diminishes their cultural prominence among the world community and decrease the wealth of knowledge of the world as a whole.").

6 Maples, *supra* note 3, at 358; *see* Anne Rothfeld, *Nazi Looted Art*, NAT'L ARCHIVES (2002), https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html [https://perma.cc/962K-E9RH].

7 The German government from 1919 to 1933. *Weimar Republic*, HIST. (Dec. 4, 2019), https://www.history.com/topics/germany/weimar-republic [https://perma.cc/3TQL-EDMY]

8 Rothfeld, *supra* note 6.

9 *Id.*; *see* Maples, *supra* note 3, at 358; *see also* Gilbert, *supra* note 2; *see also Art in Time of War: Pillage, Plunder, Repression, Reparations & Restitution*, HARV. L. SCH.: ART L. [hereinafter *Art in Time of War*], http://www.law.harvard.edu/faculty/martin/art_law/war.htm#looting [https://perma.cc/4RV5-WMKA].

10 Jackie Mansky, *Why It's So Hard to Find the Original Owners of Nazi-Looted Art*, SMITHSONIAN.COM (May 31, 2017), https://www.smithsonianmag.com/arts-culture/why-its-so-hard-find-real-owners-nazi-looted-art-180963513 [https://perma.cc/3X48-2YNJ].

11 Rothfeld, *supra* note 6; *see* Maples, *supra* note 3; *see also* Vlasic & Turku, *supra* note 5.

12 *Art in Time of War*, *supra* note 9.

was sold at auction to fund Nazi war efforts or traded for more acceptable works, it is estimated that approximately five thousand were simply burned as a "fire department training exercise" for the Berlin central fire station.[13] Art that was deemed to properly portray Nazi ideology was confiscated for Hitler's elaborately planned *Führermuseum* in his hometown of Linz, Austria, which Hitler intended to turn into a cultural center to match that of Vienna.[14] Other pieces were taken for Reichsmarschall Hermann Göring's personal collection—a massive monument to himself that arguably rivaled Hitler's own obscene collection.[15] Art considered worthy of such collections was hidden in castles or mines to protect the works from bombing raids and the elements.[16] The Altaussee salt mine in Styria, Austria, alone contained over 12,500 works of art, including Michelangelo's *Madonna and Child*.[17] In 1945, Hitler's Nero Decree included the order for the destruction of art and other valuables, with the attitude that if he could not have it all, no one else could either.[18]

Göring played a key role in establishing the *Einsatzstab Reichsleiter Rosenberg* (ERR), a highly organized Nazi agency charged with the duty of confiscating primarily Jewish art collections, or possessions of "undesirable" individuals.[19] This agency was initially established for anti-Semitic research purposes through the looting of synagogues, libraries, archives, and all cultural property contained therein, but soon after developed into the Reich's primary art confiscating machine.[20] The ERR was based in the Jeu de Paume Museum in Paris from 1940 to 1944, and had an astonishingly detailed system of inventorying the stolen art, which went so far as to include photographs and family names.[21] Over twenty-one thousand objects, from more than two hundred Jewish-owned collections, were ultimately confiscated by the ERR alone.[22]

After public institutions had been looted and following the occupation of Austria, Hitler turned to private collections to satiate his unyielding desire for any art he could find.[23] Initially, Jews throughout

13 Maples, *supra* note 3, at 360; *see* Gilbert, *supra* note 2; *see also* Mansky, *supra* note 10.
14 Rothfeld, *supra* note 6.
15 *Id.*
16 *Id.*; *see* Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473 (2010).
17 Gilbert, *supra* note 2.
18 Peter Campbell, *Why Hitler Stole Art*, MEDIUM (Apr. 11, 2014), https://medium.com/@peterbcampbell/why-hitler-stole-art-2136f1f54e77 [https://perma.cc/YE3X-YMG6].
19 Rothfeld, *supra* note 6; *see* Maples, *supra* note 3, at 359; *see also Art in Time of War*, *supra* note 9.
20 Maples, *supra* note 3, at 359; *see also* Rothfeld, *supra* note 6.
21 Rothfeld, *supra* note 6.
22 *Id.*; *see* Maples, *supra* note 3, at 359.
23 Maples, *supra* note 3, at 358.

Europe were required to file a "declaration" listing their valuable property, which Nazis would in turn use to confiscate and sell.[24] Many art collectors were forced to sell their prized possessions in order to escape Nazi territory, though often they did not ever see the funds from their sales due to Nazis holding the money in blocked accounts.[25] These forced sales were carried out in numerous ways, be it by families having no choice but to sell their valuables (often significantly under market value because of Nazi-appointed appraisers) in order to raise funds to flee, by the excessive taxes, penalties, and fines imposed, or by coercion and duress.[26] Art abandoned by Jews given no choice but to leave their property behind when fleeing or taken to concentration camps was quickly confiscated and declared property of the Reich.[27] Jews throughout most of Europe were labeled as "stateless" and stripped of their property rights while the Gestapo[28] specifically sought out their valuables.[29]

B. *Restitution Efforts*

Perhaps the most notable of U.S. recovery efforts during the War is the creation of the Monuments, Fine Arts, and Archives Program (colloquially known as the "Monuments Men") by the Allied armies.[30] In 1945, the Monuments Men were responsible for the discovery of the many caves and mines used as illicit storage facilities for looted art, such as the aforementioned Altaussee salt mine and another in Merkers concealing extensive amounts of gold.[31] After these major discoveries, the property was transported to central storage areas under U.S. occupation to begin the daunting task of returning the works to their rightful owners.[32] Despite highly organized and well-documented efforts, the task of returning the stolen property proved to be a truly massive undertaking due to the immense scale of the theft, and many works were never found or did not ultimately make it home to their rightful owners.[33] Because of the seemingly impossible scope of the mission, art was often

24 Rebecca E. Hatch, *Litigation Under Common Law for Recovery of Nazi Looted Art* (2015), *in* 141 AM. JURIS. TRIALS 189, Westlaw (database updated Aug. 2019).
25 *Id.*
26 *Id.*
27 Maples, *supra* note 3, at 358; *see* Hatch, *supra* note 24.
28 *Gestapo*, LEXICO.COM, https://www.lexico.com/en/definition/gestapo [https://perma.cc/872N-XF6L].
29 *See* Rothfeld, *supra* note 6.
30 Gilbert, *supra* note 2.
31 Anne Rothfeld, *Nazi Looted Art, Part 2*, NAT'L ARCHIVES (2002), https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-2.html [https://perma.cc/TT9Z-UNRP].
32 *Id.*
33 *Id.*

returned to its country of origin rather than to specific owners.[34] This created a whole new set of issues, with some countries addressing restitution differently than the U.S. might have, and laws governing property rights varying considerably across borders.[35]

Although nearly seven hundred thousand works of art have been returned to rightful owners or their heirs, many still remain unaccounted for or shrouded in secrecy in private collections.[36] Unfortunately, due to the time that has passed since the thefts, their widespread geographic scope, and the typically underground nature of transactions dealing with stolen property (let alone extremely valuable art), many of these works may never be seen again. Returning these pieces to their rightful owners is further complicated by a plethora of issues—tracking the works' provenance,[37] heirs being unaware of what is actually missing from their family assets, the mystery of what was systematically destroyed by the Nazis, and jurisdiction-specific legal principles. While it might seem morally and ethically obvious that art stolen from Holocaust victims should be returned to their families, fierce legal disputes arise between victims and those claiming superior ownership rights.[38] The emotions art and stolen property evoke, the large sums exchanged in the industry, and the cultural value treasured by institutions and private collectors alike all complicate the matter for both plaintiffs and defendants.

C. *History Repeats Itself: ISIS-Looted Cultural Property*

This "cultural cleansing," and even the concept of an organized art looting system, has not been limited to World War II or the Nazi regime;[39] the Islamic State of Iraq and Syria (ISIS) has similarly taken part in the theft and destruction of valuable artifacts. From destroying important archaeological sites, such as monuments and temples, as propaganda, to looting in order to fund terrorist activity, ISIS' actions are eerily reminiscent of Nazi Germany.[40] It is suspected that, in addition to funding terrorism, ISIS may even utilize part of this revenue, typically generated

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34 *Art in Time of War*, *supra* note 9.

35 *Id.*

36 Cleve R. Wootson Jr., *A painting stolen by Nazis is up for auction – despite a Jewish family's demand for its return*, WASH. POST (Apr. 24, 2017, 2:36 PM), https://www.washingtonpost.com/news/worldviews/wp/2017/04/24/a-painting-stolen-by-nazis-is-up-for-auction-despite-a-jewish-familys-demand-for-its-return/?noredirect=on&utm_term=.76d5680794a9 [https://perma.cc/KTY3-ZLBX].

37 From the French word *provenir*, meaning "to come from." Mansky, *supra* note 10.

38 *See* Reif v. Nagy, 80 N.Y.S.3d 629, 630-31 (Sup. Ct. 2018), *aff'd*, 106 N.Y.S.3d 5 (App. Div. 2019); *see also* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 427 (N.Y. 1991).

39 *See* Vlasic & Turku, *supra* note 5, at 1374; *see also* Benoit Faucon et al., *The Men Who Trade ISIS Loot,* WALL STREET J. (Aug. 6, 2017, 7:28 PM), https://www.wsj.com/articles/the-men-who-trade-isis-loot-1502017200.

40 *See* Vlasic & Turku, *supra* note 5, at 1374, 1378; *see also* Faucon et al., *supra* note 39.

from the sale of looted artifacts to Western dealers and collectors, to fund the populations it attempts to win over, and pay its members' salaries in order to compensate for losses in oil revenue.[41] These priceless artifacts, rich with history, include ancient bibles, statues, jewelry, and coins, among a variety of other things.[42]

It is expected that many of these looted and smuggled antiquities will turn up for sale in the years to come, much like what has occurred with Nazi-looted art.[43] A unique occurrence of this trafficking is the falsification of provenance records to further obscure the disturbing reality of the artifacts' origins.[44] Traffickers have been known to use typewriters to create false certificates of ownership, or move pieces from dealer to dealer in order to create a "fake paper trail."[45] This leads to an even more complex issue with litigation, as the provenance of a piece is crucial to the outcome of such cases. The theft and destruction of art have been shown to have an extensive history and widescale use as forms of systematic warfare, thereby necessitating entire bodies of law to address not only the humanitarian issues involved, but the now muddled property rights of victims in the path of destruction.[46] How effective these principles of art, property, and international law have been in combatting such crises is another inquiry, in addition to what a feasible restitution solution would look like in situations involving countries overrun with political instability.[47]

In a 2017 civil case initiated by the U.S., Hobby Lobby settled for $3,000,000 after purchasing thousands of artifacts overseas, such as ancient cuneiform tablets and clay bullae, which were found to have been smuggled out of Iraq.[48] According to the complaint, the artifacts were "displayed informally . . . spread on the floor, arranged in layers on a coffee table, and packed loosely in cardboard boxes, in many instances

41 Vlasic & Turku, *supra* note 5, at 1375; *see* Emma Green, *Hobby Lobby Purchased Thousands of Ancient Artifacts Smuggled Out of Iraq*, ATLANTIC (July 5, 2017), https://www.theatlantic.com/politics/archive/2017/07/hobby-lobby-smuggled-thousands-of-ancient-artifacts-out-of-iraq/532743/ [https://perma.cc/SFB7-5DK7]; *see also Nazi Party*, *supra* note 2; *see also* Faucon et al., *supra* note 39.

42 Faucon et al., *supra* note 39.

43 *See id*.

44 *See id.*

45 *Id.*

46 The destruction and looting of cultural property during wartime is often a legal issue that crosses international borders. *See* Vlasic & Turku, *supra* note 5, at 1391-94 (discussing international treaties on cultural property, such as the Hague 1954 Convention, the UNESCO 1970 Convention, the UNESCO 1972 Convention, and the UNIDROIT 1995 Convention); *see also* David W. Bowker et al., *Confronting ISIS's War on Cultural Property*, AM. SOC'Y INT'L. L. (July 14, 2016), https://www.asil.org/insights/volume/20/issue/12/confronting-isis-war-cultural-property [https://perma.cc/C7NG-BSJZ] (discussing three UN Security Council Resolutions adopted to address the ongoing "cultural property crisis" in Iraq and Syria).

47 *See* Bowker et al., *supra* note 46.

48 Green, *supra* note 41; *see* Faucon et al., *supra* note 39.

with little or no protective material between them" at the time Steve Green, president of Hobby Lobby, purchased them in the United Arab Emirates.[49] The sale went forward despite the red flags and contrary advice of an expert consultant, and the artifacts were subsequently shipped to the U.S. in packages labeled "Tiles (Sample)."[50] Although the company argued they were "new" to this type of acquisition and "did not understand" the process, the combined facts of the scale of antiquities theft in Iraq, the bizarre circumstances of the sale, the questionable manner of payment, and the glaring customs violations speak for themselves.[51] The Green family, who owns the craft-supply chain, is known to be a collector of ancient antiquities, as well as the primary contributor behind the Museum of the Bible in Washington, D.C.[52]

D. *Legal Background*

The law governing transactions and restitution involving art and antiquities is comprised of basic property law principles, time-sensitivity defenses, and international treaties addressing the residual effects of war. Although the combination of these various doctrines should ideally be enough to either prevent these situations or address disputes effectively, litigation often ends with unfavorable outcomes for claimants due to technical formalities.

1. Categories of Property; Obtaining Good Title

Under common law, found or unclaimed property can be categorized as either lost, mislaid, treasure trove, or abandoned.[53] How property is categorized plays a significant role in determining ownership rights in situations where a missing item falls into the hands of a new individual. "Lost" property is defined as "property which the owner has involuntarily parted with through neglect, carelessness, or inadvertence."[54] An example of this could be a bracelet falling off in a train station due to a loose clasp. "Mislaid" items are "[those] which [are] intentionally put into a certain place and later forgotten."[55] The situation differs slightly from lost property; for example, a wallet placed on a store

49 Green, *supra* note 41.
50 *Id.*
51 *Id.*
52 *Id.*
53 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* §§ 13-16, Westlaw (database updated Aug. 2019); *see, e.g.*, Grande v. Jennings, 278 P.3d. 1287, 1290-91 (Ariz. Ct. App. 2012).
54 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 13, Westlaw (database updated Aug. 2019); *see Grande*, 278 P.3d at 1290-91. For example, pursuant to the above definition of lost property, a bracelet laying on the side of the road could be classified as "lost."
55 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 15, Westlaw (database updated Aug. 2019); *see Grande*, 278 P.3d at 1290. An example of a "mislaid" item would be a wallet, intentionally placed on a store counter, that was simply forgotten by the owner.

counter by an individual who forgot to retrieve it on his way out would be classified as mislaid. Property labeled "treasure trove" is typically hidden and quite valuable, and where the owner is unknown or highly unlikely to ever be discovered because of the property's age.[56] A typical example of treasure trove is ancient gold coins buried in the earth. The fourth category, "abandoned" property, refers to property that has been "thrown away, or was voluntarily forsaken by its owner."[57] A clock tossed in the trash set out on a curb would be considered abandoned, as there would be an assumption that the owner is not coming back for it.

Although this system of categorization is not wholly determinative in situations of artistic ownership involving wartime theft, it is useful in considering the status of property no longer in the original owner's possession. This system has been used by courts to determine whether a finder is entitled to keep an item, or if it should be returned to a claimant coming forward to reclaim their right to possession.[58] Perhaps most relevant of these distinctions for this analysis is abandoned property, which raises the consideration of individuals forced to flee and leave their valuables behind during wartime. Despite this legal characterization and its implications, defendants attempting to claim abandonment as a defense will face great difficulty when the property was abandoned due to threat, coercion, pressure, misapprehension, or in fleeing from an enemy, in which cases the property will not qualify as abandoned.[59] In *Menzel v. List*, the court rejected the defendants' abandonment argument where the plaintiff and her husband had left their Chagall painting behind when fleeing their apartment in Brussels:

> [P]ersonal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited. The relinquishment here by the Menzels in order to flee for their lives was *no more voluntary than the relinquishment of property during a holdup* . . . . If the seizure is to be classified at all, it is to be classified as *plunder and pillage*, as those terms are understood in international and military law.[60]

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56 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 16, Westlaw (database updated Aug. 2019); *see Grande*, 278 P.3d at 1291. One example of property that falls within the category of "treasure trove" is gold coins that are buried beneath the ground.

57 *See Grande*, 278 P.3d at 1291.

58 *See, e.g.*, Menzel v. List, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).

59 Hatch, *supra* note 24.

60 *Compare Menzel*, 267 N.Y.S.2d at 810-11 (emphasis added) ("*Pillage*, or *plunder*, on the other hand, is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful . . . . Where pillage has taken place, the title of the original owner is not extinguished." (internal citations omitted)), *with* Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (holding that, where the former owners sold a Picasso painting for

These circumstances were typical of art left behind by Holocaust victims, who often had no other choice when the struggle to survive was a daily reality and of the utmost importance. Although these categories of property carry minor weight in this particular analysis of ownership rights, they nonetheless do not fully address property that is blatantly stolen, as was most art during World War II.

A general tenet of U.S. property law is that one can only sell or transfer the rights that they have or have the right to sell or transfer.[61] Section 2-403(1) of the Uniform Commercial Code (UCC) provides: "A purchaser of goods acquires all the title which his transferor had or had power to transfer. . . ."[62] Section 2-403(1) further differentiates between void title and voidable title and the validity of transfers that can occur under each.[63] Void title accompanies stolen property, and if it is then sold by the thief, the purchaser, bona fide or otherwise, likewise does not obtain good title.[64] Unlike void title, voidable title (in situations, for example, involving deceit or a bad check) gives a seller with title defects the ability to transfer title to a good faith purchaser for value.[65] Section 2-403(1) defines the "good faith purchaser" as one who acts "with 'honesty in fact' and in accord with 'reasonable commercial standards of fair dealing.'"[66] These principles are critical in the context of looted art because the property often exchanges hands many times to "good faith" purchasers over an extended period of time, although the seller typically did not have good title to transfer in the first place. Many purchasers are, in fact, what one would perhaps colloquially consider good faith, and the proposition that the art for which they just wrote a massive check is stolen property comes as an unpleasant shock. This leads to the question of how to possibly balance the equities and protect the rights of both the true owner and the subsequent purchaser, as well as the issue of who is truly to blame when these lawsuits arise, perhaps decades after the property was initially stolen.

significantly under value to finance their escape, there was no requisite duress caused by the defendant), *aff'd*, 938 F.3d 186 (2d Cir. 2019).

61 U.C.C. § 2-403(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977); *see* Reif v. Nagy, 80 N.Y.S.3d 629, 632 (Sup. Ct. 2018), *aff'd*, 106 N.Y.S.3d 5 (App. Div. 2019).

62 U.C.C. § 2-403(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

63 *Id.*

64 *See id.*

65 *Id.*

66 *Id.* § 2-403(2).

2. Adverse Possession, Statute of Limitations, and Laches

Adverse possession allows a possessor of property owned by someone else to acquire title under certain circumstances.[67] Although specific requirements vary across jurisdictions, under common law generally five elements must be established: The possession must be (1) hostile and under claim of right, (2) actual, (3) exclusive, (4) continuous, and (5) open and notorious, for the statutory time period.[68] The true owner of the dispossessed property can reclaim their rights before another takes title through adverse possession, but only has a limited time in which to do so.[69] The elements serve to put the true owner on notice of the usurping of their property rights.[70] The goal of adverse possession is to clear and settle title disputes;[71] it is not intended to reward a thief or trespasser, but rather to punish the negligent owner who allows others to exercise dominion over their property, and to protect consequential reliance interests.[72] The doctrine has been traditionally used in disputes over title to land, but has also been extended to chattel.[73] With regard to chattel (especially valuable art), the elements of adverse possession become much more complex, and questions arise in particular regarding how to address the "open and notorious" requirement.[74]

Reynolds v. Bagwell discussed this "open and notorious" element in an action for replevin to recover a stolen violin.[75] In considering whether the claim was barred by the state's two-year statute of limitations, the court also examined whether or not the violin had been concealed, which would have prevented the statute of limitations' accrual.[76] The violin, purchased in good faith for the defendant's daughter's violin lessons, remained mostly in the family's home, and made outside appearances solely for the purpose of traveling to and from the lessons.[77] The court reasoned that, because the violin's minimal appearances were not

67 Eric M. Larsson, *Acquisition of Title to Property By Adverse Possession*, 142 AM. JURIS. PROOF FACTS 3D 349, Westlaw (last updated Sept. 2019).
68 *Id.* § 3; *see* O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980).
69 Larsson, *supra* note 67, § 1.
70 *Id.* § 3.
71 *Id.* § 2
72 *Id.*
73 *See O'Keeff*e, 416 A.2d at 870.
74 *See id.* at 870-71 ("Other problems with the requirement of visible, open, and notorious possession readily come to mind. For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor. The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed.").
75 Reynolds v. Bagwell, 198 P.2d 215, 216 (Okla. 1948).
76 *Id.* at 217.
77 *Id.*

inconsistent with the typical use of a violin, such outside exposure, albeit limited, did not constitute an act of concealment and, therefore, satisfied the open and notorious element of adverse possession.[78] Despite this reasoning, the court left open the possibility of finding concealment where the violin's varnish had been removed, drastically changing its appearance.[79] If this type of "concealment" had not occurred after the statute of limitations had already run, the case might have turned out differently for the claimant.[80]

Working in conjunction with adverse possession, the statute of limitations and laches, both related to the passage of time, are often raised as affirmative defenses by defendants in conversion and replevin actions in which the defendant is a good faith purchaser.[81] Under U.S. common law, title to stolen property cannot pass until the statute of limitations has run.[82] The statute of limitations has been applied differently across jurisdictions, with most states applying a "discovery rule," while others utilize a "demand and refusal rule."[83] These rules refer to when the statute of limitations begins to run; application of either can yield drastically different outcomes.[84] For example, under the discovery rule, the statute of limitations begins to accrue when the original owner knows (or reasonably should know) the individual or entity to sue, and typically requires the original owner to do their "due diligence" in making these determinations.[85]

O'Keeffe v. Snyder outlined the discovery rule in the Supreme Court of New Jersey in 1980.[86] The property at issue in the replevin action was three Georgia O'Keeffe paintings the artist had noticed missing from an exhibit in 1946.[87] Importantly, the paintings had not initially been reported missing to either law enforcement or the public at large;[88] it was not until 1972 that the theft was reported to a stolen art registry.[89] In 1975, O'Keeffe learned of the whereabouts of the paintings, and finally, in 1976, she demanded their return.[90]

78 *Id.*
79 *Id.*
80 *Id.*
81 Graefe, *supra* note 16, at 480.
82 *Id.* at 481.
83 *Id.* at 481-82; *see generally* Menzel v. List, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).
84 Graefe, *supra* note 16, at 481.
85 *Id.* at 482-83; *see* O'Keeffe v. Snyder, 416 A.2d 862, 874 (N.J. 1980).
86 *O'Keeffe*, 416 A.2d at 865.
87 *Id.*
88 *Id.* at 865-66.
89 *Id.* at 866.
90 *Id.*

The case raised two key issues: (1) when O'Keeffe's cause of action had accrued, and (2) whether or not it was ultimately time-barred by New Jersey's six-year statute of limitations.[91] The court, upon applying the discovery rule, determined that the cause of action had accrued when O'Keeffe "first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the current possessor of the paintings."[92] The case was then remanded to determine whether O'Keeffe had actually done her "due diligence," by considering factors such as methods available at the time of the theft and whether her actions would suffice to put a reasonably prudent purchaser on notice of potential title defects.[93] Regarding the application of the discovery rule, the court reasoned that the typical issues arising from the elements of adverse possession are only amplified in the art community: "Like many kinds of personal property, works of art are readily moved and easily concealed . . . . The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner."[94] Although the court's analysis is clear in light of the facts (consider the thirty-year gap between the time the art was discovered to be missing and the time its return was demanded), the discovery rule would prove problematic for many claimants of Holocaust-era art.

Under the slightly less stringent demand and refusal rule, the statute of limitations instead begins to run when the original owner makes a demand for the return of their property and is refused by the new possessor.[95] Unlike states applying the discovery rule, states that adopt this rule do not require a showing of "due diligence" on the part of the claimant.[96] Another influential dispute involving stolen art, *Solomon R. Guggenheim Foundation v. Lubell*, demonstrated a New York court's refusal to adopt a discovery rule.[97] In that case, the Guggenheim Museum sought to recover a Chagall gouache that was believed to have been stolen in the 1960s by a mailroom employee.[98] Lubell was a good faith purchaser who had obtained the painting for $17,000 from a gallery in 1967, and then displayed the painting in her home for over twenty years.[99] Although the Guggenheim had become aware of the missing painting by the end of the 1960s, it did not inform other museums, galleries, or organizations of the theft, and did not even inform law enforcement—

91 *Id.* at 868.
92 *Id.* at 870, 873.
93 *See id.* at 870.
94 *Id.* at 870, 872.
95 Graefe, *supra* note 16, at 483.
96 *Id.* at 484.
97 Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 426 (N.Y. 1991).
98 *Id.* at 427.
99 *Id.* at 427-28.

claiming that if it had, it would have only pushed the art further underground and greatly diminished the possibility of its recovery.[100] The museum did not make a demand for its return until 1986, which Lubell refused.[101] The issue before the court was whether the Guggenheim's failure to take certain steps to locate the painting was relevant to the accrual of the statute of limitations.[102]

Although Lubell argued that the museum had a duty to use reasonable diligence to recover the stolen painting and, as such, was barred from recovery by the three-year statute of limitations, the court rejected this argument and held that the only relevant factors in assessing the statute of limitations were the timing of the Guggenheim's demand for the painting's return and Lubell's refusal—the "demand and refusal rule."[103] No duty of due diligence would be imposed upon original owners of stolen artwork for purposes of the statute of limitations.[104] In the court's discussion of why New York rejected the discovery rule, it reasoned that the demand and refusal rule afforded more robust protection to rightful owners of stolen property:[105]

> [T]he facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence . . . . In light of the fact that members of the art community have apparently not reached a consensus on the best way to retrieve stolen art, it would be particularly inappropriate for the Court to spell out arbitrary rules of conduct that all true owners of stolen art work would have to follow to the letter if they wanted to preserve their right to pursue a cause of action in replevin . . . . The value of the property stolen, the manner in which it was stolen, and the type of institution from which it was stolen will all necessarily affect the manner in which a true owner will search for missing property . . . . To place the burden of locating stolen artwork on the true owner and to foreclose

100 *Id.* at 428.
101 *Id.* at 427-28.
102 *Id.* at 427.
103 *Id.* at 429 ("New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value. There is a three-year Statute of Limitations for recovery of a chattel. The rule in this State is that a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. Until demand is made and refused, possession of the stolen property by the good-faith purchase for value is not considered wrongful." (internal citations omitted)).
104 *Id.*
105 *Id.* at 430 ("[T]he Governor expressed his concern that the [vetoed] statute[, which would have implemented a discovery rule in actions for recovery of art objects brought against certain not-for-profit institutions,] '[did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished.' The Governor also stated that . . . the bill, if it went into effect, would have caused New York to become a 'haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.'").

> the rights of that owner to recover its property if the burden is not met would, we believe, encourage illicit trafficking in stolen art (internal citations omitted).[106]

Similarly, the laches defense is used by defendants asserting that a plaintiff's unreasonable delay in bringing an action was prejudicial to the defendant.[107] This defense also calls into question the original owner's diligence in locating their stolen property, and can likewise lead to their loss of property rights.[108] In theory, the laches defense is a solution to the possible difficulties that may arise for a defendant after a plaintiff has waited an excessive period of time before bringing a claim, including the potential loss of evidence and witnesses.[109]

3. The Law Governing Cultural Property

The looting of art during wartime is far from limited to the World War II context, with artifacts of every variety being subjected to theft and destruction on an international scale.[110] Thus, the international community has revisited the issue repeatedly through the years and developed principles to aid with the complications that arise when stolen artifacts cross national boundaries. The law governing looted cultural property somewhat differs from and strays beyond the private property rights discussed above, and is instead dominated primarily by international cooperation efforts. Cultural property is broadly defined by the 1954 Hague Convention as "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history . . . archaeological sites . . . works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives . . . ."[111]

Notable legal developments arose with the first protocol of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which broadly stated that "'[d]amage to cultural property belonging to any people whatsoever' is internationally

106 *Id.* at 430-31.
107 Graefe, *supra* note 16, at 486.
108 *Id.* at 487.
109 *Id.* at 488.
110 *See generally* Ho-Young Song, *International Legal Instruments and New Judicial Principles for Restitution of Illegally Exported Cultural Properties*, 4 PENN ST. J.L. & INT'L AFF. 718 (2016), https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1145&context=jlia [https://perma.cc/BE97-W7M9].
111 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention], https://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf [https://perma.cc/MNY8-CYFX].

recognized as 'damage to the cultural heritage of all mankind.'"[112] The second protocol was implemented in 1999, introducing heightened protection for cultural properties "of very great importance," as well as advocating for the punishment of certain severe violations of the Convention, such as theft and pillage.[113]

Building off prior development, the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property required nations joining UNESCO to regulate the trade of cultural property.[114] Thus, the law further endeavored to promote international cooperation in confronting this widescale cultural problem.[115] The United States became a state party to UNESCO in 1983.[116] Issues with the uniformity and force of these international agreements (the UNESCO Convention was not self-executing) were addressed with the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention.[117] This enactment complemented the UNESCO Convention by creating principles for establishing uniformity among states' private laws, and conversely was self-executing so that its provisions could be applied as governing law.[118] Thus far, the UNIDROIT Convention has allowed for the strongest condemnations of this illicit activity.

Most recently, in 2017, Resolution 2347 of the United Nations Security Council was unanimously adopted, which "*condemns* the unlawful destruction of cultural heritage, [including] inter alia [the] destruction of religious sites and artefacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives, and other sites, in the context of armed conflicts, notably by terrorist groups."[119] The Resolution places particular emphasis on the illicit trafficking of cultural property and its use in the funding of terrorist activity.[120] Further, it notably affirms that "directing unlawful

112 Catherine Fiankan-Bokonga, *A historic resolution to protect cultural heritage*, UNESCO (Oct.–Dec. 2017), https://en.unesco.org/courier/2017-october-december/historic-resolution-protect-cultural-heritage [perma.cc/8ESL-YBU5].

113 *Id.*

114 William G. Pearlstein, *White Paper: A Proposal to Reform U.S. Law and Policy Relating to the International Exchange of Cultural Property*, 32 CARDOZO ARTS & ENT. L.J. 561, 564 (2014), https://www.culturalheritagelaw.org/resources/Pictures/Pealstein.White%20Paper.pdf [https://perma.cc/AL4C-67MZ].

115 *Id.*

116 *Id.* at 565.

117 *See* Song, *supra* note 110, at 732, 739.

118 *Id.* at 733, 739.

119 S.C. Res. 2347, ¶ 1 (Mar. 24, 2017) [hereinafter Resolution 2347], https://undocs.org/pdf?symbol=en/S/RES/2347(2017) [https://perma.cc/S8AJ-7GKY].

120 Fiankan-Bokonga, *supra* note 112.

attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances and pursuant to international law a war crime . . . ."[121]

Restitution provisions in the 1954 Hague Convention provide for the return of cultural property to the "competent authorities" of the occupied territory at the end of hostilities.[122] The 1970 UNESCO Convention contains provisions compelling state parties to undertake, "at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned . . . ."[123] Regarding the rights of good faith purchasers, the UNESCO Convention provides that the requesting State compensate an "innocent purchaser" or one who has valid title.[124] This state compensation allows for some relief for the current possessor, who may have to relinquish property for which they likely expended a large sum.

The 1995 UNIDROIT Convention, which focused more on domestic laws and the rights of individuals, further elaborated on these ideas to facilitate restitution, with "[s]tates commit[ting] to a uniform treatment for restitution of stolen or illegally exported cultural objects and allow[ing] restitution claims to be processed directly through national courts."[125] The restitution provisions of the UNIDROIT Convention allow claimants to demand the return of unregistered or privately owned cultural property, and provide for the *compulsory* return of such property, regardless of the good faith of purchasers.[126] The UNIDROIT Convention contains limitations on the time claimants have to demand return—as seen with the statute of limitations and laches defenses raised in litigation—and again requires compensation for good faith purchasers.[127]

121 Resolution 2347, *supra* note 119, ¶ 4.

122 Song, *supra* note 110, at 730.

123 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 7(b)(ii), Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 Convention], https://treaties.un.org/doc/Publication/UNTS/Volume%20823/v823.pdf [https://perma.cc/8M6D-89M4].

124 *Id.*

125 *The 1995 UNIDROIT Convention*, UNESCO, http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1995-unidroit-convention/ [https://perma.cc/4G74-YG8D]; *see* UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention], https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf [https://perma.cc/ H58W-7ZMJ]; *see also* Song, *supra* note 110, at 738-39.

126 Song, *supra* note 110, at 734.

127 *See id.*

4. Legal Developments in Holocaust-Era Art Claims

Although it has been a largely uphill battle for Holocaust victims and their families to regain their stolen property, legal developments over the years have at least symbolically recognized the inherent unfairness victims face in legal proceedings and attempted to reform the complicated legal landscape. The effect of many of these developments, however, is questionable, and truly significant progress has not been seen until very recently.

In 1998, the Holocaust Victims Redress Act was passed, providing that "[a]ll governments should undertake good faith efforts to facilitate the return of private and public property . . . 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."[128] Additionally, the Washington Conference Principles on Nazi-Confiscated Art (the "Principles"), adopted in 1998, were endorsed by forty-four governments, including the United States.[129] Regarding Nazi-confiscated art that has not been restituted, the Principles state that "consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era."[130] Although adamant in condemning past injustices, these developments did not provide meaningful relief to claimants seeking restitution, who continued to face the same technical legal obstacles.

Most recently and remarkably, President Obama signed into law the Holocaust Expropriated Art Recovery (HEAR) Act as of December 2016.[131] This law, in addition to adopting both the Principles and the Holocaust Victim Redress Act, addresses the difficulties victims encounter across jurisdictions with procedural technicalities that have historically time-barred reasonable restitution claims. The HEAR Act most importantly created a uniform six-year federal statute of limitations for art lost due to Nazi looting, and established a discovery rule that includes knowledge of both the identity of the current possessor and location of the missing art—preempting the state law statute of limitations varieties, discovery rules, and demand and refusal rules.[132]

128 Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15, 17-18 (1998), https://www.congress.gov/105/plaws/publ158/PLAW-105publ158.pdf [https://perma.cc/384C-62NL]; *see* Reif v. Nagy, 80 N.Y.S.3d 629, 633 (Sup. Ct. 2018), *aff'd*, 106 N.Y.S.3d 5 (App. Div. 2019).

129 *Reif*, 80 N.Y.S.3d at 633.

130 *Id.* (citing U.S. Dep't of State, Bureau of European and Eurasian Affairs, Washington Conference Principles on Nazi-Confiscated Art ¶ 4 (1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ [https://perma.cc/FA4S-XJXD]).

131 Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) [hereinafter HEAR Act], https://www.congress.gov/114/plaws/publ308/PLAW-114publ308.pdf [https://perma.cc/367V-CLTN].

132 *Id.* § 5.

The statute of limitations changes are in effect until December 31, 2026, after which time the governing law will revert back to state principles.[133] This legislation provides victims with a clearer federal standard for the time in which they have to bring their cause of action, while allowing a more ample timeframe to obtain crucial information surrounding the property before their time in court runs out. The six-year timeframe also accounts for the good faith purchaser, and attempts to strike a fair balance between both parties' claims to the stolen property.

A landmark 2018 ruling by the New York Supreme Court put this legislation into action with a major victory for Holocaust victims and their heirs.[134] In *Reif v. Nagy*, the plaintiffs (heirs of Franz Friedrich "Fritz" Grunbaum, a Jewish cabaret performer, prominent art collector, and vocal Nazi critic living in Austria) brought an action for replevin and conversion for two works by Egon Schiele, *Woman in a Black Pinafore* and *Woman Hiding her Face.*[135] Grunbaum was arrested in 1938 and murdered in the Dachau concentration camp in 1941.[136] Nazis coerced him into executing a power of attorney to his wife so that she could complete Jewish property declarations while he was at Dachau.[137] Many years later, Nagy, a professional art dealer, claimed good title to the Schiele works derived from Grunbaum's sister-in-law, who had sold many pieces to a gallery in Switzerland.[138] The gallery advertised the Schiele works for sale in 1956.[139] The plaintiffs eventually discovered the stolen works at Nagy's booth at the Park Avenue Armory in New York City in November of 2015.[140] Their attorney promptly made a demand for the return of the art, which Nagy refused.[141]

Nagy raised many defenses, among them laches, good faith acquisition, the statute of limitations, and adverse possession.[142] The court rejected all his asserted defenses, reasoning that a thief cannot convey good title, and applying the newly implemented HEAR Act.[143] Although it found that the plaintiffs' action would have been timely under the three-year statute of limitations regardless, the court also addressed how the new federal legislation would apply:

133 *Id.* § 5(g).
134 *Reif*, 80 N.Y.S.3d at 637.
135 *Id.* at 631.
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.*
140 *Id.* at 635.
141 *Id.*
142 *Id.*
143 *Id.* at 632, 635.

> [T]he HEAR Act expanded the timeliness for actions to recover Nazi-looted artwork to six years from "the actual discovery by the claimant" of the "identity and location of the artwork" and of "a possessory interest of the claimant in the artwork[."] Congress has also instructed that actions brought within six years will be timely, "[n]otwithstanding any defense at law relating to the passage of time[."] Although defendants argue that the HEAR Act is inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue. Since plaintiffs discovered the Artworks in November of 2015, their action is timely under the HEAR Act. The statute of limitations and laches defenses fail.[144]

The court solidified its reasoning with general property law doctrines, stating that "New York protects the rightful owner's property where that property had been stolen, even if the property is in the possession of a good faith purchaser for value" and "title remains with the original owner or his heirs absent a valid conveyance of the works."[145]

II. RAMIFICATIONS OF LEGAL DEVELOPMENTS

A. *Implications of the HEAR Act*

The HEAR Act and the clarity and uniformity it provides for claims arising in this area, over seventy years after the end of World War II, is long overdue. Had the Act been in place decades ago, the outcome of many cases lost due to technical procedural bars could have been vastly different, being decided instead on their merits. Troubling though this may be, the significance of this federal recognition is nonetheless important in light of the aftermath of the Holocaust, which survivors are still contending with today.

Even under New York's more lenient demand and refusal rule, potentially meritorious claims have been dismissed as time-barred. For example, in *Grosz v. Museum of Modern Art*, the court underwent a lengthy discussion of when exactly the applicable three-year statute of limitations began to accrue, and what actually constituted "refusal" on the defendant's part to return three George Grosz paintings to the artist's son and daughter-in-law.[146] Because the plaintiffs brought suit just several months outside of the three-year window, their claims for declaration of title, replevin, and conversion were all dismissed.[147] Situations like this exemplify the relatively simple technicalities that

144 *Id.* at 635 (internal citations omitted).
145 *Id.* at 634 (internal citation omitted).
146 Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 476 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x. 575 (2d Cir. 2010).
147 *Id.* at 476, 488.

come into play with more complicated communications, misunderstandings, and arguably unfair dealing between parties, which in turn can affect how claimants choose to pursue a cause of action. The result is often injustice for what could have been a perfectly reasonable, and perhaps successful, claim.

Reif v. Nagy demonstrates that with the HEAR Act's enactment, similar claims going forward are likely to be approached in this new, claimant-friendly manner. However, while it will allow more claimants their day in court and the opportunity to have their voices heard, not all lost cases came down to simply missing a deadline. Many courts have dismissed claims with the additional discussion of "due diligence," construing the facts as more or less demonstrating that the plaintiffs "should have known." The circumstances of the theft coupled with the procedural expectations from the plaintiff have historically worked alongside the statute of limitations to unjustly bar restitution claims. Although the HEAR Act partially remedies one time-related obstacle, it may not fully address all the factors that have notoriously defeated meritorious claims.

B. *Lessons to be Learned?*

While the spoils of war are neither uncommon nor limited to a specific period in time, the parallels between the widescale art theft during World War II and the present-day looting and destruction of cultural property by ISIS are nonetheless eerie. As more of this stolen property comes to light in the coming years, there is much to be gained by considering how Holocaust-era art has been addressed by the law, how the law has erred in this respect, and what sort of ramifications these legal principles will yield for claimants and society as a whole in the future. Although art as private property and art as cultural property differ in some respects, there is enough of an overlap with the ongoing issue of property ownership in wartime to examine how legal developments will affect all such artifacts. As the looting and destruction of cultural property continues, and there is potential for another wave of similar claims to arise in the very near future, a proactive approach taking into account the effects of these legal developments is necessary to prevent claims from becoming far more complicated than they have to be.

The 1995 UNIDROIT Convention has multiple benefits and disadvantages for property rights and restitution claims as compared to the private property laws governing Holocaust-era art. First, the UNIDROIT Convention imposes time constraints on such restitution claims, similar to what is seen in the law directly governing claims for looted Holocaust-era art: three years to bring a claim from the time the claimant knew of the location of their stolen property and the identity of

the possessor (a discovery-type rule), and fifty years from the time of the initial theft.[148] The beneficial effects of these time constraints are slim in the grand scheme of the issue. Compared to the federal six-year statute of limitations under the HEAR Act, the three-year limitation here seems quite insufficient to achieve truly equitable resolutions. Further, as seen with Nazi-looted art, claims are surfacing over seventy years after the end of World War II and will likely continue for many years to come as stolen art, often very well concealed, eventually comes to light. These seemingly random discoveries are perhaps due to advances in technology and record-keeping, or the eventual changing of hands of private collections that have remained in families for generations; however, it is unknown and quite unpredictable what the future will hold with regard to long-lost art potentially making an appearance. The fifty-year limitation under the UNIDROIT Convention (subject to some exceptions) thus is an insufficient timeframe for these claims to be resolved. Considering the difficulties the statute of limitations and discovery rules have imposed on the restitution of Nazi-looted art, the UNIDROIT Convention could improve considerably in this respect.

Conversely, the UNIDROIT Convention contains strong language regarding restitution, when it is permitted. The Convention provides for compulsory restitution of cultural property that has been stolen, regardless of whether or not the possession can be considered good faith.[149] These provisions employ far stronger language than what has been seen in claims over Nazi-looted art, which have been subjected to the laches defense and discussions of the good faith of the current possessor. This is a major benefit for victims, and something to be taken into consideration with federal legislation such as the HEAR Act. Because there is a fine line between cultural property and privately-owned art, a question is raised as to why the same principles should not apply in both respects—both types of property have immense artistic value, and their looting is often motivated by the same goals of destroying a culture and disenfranchising a population. Requiring the compulsory return of all such art would send a powerful message of the value our society places on culture as a whole, and intolerance toward those who seek to disrupt it.

Third, while the UNIDROIT Convention provides for the compensation of good faith purchasers for value where stolen property must be returned, it imposes strong limitations with regard to the actions of the current possessor.[150] Unlike what is seen with Nazi-looted art

148 UNIDROIT Convention, *supra* note 125, at 2.
149 *Id.*
150 *Id.* at 3.

claims, the Convention places particular importance on the *due diligence* of the *possessor*, rather than the original owner, to address whether or not the acquisition was in fact good faith. It also imposes these due diligence requirements on those who receive cultural artifacts through donation or inheritance.[151] This is perhaps one of the Convention's strongest provisions for victims, and another crucial factor for federal legislation to emulate. Because it can often be difficult for original owners and their heirs to conduct their "due diligence" under the law to locate and retrieve their stolen property, especially after already falling prey to war, it appears far more sensible to impose this burden—to seriously take into consideration the provenance and history of art sought for acquisition—upon purchasers and beneficiaries of art. Current possessors are often in a much better position, especially financially, to make these complicated assessments as compared to victims. When balancing the rights of the original owners and the rights of good faith possessors, recognizing the reality of each party's access to this crucial information can considerably affect the analysis. This attribute of the UNIDROIT Convention is, notably, quite progressive.

Overall, the international principles governing the looting, destruction, and trafficking of cultural property have been considerably stronger in condemning such actions and attempting to make amends to victims as compared to the developments in the law directly governing the restitution of Holocaust-era art. While these international recognitions are quite beneficial for the future of these claims and will hopefully allow for better outcomes in cases that may arise with ISIS-looted property, they do not resolve the issues that continue to loom over the long-fought battles over Holocaust-era art. The recent enactment of the HEAR Act is a major success for Holocaust survivors, but it still does not contain such robust condemnations, guidelines, and remedies that may be the key to resolving the issue (to the best of our ability) once and for all.

III. PROPOSAL FOR PROACTIVE REFORM

Although the law in this area, both with respect to Holocaust-era art and looted cultural property, appears to be trending in a new, positive direction for claimants, complications derived from wartime-looted art cannot be completely addressed by simply extending the statute of limitations, as seen in recent federal legislation. While the ultimate goal of such claims is the restitution of the stolen property to its original owners, their heirs, institutions, or deprived nations as a whole, there remains the issue of these claims arising at all, and the attendant difficulty

[151] *Id.*

of fairly resolving such disputes once they arise. This difficulty is accentuated by time passed, shoddy records, and the often intensely contrasting interests of the parties involved. War and the crimes that accompany it are largely outside the control of anyone involved in resolving these disputes today; it is understandable how, in 2019, conflicts either long-passed or occurring in places too distant to occupy the minds of everyday citizens are not always the focal point of art transactions. But, at the very least, everyone can help avoid furthering the complications by practicing their own due diligence.

When speaking of due diligence, the law has historically focused on the claimant in many jurisdictions: Did they make a great enough effort to retrieve their art? Did they wait too long? Shouldn't they have known? Will these facts prejudice the defendant? While this may be how property laws are generally applied, in the context of wartime, the property of genocide victims, and antiquities looted for terrorist regimes, it seems largely unfair and borderline offensive to be making these inquiries at all. In other scenarios, the law does not place this sort of blame onto the victim when a crime has been committed against them. It seems reasonable enough that after such traumatizing events, tracking down Grandpa's missing art collection might not be at the top of the to-do list for many. Moreover, recent advances in technology may be the only way survivors of such events ever could have found their property again. Before the proliferation of these more sophisticated methods of record keeping in the art community, people might have completely lost hope in ever seeing the art again, or have not even known that they were missing something so valuable in the first place. And despite this, tracking this information down is still a daunting task today—many would not even know where to begin.

Because of crucial advances in technology and the sheer amount of time we have had to learn about events such as the Holocaust, it could be said that the world has been put on fair notice that this could be a lingering problem with art and antiquities. It is time to hold purchasers and beneficiaries of all such artifacts to the same due diligence standard that has been unfairly imposed upon claimants, and for anyone purchasing, trading, or acquiring art to take on more responsibility. Regardless of whether or not an individual is an art dealer or subject matter expert, transactions involving such expensive works of art and priceless cultural artifacts suspected to be from a part of the world engaged in conflict must involve the due diligence of the close examination of provenance records. Anything less is deliberate avoidance,[152] especially on the part of someone who often has the significant benefit of being considered "good

[152] *See* discussion *supra* Section I.C.

faith" under the law. These negligent transactions have notably assisted the funding of oppressive regimes and acts of terrorism—a fact that cannot be disregarded. Especially where there is evidence of the questionable nature of transactions, disregard of counsel, and acts of concealment after the fact, the purchaser or beneficiary can no longer be given the benefit of the doubt at the expense of the claimant and those who have to suffer through acts of terrorism supported by these transactions. The role purchasers and beneficiaries play in wartime is not insignificant, and as such must not be overlooked by the law. Thus, the HEAR Act could be improved by following the UNIDROIT Convention's progressive lead in shifting the onus of this diligence inquiry onto the current possessor.

This shifting of the due diligence burden onto possessors and the general practice of responsible art consumption could help to not only avoid the ethical crisis of looting and trafficking in the first place, but also to potentially limit the complex legal disputes and their residual effects that follow from the repeated changing of hands of the art. As an additional benefit, it can also remedy the near victim-blaming stance this area of law has taken toward claimants of wartime-looted property and establish a policy that these practices will no longer be overlooked, excused, aided, or abetted in any way by the law. Holocaust-era art legislation must adapt with far stronger condemnations and consequences, and it is long overdue.

As to the goal of restitution, the HEAR Act's implementation is undoubtedly a success for Holocaust survivors. However, the six-year statute of limitations is not nearly enough to prevent claims from falling through the cracks, which only continues to add further insult to injury to people who have already suffered enough. Because most losses for plaintiffs in these cases have been due to the time-barring of their claims, the federal statute of limitations should be removed completely once and for all, and recognized as inappropriate in these particular, very sensitive circumstances. The HEAR Act cannot retroactively remedy the cases lost due to this technicality, so to prevent these injustices from continuing into the future, the elimination of a timeframe to resolve the disputes could be the only way to make amends. Alternatively, if the removal of the statute of limitations is not feasible, the HEAR Act should employ a more claimant-friendly demand and refusal rule rather than a discovery rule (which has proved quite problematic) in determining when the statute of limitations begins to accrue.

Likewise, the UNIDROIT Convention's three-year timeframe and fifty-year window from the time of the theft are insufficient and should be eliminated. Not only are these timeframes—in particular the three-year limit—seemingly microscopic and, as such, inappropriate for the

situation, but both will only lead to the same exact issues the HEAR Act is only now beginning to remedy in a different context. Again, if this is not feasible, the demand and refusal rule should replace any variation of the discovery rule to allow for broader opportunities for recovery. To avoid having to enact similar legislation decades down the road for cultural property recovery, a proactive approach should be employed now while this looting and destruction are ongoing. Circumstances of claimants bringing a cause of action vary for a multitude of reasons, and asking more of people and nations who have already lost so much without accounting for their situations will only result in the same inequities time and time again.

Another major factor to consider is the financial hardships plaintiffs encounter in deciding to pursue legal action for their stolen property, and whether it is actually a realistic option for many. If the HEAR Act truly seeks to make amends for the persecution plaintiffs and their families have historically faced from both the war and the legal system, attorneys' fees should be provided for as well. In situations where plaintiffs succeed on a replevin or conversion claim and finally retrieve their long-lost art or at least pecuniary compensation, their victory is completely diminished if they are forced to sell the recovered property at auction or walk away with nothing due to the financial burdens imposed by litigation. Financial factors can discourage claimants from seeking restitution at all, which effectively allows the theft to be excused and for victims' voices to be silenced—outcomes that the law must never encourage.

Finally, the sunset provision of the HEAR Act should be removed. The HEAR Act and the progress it means for victims should be indefinite and not subject to renewal upon expiration. While the legislation passed with bipartisan support under the Obama administration, political factors that could potentially affect the Act's renewal in the future should be considered to avoid harm to progressive policy. Stolen art that has been successfully concealed for decades can come to light unexpectedly at any moment in the future, be it through advances in technology or simply by random chance; this is why claimants are still coming forward with lawsuits today, long after the Holocaust has passed. Without the law being indefinite, progress for victims and amends made for these societal injustices may not continue. If, upon the Act's expiration, the governing law reverts back to problematic and inconsistent state law principles, the cycle will only continue, and claimants will be back at square one. The HEAR Act's significance and step in the right direction ultimately should not be undermined and subjected to a time constraint just as victims' claims for justice have been.

CONCLUSION

Overall, the law has been inexcusably slow to address the residual effects of the Holocaust, as demonstrated by the struggle survivors and heirs are still facing in recovering their stolen property long after the war. Because forward legal movement is long overdue, and we are on the cusp of another antiquities-looting crisis, it is time for our jurisprudence to resolve the complexities, inconsistencies, and injustices seen for decades, and establish solid principles for wartime-looted art restitution.

Recent legal developments, including the enactment of the HEAR Act and heartening case law such as *Reif v. Nagy*, have attempted to remedy perplexing jurisdictional inconsistencies and establish firm restitution guidelines—a true victory for survivors and their heirs. However, these developments do not go far enough in force, duration, or remediation to resolve the issue of Nazi-looted art fairly and equitably once and for all. Because of the similarities between the artistic crisis encountered during World War II and the current looting and destruction of cultural artifacts by ISIS, there is significant value in examining how the law has developed differently—for better or for worse—in each respective area, and considering how our society and legal system will address similar claims well into in the future.

Although what is "fair" can differ sharply depending on the point of view of the parties involved, the looting, destruction, and trafficking of art, and the damage it inflicts on individuals and culture alike, should be at the forefront of the conversation in considering how to proceed. Preventing the misappropriation of art to disenfranchise innocent people and fund death and destruction is likely something both plaintiffs and defendants can agree on, regardless of their property interests. By factoring further moral and ethical principles into the development of this area of law, equity can be more efficiently and reasonably achieved, and the future of similar claims that will undoubtedly arise can lead to a jurisprudence conveying a clear message of the wartime disenfranchisement we will no longer tolerate.

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