COMMENTS

WHEN HONOR WILL NOT SUFFICE: THE NEED FOR A LEGALLY BINDING INTERNATIONAL AGREEMENT REGARDING OWNERSHIP OF NAZI-LOOTED ART

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1. INTRODUCTION

The casualties of the Second World War were not limited to the human victims. Along with the millions of lives lost during the Holocaust, millions of works of art fell victim to the Nazi Regime.1 Although the capture of art and cultural property during a war is an ancient practice, the Nazis systematically looted Europe's art during World War II on an unprecedented scale.2 The theft of this art was not simply a case of the victors claiming the spoils. For Hitler, both the acquisition and cleansing of art

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2 See DAVID ROXAN & KEN WANSTALL, THE RAPE OF ART 10 (1964); Nicholas, supra note 1, at 39; Urice, supra note 1, at *4; see also HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 23 (1997) ("In twelve years... as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars.").

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fell squarely within his plan of a pure Germanic empire. Thus, "[l]ooting was carried out with typical German efficiency, planned beforehand and ruthlessly executed." Today, over fifty years after the end of World War II, thousands of pieces of art remain displaced because of Hitler's efforts.

While 1998 saw the settlement of war claims against the two largest Swiss banks, resolutions of ownership disputes about Nazi-looted art have been few and scattered. Yet as claims for restitution of these artworks have increased, international efforts at resolution have also increased. Once predicted to be the "Swiss gold" of 1999, this Comment contends that, despite recent efforts towards a resolution of the controversy, hope for a real solution to the problem of Nazi-looted art is overly optimistic in the absence of a binding international agreement. An international consensus is necessary, but not sufficient, to ultimately resolve this issue. While the issues surrounding the stolen art of the Holocaust ideally could be settled by individual nations through non-binding principles of international cooperation that only impose a moral commitment, realistically, such an approach is unlikely

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3 See Nicholas, supra note 1, at 39-41.
4 ROXAN & WANSTALL, supra note 2, at 11. See infra Section 3 for a more complete discussion of the Nazis' looting mechanism.
5 See CNN Saturday: 44 Countries Adopt Guidelines on Returning Art Stolen by Nazis (CNN television broadcast, Dec. 5, 1998), available in LEXIS, News Library, Cnn File (estimating that although thousands of art objects were returned by the Allies after the War, more than 100,000 paintings and other works are still missing).
7 See Morse, supra note 6, at 78 (discussing the issue of Holocaust reparations). For a complete discussion of recent cooperative efforts, including the Washington Conference on Holocaust-Era Assets held in December 1998, see infra Section 2.2.
8 Mandell, supra note 6 ("Art will become the Swiss gold of the new year.").
9 In the Winter of 1998, the United States hosted the Washington Conference of Holocaust-Era Assets. The Washington Conference ended with the adoption of 11 non-binding principles for resolving disputes over ownership of Nazi-looted art. See infra Section 2.2.
to be successful. In light of the historically duplicitous approaches many nations have taken in dealing with Nazi war loot\textsuperscript{10} and the implications of this issue for the art world, a finite resolution of this problem requires more than a moral obligation—it requires a legally binding commitment that would render a determination of ownership by a member country that is binding on all parties. This legally binding obligation must explicitly preempt individual statutes of limitations and set forth a uniform policy agreed upon by all nations regarding the time in which to raise claims.

Section 1 of this Comment gives a brief introduction to the problem of Nazi-looted art. Section 2 addresses both formal international agreements and treaties and the recent international conference pertaining to Holocaust assets. Section 3 focuses on the historical background of Hitler's attempt to rid his empire of "degenerate art"\textsuperscript{11} and to obtain an unparalleled collection of Nordic-Germanic art. Section 4 outlines the U.S. approach to disputes over Nazi-looted art. This Section discusses federal, state, and private efforts at resolution. Section 5 examines the sharply contrasting approaches taken by the Austrians, the French, and the Swiss. Section 6 sets forth a proposal for resolving ownership rights to Nazi spoilage. Section 7 concludes the Comment and reiterates that a finite resolution of disputes over artwork looted by the Nazis requires an legally binding international agreement.

2. The International Approach

This Section focuses on international efforts toward the restitution of Nazi-looted art. During, and immediately following, World War II, international commitment to returning these works to their original owners appeared to be strong.\textsuperscript{12} Quickly, however, this façade of dedication withered and for the ensuing fifty years, nations were left to restitute owners on an individual

\textsuperscript{10} See infra Section 5 (highlighting the approaches taken by three foreign nations).

\textsuperscript{11} "Degenerate art" was the label given to artwork created by artists or in styles disfavored by Hitler. See infra Section 3.1.

\textsuperscript{12} See infra Section 2.1 (discussing international agreements); infra Section 4.1 (focusing on American and Allied efforts at repatriating this art).
basis. As evidenced by the thousands of works that remain separated from their original owners, these individual efforts largely failed. Recently, however, international efforts at restitution have been renewed. These efforts, however, will continue to fall short in the absence of an international legally binding agreement.

The 1907 Hague Convention forbade the seizure and destruction of cultural property in a time of war and provided for compensation for violations of these provisions. Thus, the Nazis’ pillage of Europe’s art was both immoral and illegal. In 1943, the Allies issued a directive, the Declaration of London, to deal with the issue of Nazi loot prospectively. The Declaration warned neutral nations that the Allies intended “to do their utmost to defeat the methods of dispossession practised [sic] by the [Nazis].” In the Declaration, the Allies reserved the right to annul “transfers or dealings hav[ing] taken the form of open looting or plunder” as well as seemingly good faith transactions, “even when they purport to be voluntarily effected.” Since the Declaration dealt with private law matters, nations needed to enact it by individual legislation. Initially, the Declaration was adopted so ex-

13 See infra Section 5.2-5.3 (describing the French and Swiss approaches to restitution of the Nazi-looted art).
14 See CNN Saturday, supra note 5.
15 But see infra Section 5.1 (discussing the successful recent efforts of the Austrian government).
16 Among the explanations posited for the renewed interest in Holocaust-era claims is the ending of the Cold War. According to Hector Feliciano, during the Cold War, the world was focused on battling Communists and rebuilding Europe; when the Cold War ended, countries were “finally afforded... the opportunity to analyze fundamental domestic, historical and societal questions, such as how to handle the continuing ripple effects of the Holocaust.” Daniel J. Bender, An Alternative Approach to Settling Disputes Over Stolen Art, N.Y.L.J., Aug. 12, 1998, at 1.
18 See Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, 8 DEPT ST. BULL. 21 (1943) [hereinafter Declaration of London]; see also Lyndel V. Prout, Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War, in THE SPOILS OF WAR, supra note 1, 225, 226 (discussing the Declaration of London).
19 Declaration of London, supra note 18.
20 Prout, supra note 18, at 226.
21 See id.
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tensively that "it became something of a common law in the postwar period." After the initial enthusiasm waned, however, countries ceased a rigid application of the law. Because nations were not legally bound to enforce this law, they essentially did not. Bound only by honor, individual nations failed to settle the issue, leaving the rightful ownership of a great many pieces of art unknown to this day.

2.1. International Agreements

In the years since World War II, three major international conventions have attempted to deal with the problem of Nazi-looted art. Because none of them garnered widespread acceptance, all have remained relatively ineffective. Further, because all have focused on protecting nationally owned cultural property, none has provided adequate recourse to private citizens, victims of Nazi art theft, seeking to reclaim individually-owned property looted in the course of war.

2.1.1. The Hague Convention

On January 6, 1999, President Clinton forwarded the 1954 Hague Convention to the Senate with a recommendation for ratification. As the President explained, the Hague Convention "establishes a regime for special protection of a highly limited category of cultural property ... [and] provides both for preparations in peacetime for safeguarding cultural property against foreseeable effects of armed conflicts, and also for respecting such property in time of war or military occupation."
However, that the United States is only now considering becoming a signatory to the Convention indicates that the Convention has not yet proven to be an effective solution to the problem of Nazi-looted art. Further, the terms of the Convention itself provide an inadequate solution to the problem.\footnote{27} The Convention limits the definition of "cultural property" to "movable or immovable property of great importance to the cultural heritage of every people..."\footnote{28} This definition seemingly refers only to nationally, as opposed to privately, owned property.\footnote{29} Further, the Convention gives signatories the ability to enforce sanctions and penalties on violators "as they consider appropriate"\footnote{30} but fails to provide any mechanism for settling disputes.\footnote{31} These factors have led to inconsistent enforcement.\footnote{32} Thus, "[w]hile the Hague Convention is broad enough to promote respect for cultural property during armed conflicts, the specifics do not adequately address the question of restitution" of claims to Nazi-looted art.\footnote{33}

\subsection*{2.1.2. The UNESCO Convention}

While the United States is only now considering ratifying the Hague Convention, in 1983, it ratified the 1970 UNESCO\footnote{34} Convention on Cultural Property.\footnote{35} The UNESCO Convention im-

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29 See Cuba, \textit{supra} note 24, 474 n.220 & 476.


31 See Lehman, \textit{supra} note 27, at 535; Cuba, \textit{supra} note 24, at 476.

32 See Lehman, \textit{supra} note 27, at 535; Cuba, \textit{supra} note 24, at 476.

33 Lehman, \textit{supra} note 27, at 535.

34 UNESCO is the United Nations Educational, Scientific, and Cultural Organization.


https://scholarship.law.upenn.edu/jil/vol21/iss2/4
poses on member-states an obligation to preserve and safeguard cultural resources during both times of war and times of peace.36 Under its “nationalist” approach, each signatory must establish agencies, enact legislation prohibiting domestic institutions from acquiring illegally obtained cultural property, compile lists of works of cultural influence, and set up cultural education programs.37 However, “[t]he Convention only explicitly addresses the broad obligations” of its members “to prevent cultural institutions from purchasing property which has been illegally exported and to return art stolen from a museum, religious institution or public monument.”38 Beyond that, the Convention provides “only a general responsibility to combat the illegal export or import of art and to entertain actions for the recovery of artistic objects . . . .”39 Because the Convention does not address the problem of displaced cultural property looted from or in the possession of a private individual,40 it, like the Hague Convention, does not provide an adequate mechanism for adjudicating claims to Nazi-looted art.

2.1.3. The UNIDROIT Convention

Unlike either the Hague Convention or the UNESCO Convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects allows for claims by private individuals.41 However, because private claims must be brought “within a period of fifty years from the time of the theft,”42 the UNIDROIT

36 See Lippman, supra note 35.
38 Lippman, supra note 35, at 78-79 (citations omitted).
39 Id. at 79 (citations omitted).
40 See id.
41 See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995), art. 2 (defining “cultural objects” as “those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science”) [hereinafter UNIDROIT Convention]; see also Cuba, supra note 24, at 478-79.
42 UNIDROIT Convention, supra note 41, art. 3(4). Cultural property “forming an integral part of an identified monument or archaeological site, or belonging to a public collection” is not subject to the fifty-year limitations period. Id. art. 3(5).
Convention, like its predecessors, in its plain terms fails to provide a solution for settling claims to Nazi-looted art. Nevertheless, the Convention’s balance of both civil and common law objectives “by providing fair and reasonable compensation in return for requiring the possessor of stolen or illegally exported art to return the object” could serve as a model for any future proposal to settle the issue.

2.2. Cooperative Efforts—The Washington Conference

In December 1998, the U.S. State Department hosted the Washington Conference on Holocaust-Era Assets. Attended by over forty countries and numerous non-governmental organizations (“NGOs”), the Conference focused on the lost art of the Holocaust and aimed at “forg[ing] an international consensus on how governments and other entities can cooperate to redress grave injustices” remaining from that era. The organizers proved successful in these efforts as the Conference concluded with the adoption of eleven principles to assist in settling the issues surrounding Nazi-looted art. The guidelines call for a “just and fair solution” and impose upon nations a “moral commitment to identify and publicize stolen works” to aid in their return to their original owners.

Leaders heralded the principles as redefining the manner in which the art world will handle Nazi-looted art. "From now

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43 Conceivably, however, nations could enact the UNIDROIT Convention and implement a longer limitations period in which to bring individual claims. See id. art. 9(1) ("Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable [sic] to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention."). However, no other “Contracting State” would be obliged to recognize or enforce a “decision of a court or other competent authority of another Contracting State that departs from the provisions of the Convention.” Id. art. 9(2).

44 Lippman, supra note 35, at 82.


on,” said Stuart E. Eizenstat, the U.S. Under Secretary of State for Economic, Business, and Agricultural Affairs, “the sale, purchase, exchange, and display of art from this period will be addressed with greater sensitivity and a higher international standard of responsibility.” However, since the principles are not legally binding but merely represent a moral commitment calling upon countries to “act within the context of their own laws,” such sentiments may be overly optimistic.

2.2.1. The Principles in Practice?

Despite the enthusiastic reception the principles met at the conference, the ensuing years have shown that non-binding principles alone are not an adequate solution. While progress has been made, it has in no sense been uniform or steady.

On a particularly encouraging note, the European Commission on Looted Art was launched in March 1999 in response to the Washington Conference. Among the Commission’s key objectives are to create a timetable in which to implement the eleven principles announced at the Washington Conference and to “put restitution at the center of the agenda and to provide backing and support for the pursuit of claims.” As the principles encourage,

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49 Id.


51 See Eizenstat, Concluding Statement, supra note 48.


53 See U.S. Holocaust Memorial Museum, Attempts to Trace Holocaust Assets by Type of Asset Art (visited Mar. 7, 2000) <http://www.ushmm.org/assets/ushmm4.htm> (indicating that the Commission aims “to provide a platform for all organizations, groups and individuals in Europe to speak with one voice on this issue”).

54 Id. (setting forth the eight major objectives of the Commission). Interestingly, the Commission indicates that it will “work towards the establish-
the Commission has committed itself to establishing alternative dispute resolution mechanisms to resolve ownership claims and has indicated its desire to establish an independent commission to "assess, mediate and adjudicate on claims."55 The Commission’s ultimate goal, however, is to produce a comprehensive catalogue of "looted art, its location and ownership, which will serve as a permanent historical and cultural record of this epoch of depredation and spoliation."56

Further, the past year saw the National Gallery of London’s "precedent-setting publication of 120 works, acquired for its collection since 1933, which possess 'dubious provenance' requiring further study."58 Interestingly, although the list is undoubtedly the type of disclosure envisioned by the Washington Conference Principles, British law does not allow for the return of these works to their pre-war owners or their heirs.59 However, in February, the British government announced that it was establishing the Spoliation Advisory Panel to resolve disputes over Nazi-looted art presently in the custody of British museums.60 Although its recommendations will be without legal force, the panel’s powers will include recommending that looted works be returned to their original owners, that museums pay "compensation to claimants or that museums display alongside a piece of looted artwork an account of its history."61

While Great Britain and the European Community have seemingly made headway in their attempts to put the principles

55 Id.
56 Id.
59 See id. (indicating that "other compensation might be provided"). This example aptly illustrates the inability of museums to "identify possible Nazi loot in their collections, publicize their findings and return objects 'to their rightful owners or their heirs, according to national legislation'" where their national legislation prohibits them from so doing. Id. (noting a policy statement made by the International Council of Museums).
61 Id.
into action, "[d]espite its promises at the Washington Conference last December, Russia— which ended the war with more looted art than any other country— has sent conflicting signals about its readiness to resolve the problem."62 Instead of examining its own collections for looted art, as the principles call on each country to do, the Russian government has been busy cataloging Russian works stolen by the Nazis.63 Further, in October 1999, the Constitutional Court of the Russian Federation upheld the constitutionality of a statute allowing the country to nationalize "war trophies" captured from former enemy states64 after World War II "as compensation for damages inflicted by the Nazis."65 Fortunately, although the Russian high court upheld the statute, it struck down key provisions and thereby exempted artworks which were once owned by religious groups or by people persecuted for their race or political views from the purview of the law.66 The ruling further clarified that only objects removed by order of the government were legally seized and thus properly subject to nationalization under Russian criminal law.67 Fortunately, the ruling did not establish ownership of any particular piece of art and left open the possibility of employing legal procedures to settle claims.68 Further, as the head of the Consti-

62 Eakin, Unfinished Business, supra note 52.
63 See id. (indicating that the Russian government has acknowledged that many of these works have been destroyed).
65 Id. (explaining that President Yeltsin opposed the legislation).
66 See id.; Eakin, Unfinished Business, supra note 52 (explaining the changes made by the court). The court also ruled that
the following key changes must be made to the law: individuals can make claims on their own as well as through governments; a list of "ownerless" artworks currently hidden in Russian depositories must be published so that the original owners or their heirs can claim them; and the claim period—originally scheduled to end on October 21, 1999, 18 months after the law came into force—must now begin when a claimant first learns or could learn that his object is in Russia.

67 See Hochfield, supra note 64.
68 See id.; Eakin, Unfinished Business, supra note 52 ("Because the Constitutional Court ruling leaves open the possibility of using legal procedures to settle claims, Hungarian officials have vowed to sue Russia in an international tribunal for art loot it is unwilling to return.").
tional Court was quick to point out, the court did not preclude any future multinational agreements on the return of certain valuables.

3. "THE RAPE OF ART"69

Inherent in Hitler’s dreams of a pure Germanic race was a vision of pure Germanic art.70 His two-fold plan involved ridding his empire of “degenerate art” and amassing a vast collection of pure Germanic art, ironically financed by seizing and selling the assets of Jewish art collectors.

3.1. "Degenerate Art"

On one hand, he aimed to purge the world not only of works of art he deemed unsuitable, but also of the artists responsible for creating them.71 Hitler labeled such works “degenerate art” for either their dreaded style or their hated creator and removed over sixteen thousand of these works from public collections.72 “Although the Nazis found these ‘degenerate’ works unacceptable for home consumption, they were not unaware of their market value.”73 Thus, as profits from their sale helped to finance the second stage of Hitler’s plan, these condemned works made their way into collections worldwide.74

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69 This Section aims to provide a brief overview of the Nazi theft of European art treasures. The more intricate details and mechanisms of the looting transcend the scope of this Comment. For a brief yet more in depth treatment of the topic, see FELICIANO, supra note 2, at 13-42. For a greatly detailed account of the Nazi theft of art, see ROXAN & WANSTALL, supra note 2. Nicholas, supra note 1, also provides a meticulous account.

70 See Nicholas, supra note 1, at 39; see also FELICIANO, supra note 2, at 24-31 (discussing the Nazi quest to repatriate all works of “Ger man heritage”).

71 See Nicholas, supra note 1, at 39.

72 See id. (indicating that Hitler disliked anything that was abstract as well as works created by Jewish, leftists, or antiwar artists); ROXAN & WANSTALL, supra note 2, at 8 (“He disliked the French Impressionists so they would be totally banned.”); see also FELICIANO, supra note 2, at 20-21 (noting that in Mien Kampf Hitler attacked Cubism, Futurism, and Dadaism as “products of degenerate minds” and argued that the state had a duty to prevent its people from falling under these influences).

73 Nicholas, supra note 1, at 39.

74 See id. at 39-40 (describing a special, secret marketing agency which allowed the finest purged items to be bought for foreign currency at bargain prices).
3.2. The Linz Collection

Beyond ridding his empire of degenerate art, Hitler, himself a failed artist, aimed to transform his hometown of Linz, Austria into the artistic capital of his envisioned new Europe. Toward this end, Hitler employed art specialists and charged them with securing desirable works of art to build this great collection. These experts were to acquire works through mass acquisitions and seizure of paintings from public and private collections in the occupied countries such as France and the Netherlands. In these countries, they not only forcefully “bought” art, but they also had works previously held by Jewish art collectors at their disposal. Further, “Nazi officials threatened to confiscate collections or guaranteed visas or protection ... in order to persuade these Jewish collectors to sell their art to German entrepreneurs.” By the tragically ironic logic of the Nazis, the confiscation of Jewish collections was the natural extension of their policy of racial annihilation.

The Nazi quest for the artistic treasures of Europe was thus rooted in the same pathology of domination and extermination

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75 See ROXAN & WANSTALL, supra note 2, at 8. For a general discussion of the plan for the museum in Linz, see Nicholas, supra note 1, at 41, and FELICIANO, supra note 2, at 13-23.

76 See Nicholas, supra note 1, at 39-44; Urice, supra note 1, at *4; see also ROXAN & WANSTALL, supra note 2, at 17-18 (listing the four categories of artwork most in demand in World War II Germany).

77 See FELICIANO, supra note 2, at 21-23; see also Elaine L. Johnston, Cultural Property and World War II: Implications for American Museums Practical Considerations for the Museum Administrator, SC40 ALI-ABA 29, *31 (1998), available in WESTLAW (indicating that the Nazis took millions of art objects from their rightful owners “who included private citizens, especially Jews and other victims of the Holocaust, public and private museums and galleries, religious, educational, and other institutions”).

78 See FELICIANO, supra note 2, at 22; see also Margaret M. Mastroberardino, Comment, The Last Prisoners of World War II, 9 PACE INT’L L. REV. 315, 321 (1997) (“France, the Netherlands, Belgium, Luxembourg, Italy and Russia were all victims of Nazi devastation and confiscation.”).

79 Lippman, supra note 35, at 21. Wealthy Jewish art collectors were able to secure visas in return for art. For example, in Austria, the “main cultural target” of Nazi troops was the art collection of the Rothschilds, a prominent Vienna Jewish Family. Id. at 15. One member of the family, Baron Louis de Rothschild, was “interned by the Nazis for nine months and only was released after agreeing to turn over his collection of more than one thousand highly-prized paintings to the Nazi authorities.” Id.

80 Cf. ROXAN & WANSTALL, supra note 2, at 22.
underlying the Holocaust itself. In both the art world and the human race, Hitler essentially aimed to "purify" all he deemed "tainted" while usurping all that was desirable.  

But while the lives of those killed by the Nazi regime are irrevocably lost, the stolen art could be reclaimed with some effort. The restitution of this art, the "highest achievement of [a] civilization," might bring about a long-delayed symbolic victory for the victims of the Holocaust.

Sadly however, despite initial Allied attempts at restitution, over fifty years later, much of the art still remains displaced. Because of lack of consensus, lack of legally binding obligation, and a duplicitous manner of dealing with Nazi-related issues, individual nations have failed to realize the potential for restitution offered by early cooperative efforts. Thus, they can only be successful now if they are willing to do more than impose a moral obligation on themselves—each nation must agree to be legally bound.

4. THE U.S. APPROACH

Nations have attempted to restitute victims of Nazi spoilage by implementing their own approaches. A close examination of their individual efforts illustrates that although these methods constitute a moral commitment, they lack a legally binding element that would solidify and make restitution complete and significant. In the next Section, an overview of the U.S. approach

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81 Cf. Feliciano, supra note 2, at 16 (indicating that although among Western European countries Holland, Belgium, and France were heavily plundered, in Eastern Europe "the Nazis undertook to destroy its identity, folklore, architecture, and even its language through mass murder and forced Germanization").


83 See Johnston, supra note 77, at 32 (stating that after the War "vast numbers of objects were returned to their owners . . . or repatriated to the countries from which they had been removed"); Nicholas, supra note 1, at 44; see also Madeleine K. Albright, Remarks at Opening of Washington Conference on Holocaust-Era Assets (visited Apr. 7, 2000) <http://secretary.state.gov/www/statements/1998/981201.html> (indicating that the Allies made good faith, but incomplete, efforts at restitution). For a discussion of U.S. policy immediately following the War, see infra Section 4.1.
highlights some of the problems inherent in independent state action without multinational collaboration.

4.1. U.S. Policy in the Post-War/Cold War Period

Like the Nazi forces, the Western Allies also had art-specialist officers within their ranks. These “monuments officers” were to secure and sort out the vast quantities of art that had been looted by the Nazis in order to preserve and salvage these often irreplaceable works. After the War, the Monuments, Fine Arts and Archive (“MFA&A”) forces had to “store, care for, catalogue, and restitute in orderly fashion the troves of art and archives that had been discovered in salt mines and hundreds of other repositories.” Towards this end, MFA&A officers interrogated the “principle players” of the Nazi art-looting machine. The army command established “Collecting Points” to process the several million displaced pieces.

Despite the valiant performance of the MFA&A forces, not all the U.S. efforts were beyond moral reproach. Since the Al-

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84 See Nicholas, supra note 1, at 43.
86 Taper, supra note 85, at 135.
87 See id. at 136-37 (discussing interviews with Hitler’s art advisers such as Hans Posse and Herman Goring and art dealers such as Hans Wendland); see also Nicholas, supra note 1, at 43 (indicating that the U.S. Office of Strategic Services (“OSS”) sent an “Art Looting Investigation Unit” to interrogate Nazi officials in order to determine ownership of looted works). The purpose of the OSS and MFA&A investigations was two-fold: (1) to aid the art restitution process and (2) to provide evidence for the prosecution of these officials at Nuremberg. See James S. Plaut, in THE SPOILS OF WAR, supra note 1, at 124-25.
88 See Nicholas, supra note 1, at 43.
89 See, e.g., Walter I. Farmer, Custody and Controversy at the Wiesbaden Collecting Point, in THE SPOILS OF WAR, supra note 1, 130, 132-34 (recounting the Wiesbaden Manifesto, borne of the frustration and outrage of officers with President Truman’s decision to have approximately 200 pieces of the most important German-owned works removed to Washington); Feliciano, supra note 2, at 175 (discussing pillage and attempts to sell looted work by American soldiers); Willi Korte, Search for Treasures, in THE SPOILS OF WAR, supra note 1, 150-51 (discussing the greed of an American Lieutenant who sent treasure from the Middle Ages to his mother in Texas via military postal service). Interestingly, the newly formed Presidential Advisory Commission on Holocaust Assets in the United States, see infra Section 4.2.1.2, has acknowledged complicity in the “Gold Train” incident. See Hugh Eakin, Tracking the Gold
lies lacked any uniform policy on restitution, the United States, like the other Allies, essentially controlled the retrieved art within its occupied zone at its discretion.90 The United States employed two standards for managing the art in its zone: one for works stolen from various European nations, a second for the state collections of Germany.91 For the former works, the American military governor aimed to free his forces of responsibility for this art. With this goal in mind, U.S. (as well as British) policy was to return works to the country from which the Nazis had taken it.92 As to the German collections, the governor supported temporary removal of the "most precious" works to the United States.93 President Truman thus had approximately 200 of the most important German-owned works "temporarily" removed to Washington.94

Regardless of official U.S. policy, new research indicates that the U.S. military engaged in looting of its own.95 "For decades, the case of the notorious Gold Train has remained one of the murkiest episodes in post-World War II occupation of Europe by American forces."96 The Gold Train was a hopeless effort by the Nazis to collect everything of value from Hungary before the Red Army arrived.97 The train was captured by U.S. troops in Austria in May 1945, but American officials rejected pleas from Hungary

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90 See Nicholas, supra note 1, at 44.
91 See id.
92 See id. at 44 (indicating that this left the recipient nation with the "nasty task" of determining ownership).
93 Id. at 44. Some U.S. officials argued that these works should be "indefinitely" removed to America and be considered "reparations." Id.
94 This decision proved unpopular with MFA&A officers who questioned the propriety and integrity of such action. See Farmer, supra note 89, at 132-34. Although the "safeguarding" may not have originally been truly envisioned as "temporary," the removal ultimately proved to be so partly as a result of outcry from museum professionals and the press. See Nicholas, supra note 1, at 44.
95 See Eakin, The Gold Train, supra note 89 (stating that this is the "first time the American government has implicated itself to such a degree in the issue of unrestituted loot" and that "the report does not attempt to explain why American forces ignored regulations calling for the return of looted assets"); Did the U.S. Army Rob Holocaust Victims? (visited Mar. 7, 2000) <http://usmilitary.about.com.military/jobs/usmilitary/library/weekly/aa101699.htm>.
96 Eakin, The Gold Train, supra note 89.
97 See id.
to return the assets from the train to Hungarian Jews after the war.\textsuperscript{98} Instead, the American authorities handed over much of the loot to Austria while at the same time American troops took a large amount of property as "war booty."\textsuperscript{99}

4.2. \textit{Congressional Action}

Initial post-war attempts at restitution fell short, and by the middle of the 1950s, "[t]he formal efforts to recover and return displaced cultural property diminished substantially or ceased altogether."\textsuperscript{100} Recently, however, interest in the fate of the Nazi-looted art has resurfaced, and the United States has renewed its efforts to redress the problem.\textsuperscript{101}

4.2.1. \textit{The 105th Congress}

In February 1998, the House Banking and Financial Services Committee held hearings to question representatives of the art community about how they determine the provenance of works in their collection and how they deal with claims by those alleging that a work was stolen from them or their families during the Holocaust.\textsuperscript{102} Although no legislation directly emerged from these hearings, "several members of Congress have stated an intention to introduce bills that will specifically address the obligations of museums to avoid acquiring or exhibiting Holocaust-tainted objects and to return such objects to their rightful owners."\textsuperscript{103}

\textsuperscript{98} See id. ("For the Hungarians, the report comes as long overdue [sic] acknowledgment of what they have known for years.").

\textsuperscript{99} Id.

\textsuperscript{100} Johnston, \textit{supra} note 77, at 32.

\textsuperscript{101} See id.

\textsuperscript{102} See id. at 33. The hearings took place on February 12, 1998. See id. The directors of the Metropolitan Museum of Art, the Museum of Modern Art ("MOMA"), and other top American museums testified. For the transcripts of the witnesses' statements, see Johnston, \textit{supra} note 77, app. The transcript is also available online at (visited Apr. 7, 2000) \texttt{<http://commdocs.house.gov/committees/bank/hba46854.000hba46854_0f.htm>}.

\textsuperscript{103} Johnston, \textit{supra} note 77, at 33 (citations omitted). Although the federal government has passed no such legislation, the guidelines of the American Association of Museum Directors ("AAMD") set forth similar requirements. These guidelines are discussed \textit{infra} Section 4.4.1.
4.2.1.1. Holocaust Victims Redress Act

Amid a plethora of proposed legislation, the 105th Congress passed three laws relating to the Holocaust.104 On February 23, 1998, the “Holocaust Victims Redress Act” became law.105 This Act authorizes the President to commit $5 million for archival research and translation services to aid in the restitution of Holocaust-era assets.106 The Act further states that all governments should make good faith efforts to aid in the return of Nazi-confiscated assets to legitimate owners where there is reasonable proof that the claimant is the rightful owner.107 While Congress’s willingness, albeit belated, to address the problem of Nazi-looted art is commendable, it will amount to no more than empty words if other countries do not accept the challenge. Given the surreptitiousness that has shrouded this issue for almost fifty years, it seems unlikely that legislation embodying the “Sense of Congress Regarding Restitution of Private Property,”108 without more, will open the floodgates.109

4.2.1.2. U.S. Holocaust Assets Commission

With broad bipartisan support, Congress passed legislation establishing the U.S. Holocaust Assets Commission on June 23, 1998.110 The U.S. Holocaust Assets Commission Act provides for the establishment of an independent presidential commission to

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104 For an overview of enacted and proposed Holocaust-related legislation, visit the section of the United States Holocaust Memorial Museum’s website devoted to the topic at 105th Congress and Holocaust-Related Legislation (visited Apr. 7, 2000) <http://www.ushmm.org/assets/legislation.htm> [hereinafter 105th Congress and Holocaust-Related Legislation].
105 See id.
107 See id. § 202.
108 Id.
109 The legislation, however, likely contributed to the ever-growing international dialogue on the topic of Holocaust assets. To that extent, it may prove helpful in reaching a definitive resolution of the issue.
examine the role of the United States in the collection and disposition of Holocaust-era assets.\[111\]

4.2.1.3. Nazi War Crime Disclosure Act

The Nazi War Crimes Disclosure Act, passed in October 1998, calls for a "Nazi War Criminal Records Interagency Working Group" to make public Nazi war criminal records.\[112\] By declassifying heretofore classified information, the legislation aims to acknowledge the horrors of the Holocaust and to achieve justice for survivors and their heirs.\[113\] Although these are laudable efforts, unilateral action by the United States is not enough. A legally binding solution that makes other nations accountable is necessary.

4.2.2. The 106th Congress

The 106th Congress has shown a similar initiative in terms of its commitment to Holocaust-related legislation. However, like its predecessor, this Congress has been less effective in passing Holocaust-related laws than introducing them.\[114\] Amid many proposals, to this point, it has enacted only one Holocaust-related law.

\[111\] See U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611; see also USIS, supra note 110 (explaining that the substantive work of the Commission will fall into two areas: (1) conducting original research into Holocaust-era assets that came into the hands of the U.S. government after Hitler's ascent to power in 1933; and (2) reviewing research being conducted elsewhere).


4.2.2.1. The U.S. Holocaust Assets Commission Extension Act of 1999


4.2.2.2. Proposed Legislation

To date, the 106th Congress has considered eight Holocaust-related bills.

4.2.2.2.1. Making a “Federal Case” of It

Two House bills and one Senate bill propose a federal cause of action for certain Holocaust-related claims. These proposals would give federal district courts jurisdiction over civil actions to “recover damages or secure relief for certain injuries to persons and property under or resulting from the Nazi government of Germany.” District courts would have original jurisdiction to hear and grant relief for any Holocaust-related civil

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115 See id.

116 See 22 U.S.C. § 1621 (1998). Section 3(d)(1) requires the Commission to “submit a final report to the President” containing “any recommendations for such legislative, administrative, or other action as it deems necessary or appropriate.” Id. “After receipt of the final report, the President,” under section 3(d)(2), was then required to “submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate.” Id.


119 See 106th Congress and Holocaust-Related Legislation, supra note 114 (discussing introduced legislation).


122 Id.; see also 106th Congress and Holocaust-Related Legislation, supra note 114.

123 Jurisdiction would be asserted pursuant to “customary international law, any international agreement to which the United States is a party, or, to
claim, brought by January 1, 2010, to recover damages or secure relief for injuries resulting from having been "deprived of property located in Germany, or in any territory occupied or controlled by the Nazi regime or its allies . . . pursuant to programs designed to transfer ownership of such property to persons of Aryan racial stock." 124

Tellingly, the plain language of this proposed statute reveals an imperfect understanding of the rationale behind the Nazi-looting machine. The Nazis did not simply seize art to transfer ownership to non-Jews.125 As discussed above, they looted "degenerate" works that clashed with Hitler's ideal of a pure Germanic art.126 Seizures of "degenerate" works were not necessarily "designed to transfer ownership . . . to persons of Aryan racial stock" as would be required to bring a case under the Act.127 Rather, the Nazis seized these works to rid their empire of them, and had it not been for their market value, they likely would have destroyed these works.128 Thus, the act could potentially deny certain claimants of Nazi-looted art a cause of action.

4.2.2.2.2. Justice for Holocaust Survivors Act

The House has also proposed legislation to allow Holocaust survivors, who are currently U.S. citizens and who have exhausted remedies available under German law, to sue the German Government in federal court.129 This proposal would amend the Foreign Sovereign Immunity Act ("FSIA")130 which currently


124 Id. The proposal would also give a cause of action to those forced into involuntary labor, subject to involuntary medical treatment or experiments, or denied payment with certain insurance policies. See id.

125 See Lippman, supra note 35, at 26 ("Various categories of art were removed and confiscated.").

126 See id. As discussed infra Section 3.1, even different classes of "degenerate art" existed. "Hitler disapproved of the abstract art of Vasily Kandinsky and Franz Marc. Cammille Pissaro, as a Jew, was considered to be a racial pariah. George Grosz and Kathe Kollwitz were condemned as leftists." Id. (citations omitted).


128 See Nicholas, supra note 1, at 39 (discussing the Nazis' awareness of the market value of "degenerate art").


prohibits the federal courts from entertaining suits brought against the German government.\textsuperscript{131} However, the bill, in its current form, would only give the federal courts jurisdiction over claims for “money damages sought against the Federal Republic of Germany for the personal injury ... caused by an act of genocide committed against that citizen during World War II.”\textsuperscript{132} Thus, although this act would abrogate the sovereign immunity of the German government, it would not provide a mechanism for settling disputes over Nazi-looted art.

4.2.2.2.3. Proposals to Amend the Tax Code

Three of the eight Holocaust-related bills before Congress involve proposed amendments to the Internal Revenue Code. One house bill would have prohibited imposing any federal income tax on any income received by an individual as the result of adjudicating or settling “any injustice experienced by the individual as a Holocaust victim.”\textsuperscript{133} Another bill, which was ultimately vetoed by President Clinton as part of the Taxpayer Refund Act of 1999, would have excluded from gross income “any amount received by an individual (or any heir of the individual) from any person as a result of any moral or legal injustice experienced by such individual as a Holocaust victim.”\textsuperscript{134} Although no tax-break has yet been secured for those prevailing on Holocaust-related claims, the potential of one could provide an incentive for the creative settlement of cases involving Nazi-looted art.

\textsuperscript{131} See 106th Congress and Holocaust-Related Legislation, supra note 114.
\textsuperscript{132} H.R. 271, 106th Cong. (1999).
\textsuperscript{133} See 106th Congress and Holocaust-Related Legislation, supra note 114; see also H.R. 390, 106th Cong. (1999).
\textsuperscript{134} 106th Congress and Holocaust-Related Legislation, supra note 114 (discussing the Holocaust Survivor Tax Act of 1999 (H.R. 1292, 106th Cong. (1999) and S. 779, 106th Cong. (1999)). The language of the Act was incorporated into the Taxpayer Refund Act, H.R. 2488, 106th Cong. (1999), which was vetoed by President Clinton on September 23, 1999. See 106th Congress and Holocaust-Related Legislation, supra note 114. A third tax code-related bill, H.R. 3511, 106th Cong. (1999), would prohibit deductions under the Internal Revenue Code of 1986 “for any payment under a foreign-based Holocaust victims’ settlement if no deduction would be allowed under such Code for such payment were it made directly by the foreign bank or other entity entering into such a settlement.” Id.
4.3. State Action: New York

The federal government has not been alone in its efforts to settle the issue of Nazi-looted art. State involvement in the cause has also increased. The state-level, however, is not the proper level at which to solve this issue. Unilateral actions by the states, as demonstrated by the MOMA Case discussed below, may have detrimental consequences for the art world, while the restraints of statutes of limitations may create a time-bar to many legitimate claims.

4.3.1. The MOMA Case

In December 1997, the Museum of Modern Art ("MOMA") received letters from two families alleging that two Egon Schiele works on loan to the museum from Austria belonged to their families. After the Museum informed the claimants that it was in no position to decide their claims, the Manhattan District Attorney subpoenaed the MOMA, thereby freezing the works in New York until ownership was determined.

Since New York has a particularly vital position within the art world, the author has chosen to use the state as a paradigm to illustrate the repercussion of unilateral state action. New York also serves as a useful starting point for a discussion on the effects of statutes of limitation.

In 1997, New York established a Holocaust Claims Processing Office to assist claimants seeking to recover lost Holocaust assets (i.e., money in Swiss banks, unpaid insurance, and art). The Office's website invites claimants to submit their claims, but tellingly cautions that "[t]his Office, however, does not have the power to personally search for any assets in Europe or to mandate certain actions" from certain European institutions. New York State Banking Department, Holocaust Claims Processing Office (visited Apr. 7, 2000) <http://www.claims.state.ny.us/>.

The two works were Dead City and Portrait of Wally. See Judge Rules Contested Art Works Must Return to Austria: Updates with Decision to Appeal, AGENCE FRANCE-PRESSE, May 14, 1998, available in 1998 WL 2280444 [hereinafter Judge Rules].


See id. at 872; Robert Hughes, Hold Those Paintings! The Manhattan D.A. Seizes Alleged Nazi Loot, TIME, Jan. 19, 1998. Interestingly, before the D.A. intervened the Austrian owners of the work proposed that an international tribunal make a binding determination of the art's ownership. With such cooperative owners, the subpoenas appeared unnecessary to determine who held legitimate title. See id. (suggesting political motives).
These events sent chills through the art world. As the MOMA argued, "the success of New York's museums in presenting first class exhibitions on a consistent basis is dependent, in part, on their ability to provide assurances to art lenders that their work will be safely returned." U.S. museums feared that if a state could intervene in claims of ownership by subpoenaing all allegedly stolen works, no foreign museum would be willing to loan artwork for exhibition in the United States. The art community was further concerned that if the Manhattan District Attorney prevailed, museums would face the burdensome task of researching the provenance of every work on loan for a temporary exhibit.

Although the district attorney argued that a ruling for the MOMA would render New York a haven for stolen art, the trial court ruled that New York law protected the paintings from seizure. The judge rejected the district attorney's overly cautious argument. However, the appellate court overruled the decision and found that the anti-seizure statute did not apply to a subpoena issued as part of a criminal investigation. Ultimately, the Court of Appeals of New York reversed the intermediate court and held that the statute protects artwork of nonresident lenders from any kind of seizure.

If states dealt with the issue by unilateral actions like those advocated by the Manhattan District Attorney, museums would find themselves in a precarious position: torn between a moral

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142 MOMA, supra note 140, at 875.
143 See Francine Cunningham, Art with a Dubious Past, IRISH TIMES, Aug. 12, 1998, at 11 ("United States museums now dread the possibility that other collectors will refuse to lend European paintings in case they are seized during international shows."); cf. MOMA, supra note 140, at 875 ("To satisfy this concern, for the past thirty years New York cultural institutions have relied on a state law which exempts from seizure any art lent to a cultural institution by a nonresident exhibitor."). The Court was referring to section 12.03 of the New York Arts and Cultural Affairs Law ("ACAL"). A similar federal statute, 22 U.S.C. § 2459 (2000), provides similar protection to works on loan from abroad which are culturally significant and if the exhibition is "in the national interest" as determined by the U.S. Information Agency.
144 See MOMA, supra note 140, at 884 (concluding that this would be an undue burden).
145 See id. See generally Judge Rules, supra note 139.
147 In re Museum of Modern Art, 93 N.Y.2d 729, 735 (N.Y. 1999).
obligation to victims of the Holocaust, their legal obligation to lenders, and their self-imposed obligation to the public.\textsuperscript{148} The gravest danger, however, is neither the threat of New York becoming a safe repository for art with cloudy title, nor the potentially detrimental effect on New York's position as an artistic center,\textsuperscript{149} but the threat to the public. As the New York Court of Appeals noted, the intent of the anti-seizure statute was twofold: "to insulate nonresident lenders from seizures via legal process and, concomitantly, to protect state cultural institutions that depend upon the free flow of art for the benefit of the people."\textsuperscript{150} To allow state authorities to seize allegedly stolen works of art would likely deprive the American people of any opportunity to view foreign-owned works on exhibition in this country without furthering the goal of returning the works to their rightful owners.\textsuperscript{151}

4.3.2. The Legislative Response

Interestingly, the New York State Legislature promptly responded to the Court of Appeals decision with proposed "legislation to allow State intercession when artwork on loan in New York is suspected of being stolen property."\textsuperscript{152} The proposals would amend the anti-seizure statute to prohibit "attachment, execution, sequestration, replevin, distress or any kind of civil seizure" while a work of art owned by a nonresident is on exhibi-

\textsuperscript{148} See, e.g., Ralph E. Lerner, The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title, 31 N.Y.U. J. INT'L L. & POL. 15, 16 (1999) ("A museum's essential activity is to hold works of art as a public trust for the education and benefit of the general public."); Michelle I. Turner, Note, The Innocent Buyer of Art Looted During World War II, 32 VAND. J. TRANSNAT'L L. 1511, 1543 (1999) ("For museums which consider themselves public trusts, the public's interest in being able to see the artwork may be a primary goal in any litigation."); Hughes, supra note 141 (discussing the MOMA's contract with the Austrian owners).

\textsuperscript{149} MOMA, supra note 140, at 884 ("New York should not be faulted for providing an atmosphere conducive to the temporary exhibition of foreign art.").

\textsuperscript{150} In re Museum of Modern Art, 93 N.Y.2d at 736.

\textsuperscript{151} I.e., foreign owners of works with cloudy title could avoid any dispute by keeping the items in their homeland. Cf. Cunningham, supra note 143, at 11 (discussing the withdrawal of two paintings from a Bonnard retrospective when it moved from London to the MOMA in the wake of the Schiele dispute).

\textsuperscript{152} Roy L. Reardon & Mary Elizabeth McGarry, Artwork Allegedly Stolen by the Nazis, N.Y.L.J., Oct. 14, 1999.
tion in the state. The quick reaction of the legislature suggests that the balance struck by the courts may only be temporary and that the courts will likely not have the last word on this debate.

4.3.3. The Statute of Limitations

"Despite [the] rule that even a good faith purchaser cannot acquire title to [stolen] property in a common law country, the original owner will be unable to recover the object in a court in the United States, if the statute of limitation bars the claim." To allow a purchaser to feel secure in his ownership, the passage of time bars the original owner's claim and the law treats the current possessor as the owner. Thus, often the greatest barrier to Holocaust plaintiffs' claim of ownership is the statute of limitations.

4.3.3.1. Disunity among the States

In New York, a plaintiff has three years in which to bring a claim to recover stolen property held by a good faith purchaser. Under New York's "demand and refusal" rule, the statutory period is tolled when the original owner demands that the possessor

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154 In civil law countries, a thief may transfer good title to a good faith purchaser. The common law and the Uniform Commercial Code ("UCC"), a transferor can convey only the title he holds, i.e., a thief may not transfer title to stolen property. See Patty Gerstenblith, Cultural Property and World War II: Some Implications for American Museums a Legal Background, SC 40 ALI-ABA 17, 19 (1998) available in WESTLAW. See infra Section 6 for a discussion of the good faith purchaser standard.
155 Id. at 20. The rationale behind statutes of limitations is that as time passes, it becomes increasingly harder for parties to present accurate evidence and testimony regarding past events. For a full discussion of the rationale of these statutes, see id.
156 This is true despite the common law rule regarding transfer of title to bona fide purchasers. See id.
157 See Lawrence M. Kaye, Laws in Force at the Dawn of World War II: International Conventions and National Laws, in THE SPOILS OF WAR, supra note 1, at 100, 104 (discussing the obstacles posed by the statute of limitations). Since most states have a statute of limitations for recovery of personal property between two and six years from the accrual of the cause of action, the crucial question in cases involving stolen art is when does the cause of action accrue. For an excellent overview of this issue and how different states handle it, see generally Gerstenblith, supra note 154, at *20-24.
158 See Kaye, supra note 157, at 104.
return the property at issue and the possessor refuses. By contrast, in New Jersey a cause of action does not accrue until the original owner has notice of the whereabouts of the stolen property or should have obtained such notice through due diligence. In New York, due diligence is irrelevant to the tolling of the statute of limitations, but comes into play with the defense of laches. “Laches is an equitable defense used to mitigate the harsh effects of a statute of limitations when defendants have been prejudiced by plaintiffs who ‘slumbered on their rights.’” A defendant can prevail on a laches defense where he can establish that the plaintiff’s unreasonable delay caused him undue prejudice. Thus, although New York does not require original owners exercise due diligence to toll the statute of limitations, it does require that they comply with a “standard of reasonable diligence.” However, because the defendant must also demonstrate prejudice, despite this requirement of reasonableness, New York’s rule is nevertheless quite favorable to plaintiffs.

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159 See id. at 104; Gerstenblith, supra note 154, at *20-21. In New York, a claim concerning a work stolen by the Nazis in the early 1940s would not necessarily be time barred in the 2000s. Consider the following hypothetical concerning a claim for a work stolen by the Nazis in 1942: in 1999, 47 years later, the statute of limitations would not have run out and would not even begin tolling until the present possessor refused the original owner’s demand for the painting.

160 See Gerstenblith, supra note 154 at *21 (“This rule puts the burden on the true owner to establish that he or she has used due diligence in searching for the property.”). “Due diligence means ‘persistent and continuous inquiries through multiple channels of investigation.’ It involves an inquiry into title, warranties, authenticity, and provenance.” Kelly Diane Walton, Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Artwork, 9 FORDHAM INT’L. J. 549, 580 (1999) (citations omitted).

161 See Walton, supra note 160, at 590.

162 Id. at 581 (citations omitted).

163 See id. at 580.

164 Id. at 592.

165 In fact, New York is probably the most pro-plaintiff jurisdiction. See Kaye, supra note 157, at 105 (“Few jurisdictions are as favorable to plaintiffs as New York.”); see also Walton, supra note 160, at 592 (citation omitted) (indicating that commentators have argued “that stolen art, at least in courts following the New York laches rule, really has no statute of limitations”). However, although the defense of laches “may appear illusory” because of the difficult burden it places on the good faith purchaser, Walton points out that as Nazi-looted art receives more public attention and as databases become more comprehensive, “the laches defense may become more beneficial to the purchaser.” Id. at 598.
While New York's approach to the statute of limitations quandary would allow most Holocaust owners to proceed with their claims, claimants in other jurisdictions, such as New Jersey, would likely find their claims time-barred. In most forums, plaintiffs would have to prove they had exercised due diligence in attempting to locate their possessions.\[^{166}\] Placing this burden and imposing a time restriction on victims of Nazi theft is illogical and appears unjustifiable.\[^{167}\] While encouraging the trade of goods\[^{168}\] is a worthy goal, returning works of art to victims of Nazi looting is undoubtedly a loftier and more compelling one. The justifications underlying statutes of limitations pale in comparison to the moral concern calling for the return of Nazi loot. In cases involving Nazi-looted art, placing the burden of time and due diligence on the original owner seems only to further victimize Holocaust victims. Yet, even if all jurisdictions within the United States agreed to adopt New York's approach or to suspend statutes of limitations altogether to deal with this problem, that would not be enough. The problems posed by the disparity in time-requirements and the application of statutes of limitations to the claims of Holocaust victims is not limited to the United States. Thus, an international consensus is required.

4.3.3.2. Differences Between Nations

While dismissing an otherwise valid claim based solely on the expiration of the statute of limitations period terminates the claim, it hardly resolves or settles a valid claim involving Holocaust spoilage. For the time being, the use of legal technicalities such as the statutes of limitations is inappropriate in the context of the morally reprehensible actions of the Nazis.\[^{169}\] Nations

\[^{166}\] See Gerstenblith, supra note 154, at *23-26 (examining the "due diligence" standard).

\[^{167}\] See Kaye, supra note 157, at 105 ("[O]ne may well ask why a nation or an individual from whom that property is wrongfully taken during wartime should lose the right to have the property returned because of the mere passage of time.").

\[^{168}\] See Gerstenblith, supra note 154, at *20.

\[^{169}\] As argued by Kaye, it seems only logical that no statute of limitation should apply where the claimant seeks the return of cultural property seized during war. See Kaye, supra note 157, at 105; see also Phillippe DeMontebello, Art Plundered During the Holocaust, Speech at the National Press Club Luncheon (July 14, 1998) (transcript available in LEXIS, News Library, Federal News Service File) ("[F]rankly, I would not see using the technicality of an abstractly found date as a reason to deny a completely legitimate claim from the
must agree to suspend requirements such as statutes of limitations in order to reach any definitive solution. That New York has a particularly "forgiving" statute of limitations is not enough. The differences in statutes of limitations within and across national boundaries prevent a finite resolution of ownership claims to Nazi-looted art absent an international agreement.

The problems posed by varying statutes of limitations support the argument for an international agreement to suspend statutes of limitations into the near future. The resolution of claims over the stolen art of the Holocaust should not depend on the statute of limitations in a particular jurisdiction. Should no international consensus be met, the next best alternative might be to grant federal jurisdiction over cases brought within a certain time period.

4.4. Private Action: The Art Community

"The leading international museums rely on borrowing paintings from overseas to present first-rate shows." For years, U.S. museums have depended on federal and state laws to protect these loans from detention or seizure. Recently, however, as increased attention has turned to the issue of Nazi-looted art, concern has mounted over whether museums have been using these

process.

170 Cf. Stephan J. Schlegelmilch, Note, Ghost of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule, 50 CASE W. RES. L. REV. 87, 113 (advocating the imposition of a "discovery rule" and indicating that "[a] strict statute of limitations ignores the mobility and ease of concealment of stolen art, while no statute of limitations allows a would-be plaintiff to sit on her rights, thereby causing prejudice to a defendant").

171 Cf. Tarquin Preziosi, Note, Applying a Strict Discovery Rule to Art Stolen in the Past, 49 HASTINGS L.J. 225, 226 n.3 (1997) (discussing New York Congresswoman Nita Lowey's plan "to introduce legislation allowing American citizens to sue in federal court to recover artwork abroad that was stolen during the Holocaust"). The proposed legislation, discussed infra Section 4.2.2.2.1, would give federal district courts jurisdiction in civil cases arising from personal and property injuries inflicted by the Nazi government brought by January 1, 2010.

172 Cunningham, supra note 143.

173 See id.; see also supra note 143. See, e.g., MOMA, supra note 140, at 875 (discussing MOMA's argument for the application of ACAL).
laws to evade the issue of ownership of Holocaust-era assets.\textsuperscript{174} While the ethical issues surrounding Nazi spoilage "threaten the free flow of art across the Atlantic," critics have pleaded with museums not to "turn a blind eye."\textsuperscript{175} They have not.

\subsection*{4.4.1. AAMD Principles}

The American Association of Museum Directors ("AAMD") has issued principles "deploring 'the unlawful confiscation of art that constituted one of the many horrors of the Holocaust and World War II,'”\textsuperscript{176} setting guidelines "for resolving claims," and offering database recommendations.\textsuperscript{177} These guidelines aim to balance the competing concerns of resolving claims of stolen art and keeping works available for public enjoyment and education.\textsuperscript{178} The guidelines call upon museums to conduct provenance research to determine if any works were illegally confiscated during the Nazi era.\textsuperscript{179} If a museum discovers an unlawfully confiscated work, it must publicize the finding.\textsuperscript{179} The AAMD further rec-

\textsuperscript{174} See, e.g., MOMA, supra note 140, at 875 (discussing the district attorney's argument); Cunningham, supra note 143, at 11; Garance Franke-Ruta, Lobbying & Law: The Artful Dodgers, NAT'L J., Apr. 4, 1998; cf. Roger Franklin, The Big Steal (visited Apr. 7, 2000) <http://www.theage.com.au/daily/980606/news/news23.html> (describing an incident in which the National Gallery returned alleged Nazi spoilage to Switzerland and denied that it "bore any moral or legal responsibility for determining ownership of the paintings" and insinuating that the AAMD task force was created in response to the MOMA incident). \textit{But see} DeMontebello, supra note 169 (attempting to dispel misconceptions about the complicity of the museums).

\textsuperscript{175} Cunningham, supra note 143.


\textsuperscript{177} See DeMontebello, supra note 169 ("Surely it will be in everyone's best interest whenever possible to marry simple justice and public service.");\textsuperscript{178} see also AAMD, \textit{Task Force Report Press Release}, supra note 176 (characterizing the guidelines as "reconciling the interests of individuals who were dispossessed of works of art . . . with the fiduciary and legal obligations and responsibilities" of museums to the public they serve).

\textsuperscript{178} See DeMontebello, supra note 169. Interestingly, neither the law nor industry custom has required art buyers to conduct title searches. \textit{See} Franklin, supra note 174. For the complete report of principles, guidelines and recommendations, see AAMD, \textit{Report of the AAMD Task Force on the Spoilation of Art during the Nazi/World War II Era (1933-1945)} (last modified June 4, 1998) <http://www.aamd.net/guideln.shtml> [hereinafter AAMD, \textit{Task Force Report}].

\textsuperscript{179} AAMD, \textit{Task Force Report}, supra note 178, \textit{¶II.D.}
ommended that member museums consider using mediation to resolve claims regarding art allegedly confiscated during the Second World War.\textsuperscript{180} The AAMD also expressed its commitment to employing the databases established by third-party groups regarding claims, claimants, works confiscated, and works later restituted.\textsuperscript{181}

For the efforts of U.S. museums to prove fruitful, they must not be alone in their attempts at regulation. While one would hope that the AAMD guidelines could serve as a model for international regulation of claims regarding Nazi-era looted art, the guidelines are not binding on any government or on any foreign museum.\textsuperscript{182} Yet, any resolution of claims of Holocaust-era looting of art would necessarily have its greatest impact upon the international art community, the industry that buys, sells, and displays these works. The involvement of museums, on an international level, is thus crucial to any real attempt at settlement. Education and access are vital and deserved goals, involving museums in any agreement can further these ends. Museums could effectively represent the moral and social interests that must be integrated into any legal solution.

4.4.2. The Guidelines in Action?

Museums have shown varying degrees of commitment to the principles set forth by the AAMD. In June 1999, the Seattle Art Museum voted to return a $2 million Matisse\textsuperscript{183} to the family of a

\textsuperscript{180} See id. ¶ II.E. During his address to the National Press Club, a reporter asked DeMontebello, the Director of the Metropolitan Museum of Art and the head of the AAMD, why museums should give up paintings bought in good faith. His answer indicated that museums should not necessarily have to give up works bought in good faith. This, according to DeMontebello, was the reason to turn to mediation. See DeMontebello, supra note 169.

\textsuperscript{181} See AAMD, Task Force Report, supra note 176, ¶ III; see also DeMontebello, supra note 169 (expressing optimism about the role of databases planned by the World Jewish Congress's Commission for Art Recovery and the National Jewish Museums' Holocaust Art Restitution Program ("HARP").

\textsuperscript{182} Fortunately, French and Dutch museums have parallel organizations and are drafting similar guidelines. See DeMontebello, supra note 169; Eizenstat, Briefing, supra note 45; Eizenstat, In Support, supra note 82. But cf. infra Section 5.2 (discussing the actions of French museums). The British Museum and Galleries Commission ("MGC") has issued a statement of principles on Nazi-looted art.

\textsuperscript{183} The painting, entitled Odalisque, was painted in 1927. See Rubenstein, supra note 52.
prominent Jewish art dealer from whom the Nazis stole the painting. After research into the painting’s provenance conducted by HARP confirmed the claims of the Rosenberg heirs, the museum followed through on an earlier pledge to turn over the painting. The decision, along with a similar decision by the Berlin National Gallery, has been heralded as setting a “major precedent for museums and private collectors around the world” to forego “costly and protracted legal battles.”

While the Seattle Art Museum’s actions fulfill the mandate of the AAMD guidelines to equitably resolve claims to Nazi-looted art, not all member museums have demonstrated an equally strong commitment to the guidelines. According to the guidelines, “[m]ember museums should not borrow works of art known to have been illegally confiscated during the Nazi/World War II era and not restituted” and should “endeavor to review provenance information regarding incoming loans.” Nevertheless, even though a claim had been filed with the Art Loss Register ("ALR") two months before the exhibit began, the Boston Museum of Fine Arts’ ("MFA") blockbuster Monet exhibition included Monet’s “1904 Water Lilies borrowed from a group of some 2,000 works recovered by the Allies in Germany after World War II and held in trust by the National Museums of France for eventual return to claimants.” While it is tempting

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185 See Rubinstein, supra note 52.
186 See Marks, supra note 184 (indicating that “the Berlin National Gallery agreed to restore a $5 million Van Gogh drawing to Gerta Silberberg, whose father-in-law perished in a concentration camp in Poland”).
187 Id.
188 See AAMD, Task Force Report, supra note 176, ¶ II.E.2 (calling on member museums to work with claimants to determine the provenance of claimed pieces and to resolve legitimate claims “in an equitable, appropriate, and mutually agreeable manner”).
189 Id. ¶ II.F.2.
190 Id. ¶ II.F.1.
191 Lee Rosenbaum, Nazi Loot Claims: Art with a History, WALL ST. J. (Europe), Jan. 29, 1999 at 14 [hereinafter Rosenbaum, Claims]. See infra Section 5.2 for a discussion of the 2000 works “temporarily” held by French government. After this violation of AAMD guidelines came to light, the museum placed an explanatory placard beside the painting indicating that the work was claimed by heirs of a French Jewish art dealer and collector, Paul Rosenberg, whose inventory the Nazis looted in 1940. See Walter V. Robinson, MFA Ex-
to criticize the MFA for the gulf between its practices and the AAMD principles, such a reaction ignores a possible flaw in the principles: that their ban on loans of Nazi-looted art shields these works from public display where they can be seen by potential claimants. Interestingly, rather than condemning the MFA’s departure from the guidelines, Elaine Rosenberg “noted that her opportunity to eyeball the Monet in Boston allowed positive identification of the work as the same one that her family sought,” allowing them to file a formal claim with France.192

Regardless of the wisdom of all of the AAMD’s provisions and the MFA’s shirking of them, the MFA, however, has made some strides towards executing the guidelines. The AAMD calls upon its members to “review the provenance of works in their collections to attempt to ascertain whether any were unlawfully confiscated during the Nazi/World War II era and never restituted.”193 Last February, the museum uncovered documents from 1948 regarding claims to a landscape by Henri met de Bles and offered to return the work to the Dutch government if they could provide evidence that it had been stolen.194 Tellingly, however, five decades of inaction, numerous reports by the Boston Globe, and pledges made by the AAMD proceeded the museum’s attempt to return the painting which it had acquired in 1946.195 Still the MFA deserves credit for not standing behind legal technicalities to hold onto the de Bles and for attempting to take responsibility for its actions in the 1940s.196 Back then, the MFA “simply did what everyone else was doing—acquiring fine art

192 Rosenbaum, Claims, supra note 191 (quoting Mrs. Rosenberg, Paul Rosenberg’s daughter-in-law, as saying “If you don’t show these pictures, it doesn’t help the owners to find them.”).

193 AAMD, Task Force Report, supra note 176, ¶ II.A.

194 See Walter V. Robinson, Question of Ownership Taints MFA Painting, BOSTON GLOBE, Feb. 25, 1999, at A1. Apparently, the Dutch first informed the MFA that the painting had been stolen from Holland by the Nazis and asked for its return in 1948. See id. The MFA responded by insisting the Dutch provide the museum with “‘definite’ evidence it had been stolen.” Id.

195 See id.

196 See id. (indicating that according to Boston University law professor Alan Feld, the MFA “might have sound legal standing to retain the artwork for statute of limitations reasons, since the Dutch knew in 1948 where the painting was”).

without asking too many questions.” At the very least, the AAMD principles are finally encouraging American museums to confront those questions.

5. FOREIGN APPROACHES

Left to their own devices, nations have taken varying approaches to the issue of Nazi spoilage. While there are no clear-cut “right” answers to this problem, an examination of the varying approaches of three nations aptly highlights the need for true international consensus before the problem can be “solved.”

5.1. Austria: Righting Past Wrongs

Perhaps in part to acknowledge their complicity during the Nazi-era, Austrians have confronted the issue of Nazi confiscated art head-on and have provided a useful model in so doing. In 1995, the Austrian government enacted legislation giving the Austrian Jewish Community ownership over the “heirless treasures” looted by Nazis that the government had held in storage for five decades. The following autumn, major auction houses held an auction to sell off these works to benefit Holocaust survivors and their heirs. More recently, in 1998, Austria enacted legislation to provide for “restitution notwithstanding such legal obstacles as the statute of limitations.” In accordance with the

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197 Id.
198 See CNN Newsroom: A Sale of Art Confiscated from Jews During World War II Closes a Chapter in the History of the Holocaust, (CNN television broadcast, Nov. 26, 1996), available in LEXIS, News Library, Cnn File (“Much too long, we have denied responsibility for what Austrians did to millions of Jews.”); Eizenstat, Concluding Statement, supra note 48; see also Hughes, supra note 141 (calling the Austrian conduct in the restitution of art “impeccable”).
199 CNN Newsroom, supra note 198 (“[T]he Austrian government, the people in general, either forgot about them or didn’t know what to do with them. They’re basically heirless pieces of art.”).
200 See id.
201 See id. (indicating that as a matter of morality if any original owners came forward, the art would be returned); see also USHMM, Governmental and Private Attempts to Trace Holocaust Assets by Type, by Country (visited Apr. 7, 2000) <http://www.ushmm.org/assets/legislation.htm> (chronicling the efforts of various nations to deal with Holocaust-era assets) [hereinafter Chronicle].
202 Eizenstat, Concluding Statement, supra note 48; see also Eizenstat, In Support, supra note 82 (applauding Austria’s decision to return looted art in the possession of its federal museums and collections despite the availability of legal defenses); Chronicle, supra note 201 (indicating that the proposed Austrian
law, Austria returned 200 pieces of art to the Rothschild family that were subsequently auctioned at Christie's for $90 million.\textsuperscript{203}

Given Austria's then model behavior, the decision of a New York district attorney to seize the two allegedly looted works "seemed particularly insulting."\textsuperscript{204} When the district attorney seized the two paintings, Austria was attempting to come to terms with its past and to offer a fair resolution to problem of Nazi-looted art. Unilateral action such as that of the New York District Attorney, thus, not only shakes the trust underlying the international art trade,\textsuperscript{205} but also calls into question a nation's integrity. An international agreement setting a unified standard of conduct could provide a guide for judging appropriate behavior; absent such an agreement, however, one nation cannot be the judge of another's efforts. The resulting insult could result in unconscious retaliation (i.e., refusal to cooperate). By placing Austria on the defensive, New York risked compromising the country's impressive efforts to repatriate this art.

5.1.2. A Step Backwards?

Once hailed as an exemplar for other nations, over the past year, the mixed-bag that is Austrian restitution efforts now epitomizes the problems inherent in nations being left to deal with the issue of Nazi-looted art on their own. For "[e]ven if the need for restitution had been emphasized by the law in parliament, legal technicalities were being dug up to prevent these restitutions."\textsuperscript{206} After the Rothschild restitution, the Austrian restitution commission rejected the claims by the foreign heirs of an Austrian Jewish family for the return of paintings by Gustave

\textsuperscript{203} See Fakin, Unfinished Business, supra note 52.

\textsuperscript{204} Hughes, supra note 141; see also discussion supra Section 2.3.

\textsuperscript{205} See supra Section 2.3.

\textsuperscript{206} Hubert Czernin, Counsels of Very Grudging Justice (visited Feb. 4, 2000) <http://www.allemandi.com/TAN/news/article.asp?idart=810> ("The Austrian Parliament decided that full restitution of works of art should be made to victims of the Nazis and to those who had been coerced into giving works after 1945 to museums. But the advisory council has twice taken its own, negative, line.").
Klimt. 207 "[F]orced into exile and robbed of his collection by the Nazis, Ferdinand Bloch-Bauer died in Switzerland in 1945" and bequeathed the Klimt paintings, "although they were no longer in his possession, to his family, which had also fled Austria." 208 The restitution committee indicated that the Klimt paintings fall outside the purview of the 1998 law because of Adele Bloch-Bauer's 1923 will, which instructed her husband to leave the paintings to the Austrian National Gallery should she predecease him. 209 The committee's argument, however, failed to acknowledge that the will was written before the second World War and the persecution of Austrian Jews. 210 Because the committees denied their claim, the claimants are now pursuing their case in the Austrian courts, and the committee is viewed with great skepticism and has had its favorable decisions go all but unnoticed. 211

Despite the restitution committee's mixed performances, the Austrian museum community has taken compliance with the 1998 Restitution Law and the Washington Conference principles seriously. In January, the Joanneum Museum announced that it held about seventy works of art it believes were looted by Nazis. 212 The museum indicated that the owners of about half of the pieces had been identified and that photos of the others would "be posted on the Internet if no owners can be found." 213 Unlike American museums, which have been criticized for waiting for Nazi-looted art to be claimed rather than announcing that they have questionable holdings, 214 Austrian museums at least appear committed to identifying and returning the looted art in their col-

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207 See Eakin, Unfinished Business, supra note 52 (discussing the Bloch-Bauer case and indicating that the trove of art work claimed by the family is worth approximately $100 million); Rubinstein, supra note 52.

208 Rubinstein, supra note 52.

209 See id.

210 See id. The committee's "decision provoked widespread outrage in the art world and was criticized by an array of Austria's political and cultural elite." Eakin, Unfinished Business, supra note 52 (indicating that a week after the decision an open letter was sent by 100 Austrian intellectuals urging the return of the works); see also Rubinstein, supra note 52.

211 See Czermin, supra note 206.


213 Id.

lections as the principles announced at the Washington Conference urge.\textsuperscript{215}

5.2. \textit{France: Sluggishness and Manipulation of Law as a Barrier to Restitution}

During World War II, the Nazis looted approximately one-third of the known private art collections in France.\textsuperscript{216} After the War, Germany returned more than 61,000 works to the French government, who returned over 45,000 works to their respective owners.\textsuperscript{217} Of the remaining 15,000 works, the government sent approximately 2000 of the “most important” works for “temporary” safeguarding in museums and auctioned the remaining works with little public fanfare.\textsuperscript{218} By decree, the museums were to be “precarious holders” of the works, responsible for preserving them, exhibiting them, assisting dispossessed collectors and establishing a “provisional inventory.”\textsuperscript{219} Although these works belong to neither the French government nor the museums housing them, most of these works have been in the “provisional custody” of French museums for the past fifty years.\textsuperscript{220}

5.2.1. \textit{Publicity is the Mother of All Action}

While the French have taken steps towards settling the controversy surrounding these works of art, they have done so only when forced by the embarrassing glare of the spotlight. Since the publication of Hector Feliciano’s groundbreaking book on France’s covert management of Nazi spoilage, \textit{The Lost Museum}, French museums have been “moving sluggishly and replying cautiously to an ever widening circle of people interested in the subject.”\textsuperscript{221} A 1996 investigation by the French Cour des Comptes, the audit office, criticized the French state and museum curators for their failure to make any actual attempt to locate the owners

\textsuperscript{215} See PRINCIPLES, supra note 46, art. 5.
\textsuperscript{216} See Andrew Taber, France’s Dirty Little Artistic Secret, SALON: NEWSREAL (visited Nov. 2, 1998) <http://www.salon.com/may97/new/news970515.html> (discussing FELICIANO, supra note 2).
\textsuperscript{217} See FELICIANO, supra note 2, at 216.
\textsuperscript{218} Id. at 218.
\textsuperscript{219} Id. at 218-19.
\textsuperscript{220} Id. at 214.
\textsuperscript{221} Id. at 234.
of these works of art. The following year, the French Prime Minister established a committee to determine the status of the valuable property confiscated from French Jews during the War. During 1997, the French government displayed 987 of these looted works in three exhibitions to assist owners and their descendants in reclaiming them.

5.2.2. Outsiders' Perceptions: Criticism and Skepticism

France's efforts to return Nazi spoilage have met with suspicion and criticism. Tellingly, "as the French government representatives in Washington said that they would go along with" the non-binding principles, the Georges Pompidou Centre in Paris told the heirs of a major French collector that they could not reclaim a stolen Georges Braque because "the statute of limitations has expired." Given France's shirking of moral responsi-

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222 The report further criticized the museums for failing to identify the provenance of the works and for minimizing the importance of these works in their holdings. See id. at 237; John Lichfield Paris, Robbery that Followed the Holocaust: 2,000 Art Works in French Museums, INDEPENDENT (London), Jan. 28, 1997, (International Section), at 11.

223 Paris, supra note 222, at 11.

224 See Chronicle, supra note 201; Taber, supra note 216; see also FELICIANO, supra note 2, at 238 (indicating that these exhibitions were not enough). Five paintings were returned because of these exhibitions. See Tom Heneghan, Chirac Wants France to Keep Art Nazis Looted (visited Dec. 18, 1998) <http://museum-security.org/reports/07798.html>.

225 See Taber, supra note 216; FELICIANO, supra note 2, at 238; Richard Wolff & John Authors, France Accused over Looted Art Works: Jewish Groups Claim Paris is Dragging its Feet Over Compensation for Masterpieces that were Stolen from Victims of the Nazis, FIN. TIMES (London), Dec. 3, 1998, (World News-Europe), at 2. During the Washington Conference, the World Jewish Congress pleaded with the French government to release the works or to follow the lead of Austria and auction the unclaimed art. See id. Under French law, however, the government is merely the temporary custodians of the art and thus cannot auction the works. See id. Interestingly, French Jewish leaders have requested that the works remain in France and that the French government should take legal ownership of these works by paying compensation to the French Jewish community. See Heneghan, supra note 224.


227 CNN Saturday, supra note 5; see also Herbert, supra note 226 (explaining that the heirs were told that under the French civil code "anyone buying a stolen work in good faith can keep it unless its owners lodge a claim within three years"). The museum claimed to be good faith owners because it had bought the work from a Swiss art dealer who had obtained it legally on the art mar-
bility for fifty years, this behavior, while disappointing, is hardly surprising. Until it is bound to do otherwise, the French museum community can continue to evade justice by resorting to technicalities and by distinguishing between looted works held by French museums as temporary custodians and looted works bought on the market by French museums. Works belonging to the former class, like Leger’s Woman in Red and Green, are slowly being returned to their original owners, while good-faith purchaser laws shield the latter class. Thus, the promise to repatriate these works amounts to empty words as long as a nation can avoid its moral obligation through a rigid application of its own laws. An internationally binding agreement is thus required.

5.3. Switzerland: The Convenience of Neutrality

“In the unique circumstances of World War II, neutrality collided with morality; too often being neutral provided a pretext for avoiding moral considerations.” Switzerland’s neutral status immunized it from the Allied monitoring that occupied and belligerent nations received.

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228 See, e.g., FELICIANO, supra note 2, at 214. This is not to suggest that the French restitution efforts have had only negative results. Recent French restitution efforts have been mixed. See Eakin, Unfinished Business, supra note 52 (“The Louvre has agreed to return five 17th-century Italian paintings to a family that has claimed them for almost five decades.”).


230 See Rosenbaum, Developments, supra note 58 (indicating that the Pompidou defends its position on Braque’s Guitar Player because “the Braque is not among the works held by the French museums for eventual return to rightful owners”).

231 I.e., the rigid application by the French of France’s good faith purchaser laws. This resort to technicalities is not unique to the French. Cf. FELICIANO, supra note 2, at 155 (discussing how Swiss laws “facilitated art trafficking and provided an ideal refuge for both sellers and buyers”).

232 WILLIAM Z. SLANY, U.S. DEP’T OF STATE, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II PRELIMINARY STUDY v (1997). See generally FELICIANO, supra note 2, at 155-62 (discussing how Switzerland’s neutrality worked to its advantage, enabling it to amass a large amount of Nazi-looted art work during and after the war).

233 See FELICIANO, supra note 2, at 191. Although beyond the scope of this comment, Feliciano provides an interesting and informative discussion of the Swiss art market during World War II. He indicates that the Swiss were not

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To placate the Allies, in 1945, the Swiss adopted legislation that voided transactions involving Nazi loot that otherwise would have received the protection of its bona fide purchaser laws.234 Two years later, as the watchful eye of the Allies turned elsewhere, the Swiss suspended this legislation.235 Henceforth, standard Swiss civil law governed these transactions. Under Swiss law, a bona fide purchaser gains title to stolen goods after five years of possession, and if a stolen painting is sold through a dealer or at an auction, the legitimate owner must reimburse the buyer before reclaiming his possession.236 Thus, in Switzerland, a claimant to Nazi-looted art would either have her claim dismissed because the statute of limitations had expired or would incur compensation costs.237 Again, technicalities thwarted the claims of victims of the Nazi regime.

Unlike the Austrians, the Swiss seem content to ignore their cooperation with Nazi forces. During the war, a smuggling ring brought looted art from France to Switzerland.238 For the past fifty years, much of it has remained under the protection of Swiss law and a veil of secrecy.239 Further, given choice of law rules under which the substantive law of the forum where the wrong occurred applies,240 the determination of ownership of a work

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234 See Prott, supra note 18, at 226 (discussing the Swiss adoption of the Declaration of London). For a discussion of the Declaration, see infra Section 2 and accompanying notes.

235 See Prott, supra note 18, at 226.

236 See FELICIANO, supra note 2, at 155; see also Prott, supra note 18, at 226 (explaining that the Swiss repealed the law to avoid liability that it would have incurred under its interpretation of the legislation, i.e., the government would have had to compensate the good-faith purchaser). See generally Gerstenblith, supra note 154, at *19-26 (explaining bona fide purchaser laws).

237 See FELICIANO, supra note 2, at 192 (indicating the Allies’ disgust with the fact that the claimant would have to go to court in the first place).

238 See id. at 188.

239 See id. at 191.

240 See Gerstenblith, supra note 154, at *26 ("The traditional choice-of-law doctrine in the United States is the lex loci delicti comissi rule which states that the substantive law of the place where the wrong was committed governs the case."). In New York, for example, the "borrowing statute" provides that actions occurring outside the state may be subject to the statute of limitations of the foreign jurisdiction, even if the limitations period is shorter than that of New York. See Robert Schwartz, The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II, 32 COLUM. J.L. & SOC. PROBS. 1, 15 (1998) (discussing N.Y. C.P.L.R. § 202 (McKinney 1990)).
bought in Switzerland might be subject to Swiss laws, thus defeating a claim brought by an original owner in the United States or elsewhere.241 Although an original owner would have no claim against a Swiss “owner” if the work remained in Switzerland, the original owner might nonetheless have a claim if the work came into the possession of an American “owner.” Such a claim then would put the original owner against the new American “owner.”

The Swiss approach dramatically illustrates how one country’s inflexibly technical rules have international repercussions that preclude a definitive determination of the ownership of Holocaust art absent a international legally binding solution.

6. PROPOSAL

To reach a solution on this issue, countries must be willing to look outside of their existing legal framework. The “ordinary rules designed for commercial transactions of societies” should not apply “to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.”242 While the principles announced at the Washington Conference call upon countries to achieve a “just and fair” solution, they ask them to do so within the structure of their existing laws. To reach such a solution, however, many countries must alter their laws in a way that is collaborative of other countries.243 Historically, many nations have shown an utter disregard for the same moral commitment that these eleven principles impose upon them.244 Hence, to exact a solution to this problem requires that countries agree to be legally obligated to reform their national laws to allow claims to Nazi-confiscated art to proceed.

Recognizing the sui generis nature of the Holocaust, countries should come to a moral recognition that legal technicalities should not bar claims to the lost art of the Holocaust. Allowing claims to proceed, however, does not necessitate that the works be returned to the original owner or that the claims proceed in a

241 However, the policy of returning Holocaust loot could preclude such a possibility. Cf. Gerstenblith, supra note 154, at *26-*27 (noting this possibility might be avoided if the policy behind the common law rule that a thief may not transfer title outweighs the conflict of law analysis).

242 Eizenstat, In Support, supra note 82, at 3.

243 Countries could, for example, suspend statutes of limitations and allow mitigation to good faith purchaser laws.

244 See, e.g., infra Section 5.
traditional judicial forum. Further, as discussed above, while claims should be heard into the near future, this does not mean that claims must be heard indefinitely. At some point, ownership should become secure; after a certain amount of time, possessors should be able to obtain clear title to a work. A central registry for claims to Nazi-looted art could “include some listing procedure where the absence of a claim for a set number of years after publication would be recognized as clearing title.”

The issues involved implicate many complex concerns that in turn require creative solutions. For example, not all members of the Jewish community support claims brought over these works. Moreover, both international Jewish groups and national groups lay claim to the many heirless works lingering in a purgatory of sorts. Also, while the bona fide purchaser presents a far less sympathetic claim than the looting victim, subsequent purchasers who undertook the transaction in true good faith should not necessarily lose all legal rights.

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245 Mediation or alternative dispute resolution, for example, may provide more appropriate venues for raising these claims. See generally Bender, supra note 16 (discussing establishing an art dispute resolution commission and pointing out the weaknesses of traditional litigation).

246 See Bender, supra note 16. Legislation proposed in New York would enable a purchaser of stolen artwork or cultural property to obtain clear title so long as the purchaser, prior to purchase, checked with a (only one) computerized registry... to determine whether a theft victim had registered a claim to the object within three years prior to the proposed purchase. If the theft victim had not registered a claim within the three-year period, the claimant’s right of recovery would be time barred three years after purchase. Marilyn Phelan, Cultural Property, 33 INT’L LAW. 443, 445 (1999).

247 See Bender, supra note 16.

248 See DeMontebello, supra note 169. DeMontebello supplies an anecdote about a Jewish man of modest means expressing anger over the focus “on the belongings of the 50 richest families in Europe during the war.” Id. According to this man, “six million of us didn’t have paintings to exchange for the lives of” their families, and “they shouldn’t have them back. They were able to buy the freedom of their family.” Id.

249 See generally JOHN O. HONNOLD ET AL., SECURITY INTERESTS IN PERSONAL PROPERTY 27-30 (1992) (explaining that economic realities and efficiencies require attention to the bona fide purchaser). Bona fide purchaser laws attempt to strike a balance between the competing interests in secured ownership and safe commercial transactions. See id. at 27.
The first American case to settle resulted in an agreement to "split the baby." The dispute over a looted Degas ended with the Art of Institute of Chicago acquiring the work jointly from both the heirs of the original owners and the current owner. Such settlements provide the only real solution to these issues by avoiding the circus of claims and counterclaims. Private resolution also allows for the consideration of interests that might hold little persuasive power in a court of law. Here, not only did the heirs receive compensation while the original owners and the present owner received attribution for their contribution, but their settlement also served the public's interest in access to art. A court, in contrast, would only have had the power to make a determination regarding ownership.

7. CONCLUSION

Fifty years after the end of the Second World War, much of the art that was looted by the Nazis remains in museums and private collections across the United States and Europe.

Beyond the moral issues, claims to ownership of these looted works threaten the normal functioning of the art world. Since the art market does not function purely on a national level, only when nations jointly agree to hear legitimate claims to Holocaust spoilage and such claims have been settled can ownership in these works of art be secure.

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251 Degas's pastel, Landscape with Smokestacks, was the work in dispute. See Mandell, supra note 6, at (FanFare), 3.

252 The Institute paid the original owners half the value of the work, and the plaque which will hang with the painting will name both the original owners and the present owner as the benefactors. See id.

253 However, according to newspaper reports as late as May 1, 1999, the landscape that was lauded as a model by the U.S. State Department's Under Secretary for Economic and Business Affairs [sic] ... was languishing in storage at the Art Institute of Chicago, pending resolution of renewed squabbles among the museum, the heirs of Holocaust victims Friedrich and Louise Gutmann, and the work's most recent in a chain of subsequent owners.

Rosenbaum, Claims, supra note 191, at 14. See also Rosenbaum, Developments, supra note 58.
Left to independent action, countries have too long ignored their moral obligation to assist victims of Nazi looting and their heirs. While the recent adoption of non-binding principles marks a step in the right direction, it simply is not enough. Countries must not only be morally responsible for exacting a solution to this problem; they must be legally liable. A finite settlement of this issue requires a legally binding international agreement to settle claims over Nazi-looted art. Failure to reach such an agreement would essentially allow the defeated and deranged efforts of the Nazis to retain custody of these “last prisoners of World War II.”

254 Mastroberardino, supra note 78, at 315 (quoting Jack Kelly, The Spoils of War/Show Ignites Debate over Ownership, USA TODAY, Mar. 3, 1995, at 1D (“They are the last prisoners of World War II, about to emerge from the dark rooms where they were locked away 50 years ago.”))