

## Holocaust-era art restitution claims: is the hear act a game changer?

### *¿Producirá algún cambio la nueva ley para la restitución del arte expropiado durante el Holocausto?*

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#### RESUMEN

La articulista formula un análisis jurídico sobre la nueva ley firmada el 16 de diciembre de 2016 por el presidente Barack Obama, titulada Ley para la Restitución del Arte Expropiado Durante el Holocausto, una ley federal que otorga un plazo de seis años para que, en Estados Unidos, las víctimas de la persecución en la era de los nazis y sus herederos puedan demandar judicialmente la restitución del arte o propiedad cultural sustraído, confiscado o saqueado como resultado de las políticas del Tercer Reich.

**PALABRAS CLAVE:** Ley de 2016 para la Restitución del Arte Expropiado Durante el Holocausto, propiedad cultural, arte confiscado, demandas de restitución.

#### ABSTRACT

The author of this article presents a legal analysis of the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act"), signed into law by President Barack Obama on December 16, 2016, which creates a uniform, federal six-year statute of limitations on civil restitution claims in the United States for the victims of Nazi-era persecution and their

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RACHEL SKLAR

heirs to make a legal demand for the return of artwork or other cultural property that was seized, confiscated or wrongfully taken as a result of the policies of the Third Reich.

KEYWORDS: The Holocaust Expropriated Art Recovery Act of 2016, cultural property, confiscated art, restitution claims.

## Sumario

1. Background
2. Targeted Works of Art
3. Expropriation of Works of Art

### Part I

- A. The Washington Conference
- B. Provenance Research
- C. The Self-Regulating Guidelines of the American Alliance of Museums and the Association of American Museum Directors
- D. Civil Law

### Part II

- A. Von Saher v. Norton Simon Museum of Art at Pasadena
- B. Procedural History of the Von Saher Litigation
- C. Analysis of Von Saher and the United States' Judicial System's Failure to Apply "Just and Fair" Solutions

### Part III

- A. Background and Procedural History of the HEAR Act
- B. The Applicability of Equitable Principles

### Part IV

- A. The Importance of Congress's Involvement
- B. Congress's Two Options to Provide a Workable Solution: The Discovery Rule versus the Demand and Refusal Rule
- C. Why the Demand and Refusal Rule was Correctly Adopted by Congress
- D. None of the Original Policy Goals of Statutes of Limitations are Met in Nazi-Era Looted Art Cases
- E. What Effect Will the HEAR Act Have on Von Saher's Third Appeal?

### Part V

Proposed Amendments to the HEAR Act

4. Conclusion

During times of war, works of art in private collections and museums have tragically been looted and sometimes destroyed by enemy combatants. During World War II, the displacement of art was unprecedented, and for the first time in modern history combatant forces had within their ranks highly trained art specialists whose “duty it was to secure and preserve movable works of art, and whose professionalism” saved many works from complete destruction.<sup>1</sup> Never before had there been such a massive amount of art systematically pillaged from so many countries during wartime.<sup>2</sup> It is estimated that the scale of looted European art during the Nazi period exceeded that of all the Napoleonic Wars combined.<sup>3</sup> The Nazi regime’s purpose in looting works of art was two-fold: to “promote (and return to Germany) what in their view were examples of superior art and culture” and to eradicate the Jewish people by annihilating their culture as part of the “Final Solution”.<sup>4</sup> As a result, the Nazis’ efforts to confiscate works of art reached a historically unparalleled level.<sup>5</sup>

The Nazi regime’s policy of excluding Jews from the German economy (*Entjudung der Wirtschaft*) required a clear legal framework to be effective.<sup>6</sup> Potential buyers were reluctant to buy or invest in Jewish-owned property without obtaining secure legal title to businesses and real or personal property.<sup>7</sup> As a result, the Nazi regime created an entirely new legal mechanism to enable the comprehensive confiscation of Jewish-owned property by the German state.

During the Third Reich, it is estimated that the Nazis stole hundreds of thousands of works of art from private collections and museums throughout Europe, in what has been termed the “greatest displace-

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<sup>1</sup> Sue Choi, *The Legal Landscape of the International Art Market After the Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167 (2005).

<sup>2</sup> Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 470 (1999).

<sup>3</sup> HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* 23 (1997); see also Choi, *supra* note 1, at 167.

<sup>4</sup> Choi, *supra* note 1, at 168.

<sup>5</sup> Shira T. Shapiro, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1150 (2008).

<sup>6</sup> MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945*, 258 (2008).

<sup>7</sup> *Id.*

RACHEL SKLAR

ment of art in human history”.<sup>8</sup> An estimated \$2.5 billion dollars of art, stated in 1945 prices, was plundered by the Nazis and used to help finance the war.<sup>9</sup> That is the equivalent of \$20.5 billion dollars today.<sup>10</sup> Originally, works of art were taken by the Nazis to fund the war effort, but the seizure of works of art from private Jewish collections was part of an unprecedented process of persecution, dehumanization and eventual annihilation.<sup>11</sup>

Over the past 70 years, Holocaust survivors and their families have tirelessly attempted to reclaim property and the cultural, traditional, and historical works of art which were systematically removed from their homes and businesses. Many Holocaust survivors and their heirs in the United States have filed legitimate claims to recover their rightful property only to be denied relief after years of litigation, owing to the fact that the United States did not establish an office of independent counsel to review Nazi-era restitution claims, and the United States’ legal system lacked the means to advance legitimate claims by setting aside certain time-based procedural defenses. The United States government has twice affirmed its commitment to just and fair solutions but failed to enact a system that would lead to just and fair outcomes.<sup>12</sup> But a commitment to a solution is not tantamount to restitution.

The United States Congress has again reaffirmed its commitment to the victims of the Holocaust by recently enacting federal legislation that creates a six-year limitations period for restitution actions with the enactment of the Holocaust Expropriated Art Recovery Act of 2016 (the “HEAR Act”).<sup>13</sup> The legislation is an attempt at ensuring the kind of justice that only Congress has the ability to provide.

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<sup>8</sup> See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010).

<sup>9</sup> Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 *CARDOZO J. CONFLICT RESOL.* 643, 647 (2010).

<sup>10</sup> *Id.*

<sup>11</sup> Cuba, *supra* note 2, at 470.

<sup>12</sup> Erica Wolf, *The Ninth Circuit’s Decision in Von Saher v. Norton Simon Museum of Art at Pasadena: The Invocation of the Act of State Doctrine and its Implications for Future Nazi-Stolen Art Claims*, 34 *CARDOZO ARTS & ENT. L.J.* 525, 531 (2016).

<sup>13</sup> Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2nd Sess. 2016). The House of Representatives passed H.R. 6130 by a voice vote on December 7, 2016, the bill then passed the Senate by a voice vote as S. 2763 on December 10,

The purpose of the HEAR Act is to strengthen current law in order to help victims of the Holocaust and their heirs achieve justice. The historically weak laws for Holocaust victims in obtaining justice are due in part to the failure to implement the Washington Conference principles and the self-regulating guidelines of the American Alliance of Museums<sup>14</sup> and the Association of Art Museum Directors for claims for restitution of Nazi-era looted art. The museums and the American judicial system have systematically and overwhelmingly denied Holocaust victims' claims for restitution of looted art based on procedural defenses rather than on the legal merits. The HEAR Act is a delayed congressional response to Nazi-era looted art restitution claims and an attempt to bolster such claims by applying equitable principles.

How the American judicial system has failed Holocaust victims and their heirs is exemplified by the protracted litigation in the case *Von Saher v. Norton Simon Museum of Art at Pasadena*.<sup>15</sup> In *Von Saher*, the trial and appellate courts unfairly discounted the claimant's arguments and deferred to the museum's procedural defenses, thereby denying the claimant a just and fair solution.<sup>16</sup>

This Note advocates that Congress amend the recently enacted HEAR Act so that the legislation ensures and preserves the rights of present and future claimants to seek restitution of Nazi-era looted art.<sup>17</sup> Part I summarizes the purpose and effect of the Washington Conference held in 1998. Part I explains the importance of provenance research, and details why the United States adopted a self-regulating system for claims for restitution of Nazi-era looted art. Part I concludes with a brief explanation of Civil Law. Part II briefly describes the procedural history of the

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2016. The HEAR Act was presented to President Obama on December 15 and signed by President Obama on December 16, 2016, becoming Public Law No. 114-308.

<sup>14</sup> The American Alliance of Museums was formerly known as the American Association of Museums.

<sup>15</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) ("*Von Saher I*"); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712 (9th Cir. 2014) ("*Von Saher II*"), *cert denied*, 135 S. Ct. 1158 (2015).

<sup>16</sup> Washington Conference principle VIII states, in part: "[S]teps should be taken expeditiously to a just and fair solution" for claims involving art that has not been restituted if the owners or their heirs can be identified.

<sup>17</sup> *Id.*

RACHEL SKLAR

United States District Court for the Central District of California decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*.<sup>18</sup> Part II concludes by explaining how in *Von Saher*, the trial court unfairly discounted the claimant's arguments and deferred to the museum's procedural defenses, thereby denying the claimant a "just and fair" solution. Part III examines the background and procedural history of the HEAR Act. Part III concludes by discussing the merits of the HEAR Act and the applicability of equitable principles. Part IV explains the importance of Congress's involvement due to *Von Saher*, and the new national standard created by the HEAR Act. Part IV continues by examining the options available to Congress and its decision to adopt language in accord with New York's "Demand and Refusal Rule". Finally, Part IV concludes with the practical argument that none of the policy goals of state statutes of limitations have previously been met in Nazi-era looted art restitution cases. Lastly, Part V offers three proposed amendments to the HEAR Act to provide a greater measure of certainty that meritorious claims will be heard.

## 1. Background

The first months of Nazi Party rule were marked by considerable violence throughout Germany.<sup>19</sup> The Nazi regime systematically constructed a separate and well-organized plan for the confiscation of Jewish and occupied-territory art.<sup>20</sup> The official Nazi art confiscation service, known as *Einsatzstab Reichsleiters Rosenberg* (ERR), was formed with the goal of creating the "largest private art collection in Europe"<sup>21</sup> by performing the systematic plunder of museums and libraries and the confiscation of more than 22,000 objects of art.<sup>22</sup> The ERR operated throughout Western Europe, not only seizing archives and libraries but also providing the

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<sup>18</sup> See Order at 1, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Aug. 9, 2016), ECF No. 331.

<sup>19</sup> Dean, *supra* note 6, at 21.

<sup>20</sup> *Id.*

<sup>21</sup> Mullery, *supra* note 9, at 645.

<sup>22</sup> Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 *CARDOZO L. Rev.* 657 (1999).

infrastructure for the massive removal of Jewish-owned property.<sup>23</sup> The Nazi regime was able to confiscate works of art due to some 400 anti-Jewish measures<sup>24</sup> that allowed for a massive and well-coordinated confiscation of Jewish-owned property.<sup>25</sup> The widespread participation by the local population as beneficiaries of Jewish-owned personal property and real estate encouraged by the Nazi Party also engendered acceptance of the Nazis' measures against the Jews beyond a small circle of initial perpetrators.<sup>26</sup> The Nazis were able to manipulate the taking of property in order to mobilize society into supporting radical policies to a much greater extent than the spread of anti-Semitism alone would have supported.

By 1937, the Nazi regime had authorized a commission to confiscate "degenerate art" from all major state-owned German museums, which resulted in the removal of some 16,000 paintings, drawings, prints, and sculptures.<sup>27</sup> If not authorized for confiscation, such artworks underwent "Aryanization" which resulted in the forced sales of such works at reduced prices.<sup>28</sup> In 1938, the Nazis began expropriating all property and during the remainder of the regime, the plundering of artworks became even more determined.<sup>29</sup>

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<sup>23</sup> DEAN, *supra* note 6, at 259.

<sup>24</sup> *Id.* at 473.

<sup>25</sup> See *id.* at 470 (For instance: Ordinance for the Registration of Jewish Property (1938) required Jews to give lists of their property and then "secured" this property in accordance with the dictates of the German economy; Ordinance for the Attachment of the Property of the People's and States' Enemies (1938) facilitated confiscation of property belonging to Jews as well as non-Jewish enemies of the regime; Ordinance for the Employment of Jewish Property (1938) enabled government authorities to "Aryanize" Jewish businesses; Nuremberg Decrees of 1935 defined who was a Jew and deprived these individuals of German citizenship and certain civil rights; Ordinance of 1936 forbade Jewish art dealers or purveyors of culture from being members of the Reich Chamber of Culture (RKK); First Ordinance on the Exclusion of Jews from German Economic Life (1938) prohibited Jews from entering theaters, museums or attending cultural events; and *Sühneleistung* ("atonement tax") (1938) required Jews to pay 20% of their assets as a penalty for "inciting" violence during Kristallnacht).

<sup>26</sup> See DEAN, *supra* note 6, at 15.

<sup>27</sup> LUCIAN J. SIMMONS, 7 THE PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS: RESOLUTION OF CULTURAL PROPERTY DISPUTES, PROVENANCE AND AUCTION HOUSES 85, 87 (Kluwer Law Int'l 2004); see also Mullery, *supra* note 9, at 646.

<sup>28</sup> Mullery, *supra* note 9, at 646 ("Aryanization" was the transfer of Jewish property to non-Jewish owners and included Jewish businesses, houses, and other property, such as art).

<sup>29</sup> Cuba, *supra* note 2, at 472.

RACHEL SKLAR

## 2. Targeted Works of Art

When a work of art was confiscated, it was cataloged and determined as either “pure Nordic German art”, or it was considered “valueless to the German people”.<sup>30</sup> Painters such as Vermeer, Rembrandt, Van Eyck, and Dürer were thought to represent “pure” Northern European art of the highest order.<sup>31</sup>

The most valuable of the expropriated works of art were sent to the Galerie Nationale de Jeu de Paume in Paris for review and then systematically inventoried.<sup>32</sup> At the Jeu de Paume, these stolen works “were divided up and, depending on their quality and desirability, either transported to Germany or put up for sale.”<sup>33</sup> Hitler planned to display the “best” European art in a national art museum he intended to build in his hometown of Linz, Austria.<sup>34</sup> The art museum was to exemplify German cultural superiority and be “one of the Reich’s crowning glories”.<sup>35</sup>

Despite Hitler’s distaste for “degenerate art,” the Nazi high command recognized the value of “Judeo-Bolshevist” modern artists such as Picasso, Kandinsky, Chagall, Matisse, Pissarro, and Van Gogh.<sup>36</sup> “Degenerate art” referred to art that depicted Jewish subjects, or was critical of Germany or contradicted Nazi ideology.<sup>37</sup> Beginning in 1937, the Nazi regime auctioned off some of these expropriated works at infamous “degenerate art” shows that were attended by American, British, and

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<sup>30</sup> *Id.* at 471.

<sup>31</sup> Stephan Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 93 (2000).

<sup>32</sup> Choi, *supra* note 1, at 168.

<sup>33</sup> *Id.*; see also Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L & DIS. RES. 243, 253 (2006) (“For example: French, Swiss and German dealers who visited the Jeu de Paume in Paris to pick through the looted art apparently knew where the artworks had come from and the fact that they were illegally acquired”).

<sup>34</sup> See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994); see also Schlegelmilch, *supra* note 31, at 94.

<sup>35</sup> Shapiro, *supra* note 5, at 1151.

<sup>36</sup> Schlegelmilch, *supra* note 31, at 94.

<sup>37</sup> Shapiro, *supra* note 5, at 1151.



Belgian collectors.<sup>38</sup> Many works were sold at auction and the proceeds were then used to acquire more acceptable art.<sup>39</sup>

### 3. Expropriation of Works of Art

When Germany invaded Poland in September 1939, Hitler continued to issue orders to exploit Jewish wealth and take all property belonging to the enemies of the Reich.<sup>40</sup> Hitler ordered special troops, *Erfassungskommandos*, representing commando units staffed with art historians and scholars, to accomplish this task.<sup>41</sup> The *Erfassungskommandos* pursued the confiscation of objects from Polish and Jewish possessions that were cultural, artistic or of historic value.<sup>42</sup> Hitler believed that promoting German nationalism required Germany to assert its cultural supremacy.<sup>43</sup>

The confiscation of property continued until the very end of the war. In November 1943, the United States State Department established an Interdivisional Committee on Reparations, Restitution, and Property Rights.<sup>44</sup> Under the policy of external restitution, nations formerly occupied by the German army would provide American authorities with lists of property that had been seized from those nations' citizens, setting forth details regarding the location and circumstances of each theft.<sup>45</sup> Based on that information, American authorities would identify the listed works of art and return them to their countries of origin.<sup>46</sup> Under the policy of external restitution, each nation was responsible "for restoring the externally restituted artworks to their rightful owners".<sup>47</sup>

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<sup>38</sup> Schlegelmilch, *supra* note 31, at 94.

<sup>39</sup> *Id.*

<sup>40</sup> Cuba, *supra* note 2, at 472.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("These units of German commandos swept into designated areas and confiscated any art they deemed valuable").

<sup>43</sup> Shapiro *supra* note 5, at 1150.

<sup>44</sup> Wolf, *supra* note 12, at 534.

<sup>45</sup> *Id.* at 535.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

RACHEL SKLAR

## Part I

### A. The Washington Conference

In December 1998, forty-three countries met in Washington, D.C. for the Washington Conference on Holocaust-Era Assets.<sup>48</sup> The Washington Conference was convened to address the continuing issues surrounding Holocaust victims' restitution claims and the protection of cultural property stolen and confiscated during World War II.<sup>49</sup> The Washington Conference ended with a compromise providing that each country agree to implement the conference's eleven principles<sup>50</sup> within their own domestic legal framework by setting non-binding guidelines for the search and return of Nazi-confiscated works of art.<sup>51</sup> The Washington Conference principles are based on two fundamental propositions: "[a]rt museums and their collections should not be built with stolen property [and] passion for art should not displace respect for justice".<sup>52</sup>

The Washington Conference principles clearly advocate for alternative dispute resolution (ADR) and against litigation in order to resolve these claims and recommend that nations develop their own ADR mechanisms. Despite this clear espousal of ADR as a means to resolve claims and for nations to abide by the principles, the nations that attended the Washington Conference have done markedly little to implement any ADR mechanisms.<sup>53</sup> Particularly notable is the United States' failure to

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<sup>48</sup> Mullery, *supra* note 9, at 643.

<sup>49</sup> *Id.*

<sup>50</sup> Schlegelmilch, *supra* note 31, at 101. The Washington Conference adopted eleven principles. To develop a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognized that among participating nations there are differing legal systems and that countries act within the context of their own laws. See WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

<sup>51</sup> Schlegelmilch, *supra* note 31, at 101; see also Mullery, *supra* note 9, at 655 ("Russia, which participated in the Washington Conference, has traditionally manipulated museums and governments... to provide ironclad guarantees of immunity from seizure if museums want to borrow Russian museums' artworks").

<sup>52</sup> Wolf, *supra* note 12, at 530-31.

<sup>53</sup> Mullery, *supra* note 9, at 654; see also Washington Conference principle XI.

employ any ADR mechanism for restitution claims, despite the fact that the United States initiated the Washington Conference and was so vigorous in its efforts to promote restitution during the Clinton administration.<sup>54</sup> *Republic of Austria v. Altmann*<sup>55</sup> is a pointed example of lengthy and costly litigation being pursued despite the Washington Conference's recommendation that parties to looted art disputes pursue alternative dispute resolution mechanisms.<sup>56</sup>

### B. Provenance Research

Of the eleven Washington Conference principles, an adherence to and commitment to comply with provenance research has been the most valuable legacy of the conference.<sup>57</sup> Many cases fall into a similar fact pattern and, as such, useful rules for dealing with these cases can and should be made.<sup>58</sup> The provenance of an artwork is the historical record of its ownership. An ideal provenance history would provide a documentary record of owners' names, dates of ownership, and means of transference, inheritance, or sale through a dealer or auction, and locations where the work was kept, from the time of its creation by the artist until the present day.<sup>59</sup> The provenance process involves a crosschecking of the piece with lists of artworks that have gaps in provenance and are part of collections that are deemed suspicious in their

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<sup>54</sup> Mullery, *supra* note 9, at 654.

<sup>55</sup> *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>56</sup> Mullery, *supra* note 9, at 656.

<sup>57</sup> See Washington Conference principle VI.

<sup>58</sup> *Id.*; see also Lynn H. Nicholas, *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 47 (Elizabeth Simpson ed., 1997) (Observing that: "Before we can search for lost objects, we must know what they are and determine the exact circumstances of their displacement. We must discover if they were confiscated by governments, stolen by individuals, sold willingly or under duress, bartered for food, or simply hidden, forgotten, and randomly moved from place to place. Only when these problems have been solved can the process of restitution and compensation be undertaken, and then only on a case-by-case basis, in which, inevitably, present-day political considerations and the emotional legacy of World War II will be major factors").

<sup>59</sup> Press Release, Dickstein Shapiro LLC, Legal Analysis Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims (June 25, 2015) (on file with author).

RACHEL SKLAR

chain of title due to the history of looting.<sup>60</sup> It is after this research process that recovery efforts may follow. Provenance research can be an exacting and complex practice, further complicated by the length of time that has elapsed since the end of World War II. Even in cases where the claimant has knowledge of the work's current possessor and the location of the disputed artwork, provenance research must be carried out to determine whether there is a viable claim.<sup>61</sup>

### *C. The Self-Regulating Guidelines of the American Alliance of Museums and the Association of American Museum Directors*

Some of the countries that attended the Washington Conference have set up neutral tribunals to decide Holocaust victims' restitution claims, while others have passed laws directly addressing restitution claims.<sup>62</sup> The United States set up a self-policing system based on museum guidelines to decide if Holocaust-era restitution claims are justified or should be rejected.<sup>63</sup>

The participating countries agreed to implement eleven principles under which their national museums were to review artworks in their collections to determine if they have a Nazi-era provenance. If a work of art is determined to have a Nazi-era provenance, the question must then be asked if the piece was, in fact, subjected to Nazi confiscation.<sup>64</sup> The Washington Conference's principles call for both museums

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<sup>60</sup> Mullery, *supra* note 9, at 647.

<sup>61</sup> *Id.* at 648.

<sup>62</sup> *Id.* at 655.

<sup>63</sup> Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 501 (2010). In 1990 Congress considered enacting legislation to set standards for returning stolen art. Museum directors, however, testified that they could better handle the subject themselves, resulting in codes of ethics promulgated by the AAM and AAMD. For example, Glenn Lowry, Director of the Museum of Modern Art said the following: "I am convinced the [AAMD] task force will provide the kinds of guidelines and recommended actions necessary to ensure that America's museums set the standard for ethical behavior in this respect".

<sup>64</sup> DAVID ROWLAND, HAVE U.S. MUSEUMS LIVED UP TO THE PROMISE OF THE WASHINGTON CONFERENCE? 149 (2008).

and the survivors or their heirs of the Nazi-era expropriations to resolve looted art restitution claims in a just and fair manner.<sup>65</sup> The principles do not directly target museums; rather, the main focus appears to be the claimants' interest of rightful ownership, not the museums' burdens of following the principles, such as the financial costs of additional provenance research, publicizing stolen art and deaccessioning.<sup>66</sup> Museums in the United States that are members of the American Alliance of Museums (AAM)<sup>67</sup> and the Association of American Museum Directors (AAMD) are bound by these guidelines.<sup>68</sup> The guidelines call on these museums to waive certain available defenses in order to achieve equitable and appropriate resolution of looted art restitution claims.<sup>69</sup>

Despite a commitment to the just and fair resolution of Nazi-era looted art claims, adherence has been notably ineffective. According to recent statistics, museums in the United States have voluntarily returned only twenty-eight works of art applying these guidelines.<sup>70</sup> Further, the United States Court of Appeals for the Ninth Circuit's June 2014

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<sup>65</sup> Washington Conference principle VIII states, in part: "[S]teps should be taken expeditiously to a fair and just solution" for claims involving art that has not been restituted if the owners or their heirs can be identified.

<sup>66</sup> Graefe, *supra* note 63, at 503.

<sup>67</sup> Press Release, World Jewish Restitution Organization, Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims (June 25, 2015) (on file with author), at 3.

<sup>68</sup> Graefe, *supra* note 63, at 500-07.

<sup>69</sup> ROWLAND, *supra* note 64, at 150. Specifically, the AAM's guidelines, in part, provide: "If a museum determines that an object in its collection was unlawfully appropriated during the Nazi-era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner. Further, when appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi-era without subsequent restitution." The AAMD's guidelines, in part, provide: "If a member museum receives a claim against a work of art in its collection related to an illegal confiscation during the Nazi/World War II-era, it should seek to review such a claim promptly and thoroughly. The museum should request evidence of ownership from the claimant in order to assist in determining the provenance of the work of art. [...] If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II-era and not restituted, the museum should offer to resolve the manner in an equitable, appropriate, and mutually agreeable manner".

<sup>70</sup> See Herrick Feinstein LLP, *Resolved Stolen Art Claims, Claims for Art Stolen During*

RACHEL SKLAR

decision in *Von Saher* marked the first invocation of the Washington Conference principles in an American judicial decision.<sup>71</sup> In citing the Washington Conference principles, the Ninth Circuit effectively determined they constitute the foreign policy of the United States, and private claims for restitution of Nazi-looted art, such as those in *Von Saher*, are consistent with that policy.<sup>72</sup>

#### D. Civil Law

One of the many problems in the recovery of stolen art is the movement of stolen art across state, national and international borders, often resulting in difficult questions of international and domestic choice of law.<sup>73</sup>

In France, the Civil Code, also known as the Napoleonic Code, was first published on March 21, 1804. The Napoleonic Code's authority extended throughout the empire and was enforced in all the countries that were under Napoleon's rule: Italy adopted the Napoleonic Code in 1806, Germany in 1810, and the Grand Duchy of Warsaw in 1811. In 1820, the Russian czar and Polish king commissioned new Civil Codes based on the Napoleonic Code.<sup>74</sup> With the formation of the German empire in 1871, a major process of legal standardization ensued culminating in the Book of Civil Law (*Bürgerliches Gesetzbuch*).

The Napoleonic Code has its origins in Roman law. In 476 B. C., the Twelve Table Law was published in Rome and enforced throughout the Roman Empire.<sup>75</sup> In Table VI, "Of the Legal Concepts and the Differences Between Acquisition and Possession", Section VI states that it is for-

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*the Nazi Era and World War II, Including Nazi-Looted Art and Trophy Art*, Aug. 6, 2015 at 37-46.

<sup>71</sup> Wolf, *supra* note 12, at 532.

<sup>72</sup> *Id.*

<sup>73</sup> Schlegelmilch, *supra* note 31, at 102.

<sup>74</sup> JORGE MARIO MAGALLÓN IBARRA, *I INSTITUCIONES DE DERECHO CIVIL* 72 (1987).

<sup>75</sup> The Roman Empire encompassed present-day Germany, the Netherlands, Belgium, Luxembourg, Switzerland, Austria, the Czech and Slovak Republics, as well as parts of eastern France, northern Italy, Slovenia, and western Poland. ENCYCLOPEDIA, <http://www.encyclopedia.com/history/modern-europe/german-history/holy-roman-empire>, (lasted visited Feb. 27, 2017).

bidden to obtain possession of a thing that was stolen<sup>76</sup> Under Roman law, legal possession cannot be obtained by violence, secrecy, fraud or by duress.<sup>77</sup>

Article 2230 of the Napoleonic Code states that possession can never be obtained by violence, secrecy, fraud or by duress. Possession obtained by these means is rendered illegal *ab initio* (from its inception) and the possessor has the obligation to return to the owner the stolen property. Moreover, limitations will not run against the legal owner under these circumstances because possession never existed as it is void *ab initio*, an illegal appropriation.<sup>78</sup>

After the war, the French government retained or reassigned ownership of thousands of the artworks that had passed through the Jeu de Paume in Paris. Also, most of the other countries also retained, reassigned or returned the stolen art works (e. g., the Netherlands in *Von Saher*). However, as Germany, the Netherlands, Belgium, Luxembourg, Switzerland, Austria, the Czech and Slovak Republics, France, Italy, Slovenia, Poland and Russia followed the Civil Code, many of these determinations of ownership as a consequence should have been invalidated as a subsequent possessor can never obtain or pass legal title in the case when, from the inception, the possession was void.

## Part II

### A. *Von Saher v. Norton Simon Museum of Art at Pasadena*

In *Von Saher v. Norton Simon Museum of Art at Pasadena*,<sup>79</sup> the plaintiff, Marei von Saher,<sup>80</sup> was the sole heir to the Dutch art dealer Jacques Goudstikker. Jacques Goudstikker was the most prominent Jewish art

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<sup>76</sup> MAGALLÓN, IV INSTITUCIONES DE DERECHO CIVIL 177 (1990).

<sup>77</sup> *Id.* at 179.

<sup>78</sup> *Id.* at 185.

<sup>79</sup> *Von Saher I*, 952 F.3d 954 (9th Cir. 2010).

<sup>80</sup> For clarification purposes, when referencing the plaintiff, Marei von Saher, the author will use the term “Ms. von Saher”. When referencing the case, the author will use the term “*Von Saher*”.

RACHEL SKLAR

dealer in the Netherlands prior to World War II.<sup>81</sup> Mr. Goudstikker purchased *Adam and Eve* in 1931 from the Soviet Union at an auction in Berlin.<sup>82</sup> *Adam and Eve*, or “the Cranachs”, compose a diptych by German Renaissance painter Lucas Cranach the Elder.<sup>83</sup> On one panel Adam holds the apple of temptation while, on the other, Eve is cradling an apple as a serpent watches her closely. The work is telling the story of the moments before the act that will lead to the biblical couple’s expulsion from Eden.<sup>84</sup> The two oil-on-panel paintings stand more than six feet tall and were painted by in 1530.<sup>85</sup> In 2006, *Adam and Eve* were appraised at \$28.3 million dollars.<sup>86</sup> The Norton Simon Museum of Art (Norton Simon Museum), the defendant, contends that the Soviet Union had confiscated the paintings from the aristocratic Stroganoff-Scherbatoff family during the 1920s, although Ms. von Saher disputes that argument.<sup>87</sup>

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<sup>81</sup> Kaye, *supra* note 33, at 245.

<sup>82</sup> The auction titled “The Stroganoff Collection” was held at the Lepke Auction house in Berlin, Germany. Lepke was well known for selling artworks that the Soviet Union had confiscated. The Stroganoff family was one of Russia’s foremost noble houses, although not all of the auctioned works of art had been part of the famed Stroganoff Collection, the Cranachs were among the auctioned works and were purchased in May 1931 by Jacques Goudstikker. See Statement of Decision Granting Defendants’ Motion for Summary Judgment at 16, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 186.

<sup>83</sup> *Word and Image Martin Luther’s Reformation*, THE MORGAN LIBRARY AND MUSEUM, <http://www.themorgan.org/exhibitions/online/word-and-image> (last visited Jan. 13, 2017). Lucas Cranach was the court painter of the electors of Saxony and neighbor to Martin Luther. Cranach was known as *pictor celerrimus*, the fastest painter, because of his rapid and prolific production. In addition to creating the famous images of Martin Luther, Cranach also produced portraits of his Reformation colleagues as well as Protestant and Catholic dignitaries.

<sup>84</sup> Carolina Miranda, *Court Rules Museum Can Keep Nazi-Looted Adam and Eve Masterpieces with a Hidden Past*, L.A. TIMES (Aug. 22, 2016, 12:40 PM), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-norton-simon-good-title-cranach-20160817-snap-story.html>.

<sup>85</sup> *Word and Image Martin Luther’s Reformation*, *supra* note 83. The moment of temptation—the instant of original sin—was an incredibly popular artistic subject in the Middle Ages and Renaissance. More than thirty paintings of Adam and Eve survive from Cranach’s workshop. The Reformation propagated a new understanding of marriage, which provided stability, and considered Adam and Eve humanity’s first married couple.

<sup>86</sup> Sarah Cascone, *Norton Simon Museum’s Appeal Denied in Case of Nazi-Looted Lucas Cranach Paintings*, ARTNEWS (April 3, 2015), available at: <https://news.artnet.com/market/norton-simon-appeal-denied-lucas-cranach-284850>.

<sup>87</sup> Bianca Acquaviva, *The Latest in Nazi-Era Restitution Efforts*, CENTER FOR ART LAW



Before fleeing Germany, Mr. Goudstikker was forced to sell much of his art collection.<sup>88</sup> In 1940, Mr. Goudstikker fled the Netherlands with his wife and son.<sup>89</sup> On his family's voyage to America, Mr. Goudstikker fell to his death, leaving behind his "Blackbook" which listed his art assets and holdings. *Adam* and *Eve* spent the years during World War II in Herman Göring's possession.<sup>90</sup>

During the liberation of Germany in 1945, Allied Forces discovered *Adam* and *Eve* and approximately 200 other artworks looted by Göring and taken to Germany and sent the artworks to the Munich Central Collecting Point.<sup>91</sup> These stolen artworks were returned to the Netherlands to be held in trust by the Dutch government for their lawful owners.<sup>92</sup> The Netherlands later made the ownership determinations,<sup>93</sup> pursuant to the established policy of the Allies, which flowed from the 1943 London Declaration.<sup>94</sup>

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BLOG (Mar. 24, 2016), <https://itsartlaw.com/2016/03/24/the-latest-in-nazi-era-restitution-efforts/>.

<sup>88</sup> Leila Amineddoleh, *The Norton Simon Museum's Multi-Million-Dollar Nazi Restitution Case of Two Paintings by Cranach the Elder, Explained*, ARTSY BLOG (Apr. 5, 2016, 12:28 AM) (Under federal law, forced sales are viewed as thefts.), <https://www.artsy.net/article/artsy-editorial-the-norton-simon-museum-s-multi-million-dollar-nazi-restitution-case-explained>.

<sup>89</sup> *Id.*

<sup>90</sup> Amineddoleh, *supra* note 88; see generally *Larger Than Life the Infamous Herman Göring*, History Net <http://www.historynet.com/larger-than-life-the-infamous-hermann-goring.htm> (last visited Jan. 27, 2016). Göring was Hitler's most important and powerful deputy. Göring founded the Gestapo in 1933, and was the highest-ranking Nazi Party official tried at Nuremberg.

<sup>91</sup> Kaye, *supra* note 33, at 247.

<sup>92</sup> *Id.*

<sup>93</sup> *Von Saher I*, 592 F.3d at 959.

<sup>94</sup> Kaye, *supra* note 33, at 248. On January 5, 1943, the Allies, including the Netherlands, issued the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control" (now commonly known as the "London Declaration"). The Declaration warned that the Allies reserved "all their rights to declare invalid any transfers of or dealings with, property, rights and interests of any description whatsoever... whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form even when they purport to be voluntarily effected." Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control (Jan. 5, 1943), available at <http://www.lootedartcommission.com/inter-allied-declaration>.

RACHEL SKLAR

In 1961, George Stroganoff-Scherbatoff came forward and alleged that the Soviet government had illegally seized Adam and Eve from his family in the 1920s.<sup>95</sup> In 1966, the Netherlands sold Adam and Eve to Mr. Stroganoff-Scherbatoff.<sup>96</sup> In 1971, Mr. Stroganoff-Scherbatoff sold the Cranachs to the Norton Simon Museum.<sup>97</sup>

### B. *Procedural History of the Von Saher Litigation*

In 2002, California's state legislature enacted Section 354.3 of the California Code of Civil Procedure entitled "Recovery of Holocaust-era artwork from enumerated entities."<sup>98</sup> The statute intended to open the courthouse doors to persons with restitution claims related to artwork misappropriated during the Holocaust and in the possession of museums and galleries located in or with sufficient jurisdictional contacts with the state.<sup>99</sup> The statute provided relief from California's three-year statute of limitations. Section 354.3 gave claimants until December 30, 2010 to bring an action to recover "Holocaust-era artwork" taken as a result of Nazi expropriation.<sup>100</sup>

In May 2007, Ms. von Saher filed an action in federal district court in California for replevin, conversion, and damages under California Penal Code Section 496,<sup>101</sup> requesting title to the Cranachs.<sup>102</sup> The complaint alleged it was timely filed pursuant to California Code of Civil Procedure Section 354.3.<sup>103</sup>

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<sup>95</sup> Mr. Stroganoff-claimed that the Cranachs belonged to his family and that the Dutch government did not have any right, title or interest in them. Provenance shows the Cranachs came from the Church of the Holy Trinity in Kiev and had never been part of the Stroganoff family art collection. See Appellate Brief at 7, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), 2008 WL 644327.

<sup>96</sup> *Id.*

<sup>97</sup> Amineddoleh, *supra* note 88.

<sup>98</sup> CAL. CIV. PROC. CODE § 354.3.

<sup>99</sup> *Id.* § 354.3(c).

<sup>100</sup> *Id.* §§ 354.3(a) (2) & (c).

<sup>101</sup> CAL. PENAL CODE § 496.

<sup>102</sup> See Appellate Brief at 6, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), 2008 WL 644327.

<sup>103</sup> Acquaviva, *supra* note 88.

The Norton Simon Museum, which is not a signatory to the AAM Guidelines,<sup>104</sup> moved to dismiss the complaint on the grounds that California Code of Civil Procedure Section 354.3 was unconstitutional as preempted by the foreign affairs doctrine,<sup>105</sup> under which the “power to deal with foreign affairs [is] a primarily, if not exclusively, federal power”.<sup>106</sup> In October 2007, the district court granted Norton Simon Museum’s motion to dismiss the complaint in its entirety with prejudice.<sup>107</sup> Additionally, the district court held Ms. von Saher’s claims to be untimely filed pursuant to the then-enacted California Code of Civil Procedure Section 338.<sup>108</sup> Ms. von Saher appealed to the Ninth Circuit Court of Appeals.<sup>109</sup>

In August 2009, the Ninth Circuit affirmed in part, reversed in part, and remanded the case back to the district court. The Ninth Circuit held that California Code of Civil Procedure Section 354.3 was not preempted by the federal government’s policy of external restitution, as that policy ceased to exist in 1948.<sup>110</sup> As such, Section 354.3 did not conflict with any current foreign policy.<sup>111</sup> However, the Ninth Circuit affirmed that Section 354.3 was preempted under the foreign

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<sup>104</sup> See generally *Find a Member Museum*, Am. Alliance of Museums, <http://www.aamus.org/about-museums/find-a-museum> (last visited Jan. 18, 2017). As the Norton Simon Museum was not a party to the AAM or the AAMD, and because the Guidelines are not legally binding, the museum freely chose not to waive any of its defenses and did so without penalty.

<sup>105</sup> *Von Saher I*, 592 F.3d at 959-60.

<sup>106</sup> *Id.* at 960; see also World Jewish Restitution Organization, *supra* note 67, at 42 (“The Supreme Court has found state laws unconstitutional under the foreign affairs doctrine when the state laws directly conflict with an exercise of the federal government’s power to engage in foreign affairs, whether by treaty, federal statute, or express executive branch policy”). Effectively, the doctrine ensures that the federal government has the exclusive power to decide the country’s foreign affairs.

<sup>107</sup> Order Granting Defendants’ Motion to Dismiss at 4, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 47.

<sup>108</sup> CAL. CIV. PROC. CODE § 338(c)(1). Section 338 is California’s general three-year statute of limitations governing “actions for specific recovery of personal property.”

<sup>109</sup> Wolf, *supra* note 12, at 538; see also Brief of Appellant at 2, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 48.

<sup>110</sup> *Von Saher I*, 592 F.3d at 963 (“The United States’ authorities stopped accepting claims for external restitution of looted artwork as of September 15, 1948”).

<sup>111</sup> *Id.*

RACHEL SKLAR

affairs doctrine, under the field preemption prong, since “the power to legislate restitution and reparation claims is one that has been exclusively reserved to the national government by the Constitution”.<sup>112</sup>

The Ninth Circuit noted that the real purpose of the California statute was actually to create “a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery”.<sup>113</sup> Since the creation of a worldwide forum for the resolution of Holocaust restitution claims did infringe on the federal government’s foreign policy powers, the Ninth Circuit ruled the California statute unconstitutional.<sup>114</sup> The Ninth Circuit held that Ms. von Saher’s complaint should not have been dismissed with prejudice and allowed Ms. von Saher leave to amend her complaint.<sup>115</sup>

*Von Saher I* demonstrates how states’ legislatures had limited powers to alter their statutes of limitations to protect victims of the Holocaust and their heirs who seek restitution for Nazi-looted art.<sup>116</sup>

In response to *Von Saher I*, the California legislature amended Section 338(c) of the California Code of Civil Procedure to extend the statute of limitations from three years to six years for claims concerning the recovery of fine art from museums, galleries, auctioneers or dealers in the case of an unlawful taking or theft.<sup>117</sup> The newly enacted law was made retroactive and provided that the statute of limitations did not commence until the plaintiff actually discovers both the identity and location of the artwork.<sup>118</sup> The amended Section 338(c) makes no reference to the Holocaust or its victims.<sup>119</sup>

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<sup>112</sup> *Id.* at 967.

<sup>113</sup> *Case Summary of Von Saher v. Norton Simon Museum of Art*, INTERNATIONAL FOUNDATION OF ART RESEARCH, [https://www.ifar.org/case\\_summary.php?docid=1286569240](https://www.ifar.org/case_summary.php?docid=1286569240) (last visited Jan. 25, 2017).

<sup>114</sup> Wolf, *supra* note 12, at 539.

<sup>115</sup> *Von Saher I*, 592 F.3d at 966-68, alteration in original (“California may not improve upon or add to the resolution of war”).

<sup>116</sup> *Id.* at 969.

<sup>117</sup> Assemb. B. No. 2765 § 2, 2009-2010 Reg. Sess. (Cal. 2010).

<sup>118</sup> *Id.*

<sup>119</sup> See Legal Analysis, *supra* note 59, at 45-47. In *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617-19 (9th Cir. 2013) (comparing section 338(c) to section 354.3, the Ninth Circuit noted that section 338(c) did not explicitly create a

In April 2010, Ms. von Saher filed a petition for a writ of certiorari with the United States Supreme Court.<sup>120</sup> The Supreme Court denied the petition in June 2011.<sup>121</sup>

In November 2011, Ms. von Saher filed an amended complaint in the district court for restitution of the Cranachs, now under California Code of Civil Procedure Section 338(c), as amended.<sup>122</sup> The district court dismissed the case for a second time, holding that California Code of Civil Procedure Section 354.3 was facially unconstitutional on the basis of the foreign affairs doctrine,<sup>123</sup> cautioning that any exercise of state power that “touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place”.<sup>124</sup> The district court reasoned that Section 354.3 intruded on the federal government’s executive power to make and resolve war, including the procedure for resolving war claims.<sup>125</sup> The district court held that because foreign affairs are under the exclusive power of the federal government, the California statute of limitations was impeding executive power and was therefore unconstitutional.<sup>126</sup>

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new cause of action to remedy wartime injuries and, therefore, there were no grounds to find preemption).

<sup>120</sup> *Von Saher II*, 592 F.3d at 721, petition for cert. filed Apr. 12, 2010 (No. 09-1254), 2010 WL 1557533.

<sup>121</sup> *Von Saher*, 131 S. Ct. 3055, cert. denied June 27, 2011 (No. 09-1254).

<sup>122</sup> *Von Saher II*, 754 F.3d at 718-19.

<sup>123</sup> See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044, 1049 (C.D. Cal. 2012) (“The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power. Indeed, the Constitution allocated the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government’s resolution of war-related disputes” (internal citations omitted)).

<sup>124</sup> *Von Saher II*, 754 F.3d at 719.

<sup>125</sup> *Von Saher I*, 592 F.3d at 960.

<sup>126</sup> *Id.*

RACHEL SKLAR

In October 2012, Ms. von Saher appealed to the Ninth Circuit for the second time in *Von Saher II*.<sup>127</sup> In June 2014, the Ninth Circuit reversed the district court's order and remanded the case to the district court for further proceedings.<sup>128</sup> The Ninth Circuit concluded that the Cranachs had never been subject to any post-war internal restitution proceedings in the Netherlands, and, therefore, this matter was not preempted by the foreign affairs doctrine.<sup>129</sup> As such, Ms. von Saher's claims would not "disturb the finality of any internal restitution proceedings —appropriate or not— in the Netherlands".<sup>130</sup> In addition, the Ninth Circuit instructed the district court to determine whether the Act of State Doctrine was implicated.<sup>131</sup> The Ninth Circuit was concerned that adjudication of the case might require an evaluation of the Dutch government's decision to transfer the painting after the war. Such a decision would violate the Act of State Doctrine if it would require the court "to declare invalid the official act of a foreign sovereign performed within its own territory".<sup>132</sup>

In July 2014, the Norton Simon Museum's petition to the Ninth Circuit for rehearing was denied.<sup>133</sup> In August 2014, the Norton Simon Museum filed a motion requesting the Ninth Circuit to stay its mandate pending the disposition of the Norton Simon Museum's intended petition for writ of certiorari to the United States Supreme Court.<sup>134</sup> The Ninth Circuit granted the motion.<sup>135</sup>

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<sup>127</sup> See *Von Saher II*, 754 F.3d at 712; see also Brief of Appellant at 1, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015) (No. 12-55733), 2012 WL 4793678.

<sup>128</sup> *Von Saher II*, 754 F.3d at 721 ("Von Saher's claims do not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands..."); see also U.S. CONST. ART. VI.

<sup>129</sup> Wolf, *supra* note 12, at 543.

<sup>130</sup> *Id.*

<sup>131</sup> *Von Saher II*, 754 F.3d at 719, 725. In the six previous years of litigation, the issue as to whether the Act of State Doctrine might be implicated had never been presented.

<sup>132</sup> *Id.* at 725.

<sup>133</sup> See Order at 1, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 57.

<sup>134</sup> See Unopposed Motion for Stay of Mandate Pending Disposition of a Petition for a Writ of Certiorari of Defendants-Appellees at 1, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 99.

<sup>135</sup> See Order at 1, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 99.

In November 2014, the Norton Simon Museum filed its petition for writ of certiorari seeking Supreme Court review of the Ninth Circuit's decision.<sup>136</sup> In January 2015, after both sides had submitted their briefs, the Supreme Court denied the petition.<sup>137</sup> The Supreme Court remanded *Von Saher II* to the district court, which had been directed by the Ninth Circuit to consider the implications of the Act of State Doctrine arising from the 1966 sale of the Cranachs.<sup>138</sup>

The district court case was set for trial in September 2016. On June 13, 2016, the Norton Simon Museum filed a motion for summary judgment, and on August 15, 2016, the district court ruled that because Mrs. Goudstikker did not file a claim for the return of the Cranachs prior to the 1951 deadline, the works became Dutch property, and any subsequent transfers by the Dutch government would thus convey legal title.<sup>139</sup> Therefore, Mr. Stroganoff-Scherbatoff acquired legal title to the Cranachs when he acquired title from the Dutch government in 1966 and then passed legal title to the Norton Simon Museum in 1971.<sup>140</sup> The district court further held that the museum was sole owner of the title to the Cranachs, and that Ms. von Saher had no right, title, or interest whatsoever in the Cranachs,<sup>141</sup> and that no person had any right, title or interest in the Cranachs that is superior or adverse to the Norton Simon Museum's title.<sup>142</sup> The district court further ordered that Ms. von Saher take nothing, the action be dismissed in its entirety with prejudice, and the Norton Simon Museum recover its costs of court.<sup>143</sup>

Ms. von Saher has again appealed to the Ninth Circuit; briefs are to be submitted in March 2017.<sup>144</sup>

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<sup>136</sup> See Petition for Writ of Certiorari, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), 135 S. Ct. 1158 (2015).

<sup>137</sup> *Von Saher II*, 754 F.3d 712, cert. denied, 135 S. Ct. 1158 (2015).

<sup>138</sup> Wolf, *supra* note 12, at 547.

<sup>139</sup> See Order at 2, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-CV-02866-JFW (C.D. Cal. Apr. 2, 2015), ECF No. 333.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Case Summary, *supra* note 113.

RACHEL SKLAR

### C. *Analysis of Von Saher and the United States' Judicial System's Failure to Apply "Just and Fair" Solutions*

*Von Saher I* and *II* illustrate what enormous obstacles claimants may face. It took nine years of hard-fought litigation, including two trips to the United States Court of Appeals for the Ninth Circuit and two petitions for writ of certiorari to the United States Supreme Court, as well as the enactment of two different statutes by the California legislature, for Ms. von Saher to have the courthouse doors remain open for her and for the federal courts to hear the merits of her claim for restitution.

*Von Saher* is an example of the burdens placed on claimants when they seek restitution of their art, and how insurmountable and daunting the burdens can be. Further, *Von Saher* exemplifies how before the HEAR Act passed, states' statutes of limitations could not be modified to protect Holocaust restitution claimants, and those claims rarely survived a motion to dismiss. Now that there is a federal statute ensuring an available forum, if the objective to ensure adjudication on the merits is to be met, there needs to be a clear and definitive commitment by the entire museum community that it will waive the use of time-based affirmative defenses.<sup>145</sup>

## Part III

### A. *Background and Procedural History of the HEAR Act*

The HEAR Act, S. 2763,<sup>146</sup> was introduced to the Senate on April 7, 2016 by Senator John Cornyn (R-TX), Senator Ted Cruz (R-TX),<sup>147</sup> Senator Chuck Schumer (D-NY), and Senator Richard Blumenthal (D-CT), as

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<sup>145</sup> See World Jewish Restitution Organization, *supra* note 67, at 51.

<sup>146</sup> Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2nd Sess. 2016).

<sup>147</sup> Marc Masurovsky, S. 2763: *Restitution Kabuki*, PLUNDERED ART BLOG (June 15, 2016, 8:16 PM), <http://plundered-art.blogspot.com/2016/06/s-2763-restitution-kabuki.html>. Neither Senator Cornyn nor Senator Cruz has been known to utter a word or express a single public thought about Holocaust claimants or Nazi looted art.



cosponsors of the bill. The bill passed unanimously out of the Senate Judiciary Committee on September 15, 2016.<sup>148</sup> House Judiciary Committee Chairman Bob Goodlatte (R-VA) and Congressman Jerrold Nadler (D-NY) subsequently introduced the legislation, H.R. 6130, in the House of Representatives.<sup>149</sup> On December 7, 2016, the bill passed unanimously by a voice vote.<sup>150</sup> On December 16, 2016, President Obama signed the HEAR Act into law.<sup>151</sup>

The HEAR Act allows claimants to file claims in federal court to recover artwork or other cultural property unlawfully lost during the Nazi era, or for damages for the taking or detaining of such artwork or cultural property.<sup>152</sup> The HEAR Act establishes a uniform federal statute of limitations for all claims that arise in the United States, preempting all other state or federal statutes of limitations or defenses relating to the passage of time.<sup>153</sup>

The HEAR Act allows claims commenced within the six years<sup>154</sup> following the claimant's actual discovery<sup>155</sup> of the identity and location of the artwork or cultural property and information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost. In other words, a claim to an artwork of which someone has knowledge of today but for which a demand has not been made, or a claim which was filed fewer

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<sup>148</sup> Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2nd Sess. 2016).

<sup>149</sup> Press Release, Congressman Jerrold Nadler, Nadler and Goodlatte Praise House Passage of Bill to Recover Art Stolen During the Holocaust (Dec. 7, 2016) (on file with author).

<sup>150</sup> *Id.*

<sup>151</sup> President Obama Signs Law to Aid Recovery of Nazi-Looted Art, PR NEWSWIRE (Dec 19, 2016, 6:29 PM), [http://www.pnewswire.com/news-releases/president-obama-signs-law-to-aid-recovery-of-nazi-looted-art-300381587.html?tc=eml\\_cleartime](http://www.pnewswire.com/news-releases/president-obama-signs-law-to-aid-recovery-of-nazi-looted-art-300381587.html?tc=eml_cleartime).

<sup>152</sup> S. Res. 2763, 114th Cong. § 4(5) (2016).

<sup>153</sup> S. Res. 2763, 114th Cong. § 5(c)(2)(B).

<sup>154</sup> *Id.* at § 5(a).

<sup>155</sup> *Id.* at § 4(1); see also Nicholas O'Donnell, *Restitution Legislation: HEAR Act and Foreign Cultural Exchange Jurisdictional Clarification Act Move Forward*, ART LAW REPORT BLOG (Sept. 18, 2016, 5:13 PM), <http://blog.sandw.com/artlawreport/restitution-legislation-hear-act-and-foreign-cultural-exchange-jurisdictional-clarification-act-move-forward>.

RACHEL SKLAR

than three years ago, would not constitute the work being “discovered” and the claim is now only subject to the new six-year limitations period. The six-year period could be interpreted as a last opportunity to file a claim for restitution, that is assuming the claimant currently knows where their object is and has the funds available to pursue the litigation.<sup>156</sup>

The HEAR Act applies to claims or causes of action that are currently pending or filed after December 16, 2016,<sup>157</sup> but before January 1, 2027.<sup>158</sup> Such claims may include those that were dismissed before enactment of the HEAR Act based on the expiration of a federal or state statute of limitations or any other defense at law or in equity relating to the passage of time, as well as claims in which a final judgment has not been entered.<sup>159</sup>

The HEAR Act’s purported goal is to ensure that Holocaust victims and their heirs are afforded an opportunity to have their cases heard on the merits.<sup>160</sup> The language of the HEAR Act affirms that United States policy encompasses both the Terezin Declaration<sup>161</sup> and the Washington Conference principles.<sup>162</sup> However, the reality is the HEAR Act favors only wealthy claimants with access to significant means to support research into their claims and legal action to recover identified objects which sit in public or private collections. It is not designed to help the vast majority of claimants who lost cultural assets that are not museum-worthy. The HEAR Act ultimately does not provide a clai-

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<sup>156</sup> Masurovsky, *supra* note 147.

<sup>157</sup> S. Res. 2763, 114th Cong. § 5(c)(1)(2).

<sup>158</sup> *Id.* at § 5(d)(2).

<sup>159</sup> Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2nd Sess. 2016).

<sup>160</sup> Holocaust Expropriated Art Recovery Act of 2016: Hearing on S. 2763 Before the Subcomm. on Oversight, Agency Action, Federal Rights & Federal Courts, 114th Cong. (2016) (statement of Ronald S. Lauder, President of World Jewish Congress).

<sup>161</sup> See Press Release, *supra* 59, at 7. In 2009, the United States and 47 other countries endorsed the Terezin Declaration on Holocaust Era Assets and Restated Issues (the “Terezin Declaration”). In addition to endorsing the Washington Conference principles, the Terezin Declaration encourages public and private institutions to apply those principles and work to “facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously based on the facts and merits of the claims”.

<sup>162</sup> PR Newswire, *supra* note 151.

mant their “fair day in court” where their claim may be assessed solely on its merits.<sup>163</sup>

The HEAR Act will not oblige American museums to live up to the AAM and AAMD Guidelines for Nazi-era looted art, which are often flouted, nor will it require any foreign signatory to the Washington Conference principles to refrain from asserting an affirmative defense based on limitations, as they often do, despite their commitments to the contrary.<sup>164</sup> It is evident that the framers of the legislation did not consider reparation or restitution to be the preeminent outcomes.

### B. *The Applicability of Equitable Principles*

The underlying rationale for waiving limitations defense, or applying Civil Law, where applicable, is to allow Holocaust victims and their heirs a greater opportunity to obtain relief in the federal courts by the application of equitable principles over legal precedents. The assertion that courts apply equitable principles is not revolutionary and has been urged since at least the 1500s, most notably, in a literary context, by Shakespeare in *The Merchant of Venice*.<sup>165</sup> In *The Merchant of Venice*, Portia (a lawyer) appears before the court and argues on the qualities of mercy and mankind’s capacity for a higher, divinely inspired form of law,<sup>166</sup> Portia argues the inequity of a system which adopts the letter of the law in violation of human rights is not the best option, and is a forceful argument for the court to apply equitable principles. A more recent argument for the application of equitable principles is made in *Brown v. Board of Education II*.<sup>167</sup> In *Brown II*, Chief Justice Warren wrote that to fully as-

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<sup>163</sup> Masurovsky, *supra* note 147.

<sup>164</sup> O’Donnell, *supra* note 155, at 2.

<sup>165</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, 1599.

<sup>166</sup> “But mercy is above this sceptred sway; It is enthroned in the hearts of kings, It is an attribute to God himself; And earthly power doth then show likest God’s When mercy seasons justice. Therefore, Jew, Though justice be thy plea, consider this, That, in the course of justice, none of us Should see salvation: we do pray for mercy; And that same prayer doth teach us all to render The deeds of mercy. I have spoke thus much To mitigate the justice of thy plea; Which if thou follow, this strict court of Venice Must needs give sentence ‘gainst the merchant there.” *Id.* THE FOURTH ACT, SC. 2.

<sup>167</sup> *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 300 (1955).

RACHEL SKLAR

sess the effects of the desegregation decrees, the courts must be guided by equitable principles, stating:

Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs... To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in *Brown I*. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.<sup>168</sup>

Judges should follow Justice Warren's example of applying equitable principles to future claims. Courts should be able to swiftly adjudicate the merits in Nazi-era looted art cases. Courts have the inherent power to balance the public's interest in these artworks (if they are publicly displayed) versus the original owner's family's private interest in regaining the family's property or cultural artifact that had been taken by the Nazis. Through each looted-art claim, American courts can hold European institutions and private entities accountable for their participation in Nazi crimes.<sup>169</sup> In this way, through the recovery of some of the world's most celebrated art, justice can be served.

The Washington Conference originally claimed that "moral authority... is probably more effective than the threat of civil or criminal proceedings".<sup>170</sup> Unfortunately, as is now evident, it is precisely this lack of enforcement that has led to the failure of the Washington Conference principles. Although an enforcement mechanism based on moral authority can have a positive effect, it is apparent that to induce both private parties and governments to act forthrightly there must be the specter of punishment under law.<sup>171</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> Shapiro, *supra* note 5, at 1176.

<sup>170</sup> Mullery, *supra* note 9, at 659.

<sup>171</sup> *Id.*

## Part IV

### A. *The Importance of Congress's Involvement*

Throughout *Von Saher* it became clear that Congress needed to step in and create a national statute of limitations to be used in Nazi-era restitution cases. Congress and not the judiciary is far better equipped to “amass and evaluate the vast amounts of data” bearing upon the complicated issues presented in Nazi-era restitution cases.<sup>172</sup> It is the values set forth in *McCulloch v. Maryland*<sup>173</sup> that the United States Supreme Court recognized and continues to value the superior qualities of Congress to make policy decisions given its “capacity to avail itself of experience, to exercise its reason and to accommodate its legislation to circumstances”.<sup>174</sup> Since *McCulloch*, the Supreme Court has noted that when complex circumstances present a question of policy, “[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate for those who write the laws, rather than those who interpret them”.<sup>175</sup> Because Nazi-era looted art restitution cases are of high emotion wrapped up in controversy, they demand a rule-making procedure that, in many ways, transcends the facts of any one specific case.<sup>176</sup>

Congress has both a superior institutional capacity to collect the necessary evidence, and the fact-finding abilities to recognize the uni-

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<sup>172</sup> Cuba, *supra* note 2, at 451.

<sup>173</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>174</sup> *Id.*

<sup>175</sup> Cuba, *supra* note 2, at 451 (citing *United States v. Gilman*, 347 U.S. 507, 512-13 (1954)); see also *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 646-47 (1981) (noting that the just resolution in complex cases with a wide range of factors, which apply not only to a particular case, is inappropriate for judicial resolution and should be addressed by Congress); *Diamond v. Chakrabarty*, 447 U.S. 303, 317-18 (1980) (noting legislative competence to investigate, research and examine where the courts cannot); *United States v. Topco Assocs.*, 405 U.S. 596, 611-12 (1972) (noting the ability of Congress to weigh the myriad of factors and interests in economic issues).

<sup>176</sup> Schlegelmilch, *supra* note 31, at 112.

RACHEL SKLAR

que and complex circumstances involving Nazi-era looted art.<sup>177</sup> Such superior investigative abilities give Congress the power to create remedies far exceeding those available to the courts. The Nazi-era looted art cases demanded federal legislative action since they presented a difficult policy choice between two competing interests: victims of Nazi-era looting and the good faith purchasers of the artwork.<sup>178</sup> It was for Congress, not the judiciary, to make relative value judgments taking into consideration economic concerns and balancing competing interests.<sup>179</sup>

Moreover, the facts in many Nazi-era looted art cases are similar to one another and should be given the same considerations. “[I]t is when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress’ resolution is appropriate”.<sup>180</sup> Further, while a court’s decision only impacts the parties to the dispute, Congress is able to enact a broadly applicable rule, which affects a large class of people.<sup>181</sup>

Lastly, Congress’s political accountability made it the proper branch of government to make a policy choice in these cases.<sup>182</sup> Should the federal courts usurp policymaking authority, “the legislative process with its public scrutiny and participation [would be] bypassed...”.<sup>183</sup> Since the federal courts are “free to reach a result different from that which the normal play of political forces would have produced,” the intended beneficiaries of legislation lose protection and are “denied the benefits that are derived

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<sup>177</sup> Cuba, *supra* note 2, at 451 (noting Congress’s capacity comes from the significant resources available to the legislatures, namely their special committees, personal staff members, legislative hearings, etc.).

<sup>178</sup> *Id.* at 452.

<sup>179</sup> *Id.*

<sup>180</sup> United States v. Gainey, 380 U.S. 63, 67 (1965).

<sup>181</sup> Cuba, *supra* note 2, at 452.

<sup>182</sup> *Id.*; see also THE FEDERALIST NO. 49 at 317 (James Madison) (Clinton Rossiter ed., 1961). The Framers intended that each of the three branches have a specialized role. Congress, due to its high degree of representativeness and accountability, will best understand the “passions” of the electorate, suiting it best to make policy choices. The completely insulated, life tenured, federal judiciary will have “neither FORCE nor WILL but merely judgment...”.

<sup>183</sup> Cuba, *supra* note 2, at 452 (citing Cannon v. University of Cal., 441 U.S. 677, 743 (1979)).

from the making of important societal choices through the open debate of the democratic process”.<sup>184</sup>

*B. Congress’s Two Options to Provide a Workable Solution:  
The Discovery Rule versus the Demand and Refusal Rule*

Any claim for the recovery of Nazi-era looted art in the United States is predicated on a fundamental rule: no one, not even a good faith purchaser can obtain good title to stolen property.<sup>185</sup> This uncomplicated rule is accepted and applied as a basic tenet of common-law property law.<sup>186</sup> The owner of stolen property has the right to reclaim that property from anyone, unless barred by the statute of limitations or similar doctrines.<sup>187</sup>

The kinds of limitations rules applied in art restitution cases can generally be broken down into two categories: the Discovery Rule and the Demand and Refusal Rule.<sup>188</sup> Both rules are premised on judicial cognizance of the need to treat art differently. The courts that have addressed the issue have found it necessary to deviate from both a rule that favors original owners exclusively and a strict application of the doctrine of adverse possession of chattels, which is often used in conjunction with a legislated statute of limitations. Both modifications are attempts to recognize the mobility, concealability and financial value of art, while balancing the interests of both the original owner and the subsequent good faith purchaser.<sup>189</sup>

Historically, legislatures have left it to the courts’ discretion to decide when accrual occurs.<sup>190</sup> Most states previously followed the “Discovery Rule”,<sup>191</sup> established by the seminal case of *O’Keeffe v. Snyder*.<sup>192</sup> “The

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<sup>184</sup> *Id.*

<sup>185</sup> Kaye, *supra* note 33, at 252.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Schlegelmilch, *supra* note 31, at 105, 121 (“Theoretically, under the Demand and Refusal Rule, a claim by a would-be plaintiff is just as fresh 50 years later as it would be the day it was stolen”).

<sup>189</sup> *Id.*

<sup>190</sup> “A cause of action ‘accrues’ when a suit may be maintained thereon...” BLACK’S LAW DICTIONARY 20 (6th ed. 1990).

<sup>191</sup> Schlegelmilch, *supra* note 31, at 107.

<sup>192</sup> 416 A.3d 862 (N.J. 1980).

RACHEL SKLAR

Discovery Rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis for a cause of action".<sup>193</sup> The statute of limitations, therefore, begins to run once the true owner knows or should have known the correct person or institution to bring a claim against, and that person or institution is the current possessor of the art.<sup>194</sup> This rule requires the original owners to pursue their missing work diligently.<sup>195</sup> Under the Discovery Rule the burden is on the owner (the one seeking the benefit of the rule) to establish facts that would justify deferring the beginning of the period of limitations.<sup>196</sup> This rule applies in the case of an innocent third-party purchaser of stolen property, meaning that an original owner may still not be time-barred from bringing suit, so long as the action is brought within three years of his discovery of the artwork or the possessor.<sup>197</sup> Thus, the original owner may often times end up bringing claims decades after the date of appropriation.<sup>198</sup> The reasoning behind the Discovery Rule is that the plaintiff must proactively search for the artwork and defendants must not only show that they purchased the artwork in good faith, but must also make their possession known to the general public.<sup>199</sup>

The Demand and Refusal Rule,<sup>200</sup> followed in New York, states that the statute of limitations begins to run when the original owner demands return of the artwork but is refused by the current possessor or good faith purchaser.<sup>201</sup> In contrast to the Discovery Rule, application of this rule allows the original owner more time to find the good faith purchaser, and

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<sup>193</sup> *O’Keeffe*, 416 A.2d at 872.

<sup>194</sup> *Graefe*, *supra* note 63, at 482.

<sup>195</sup> *Id.* at 483.

<sup>196</sup> *Schlegelmilch*, *supra* note 31, at 108.

<sup>197</sup> *Choi*, *supra* note 1, at 194.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> The Demand and Refusal Rule originated in *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967), *rev’d on other grounds*, 246 N.E.2d 742 (N.Y. 1969).

<sup>201</sup> See Stephen A. Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2446 (1994).



thus gives the original owner the most protection.<sup>202</sup> Some critics compare the Demand and Refusal Rule to basically having no statute of limitations at all.<sup>203</sup> Many cases are won or dismissed on the interpretation of the statute of limitations alone, and a court will often spend years adjudicating that one issue.<sup>204</sup>

### C. *Why the Demand and Refusal Rule was Correctly Adopted by Congress*

The New York Demand and Refusal Rule is superior to the Discovery Rule. Early critics were fearful that the HEAR Act would adopt the Discovery Rule and thus limit future claimants. However, the HEAR Act creates a legal fiction that the date of “discovery” will be deemed to be the date of enactment of the law if:

(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and (B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.<sup>205</sup>

In other words, a claim of which someone has knowledge of today but has not made demand and refusal, or did so fewer than three years ago, would not have been “discovered” and subject to the new six year limitations period until the law was passed.<sup>206</sup> If three years from demand and refusal runs (or ran) before the law was enacted, however, the statute will not revive it.<sup>207</sup>

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Cuba, *supra* note 2, at 455; see, e.g., DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987), 804 F. Supp. 539 (S.D.N.Y. 1992) *rev'd*, 38 F.3d 1266 (2d Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994) (spending 13 years addressing the complexities of the statute of limitations); Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982) (spending eight years determining issues related to statute of limitations).

<sup>205</sup> Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2nd Sess. 2016).

<sup>206</sup> O'Donnell, *supra* note 155.

<sup>207</sup> *Id.*

RACHEL SKLAR

The type of statute of limitation the court applies is crucial when dealing with Nazi-era looted art because United States' common law does not allow good title to pass to stolen works of art until the statute of limitations on the initial theft expires.<sup>208</sup> Because the original owner can prevail on a claim if theft is shown, the good faith purchaser is only protected if the statute of limitations bars the claim.<sup>209</sup> In most cases, the original owners are not able to locate the stolen artwork until the statute of limitations has run on their claim. Thus, the statute of limitations historically serves as the defendant's primary defense.<sup>210</sup>

#### *D. None of the Original Policy Goals of Statutes of Limitations are Met in Nazi-Era Looted Art Cases*

The primary purpose of a statute of limitations is fairness to the defendant.<sup>211</sup> A defendant should reasonably expect that “the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the evidence has been lost, memories have faded, and witnesses have disappeared”.<sup>212</sup> Further, the limitations period “reflects a value judgment concerning the point at which interests in favor of protecting valid claims are outweighed by interest in prohibiting the prosecution of stale ones”.<sup>213</sup> However, in Holocaust-era cases, the claimants are frequently the survivors or their children who are unable to bring claims for restitution within the short statute of limitations period because of the unique challenges faced in attempting to determine the provenance of the art.<sup>214</sup> Almost every time a claimant has come forward, and a museum asserted a statute of limitations defense under state law, the museum has successfully defeated the claims.<sup>215</sup>

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<sup>208</sup> Graefe, *supra* note 63, at 481.

<sup>209</sup> *Id.*

<sup>210</sup> Choi, *supra* note 1, at 197.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Legal Analysis, *supra* note 59, at 17.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 16.

The prospect of time-consuming, combative, and expensive litigation with museums over statutes of limitations and other defenses undoubtedly has deterred claimants from coming forward and pursuing claims for restitution.<sup>216</sup> It is impossible to quantify how many claims would have been asserted but for those daunting obstacles.<sup>217</sup> One can reasonably conclude that the resort to limitations defenses by museums has had a chilling effect on potential claimants and has given the museums the upper hand, even in private negotiations and mediations. It can certainly be said that United States' museums have used limitations defenses to impose costs and burdens on claimants and to avoid having to adjudicate claims to Nazi-era looted art on the facts and merits.<sup>218</sup>

#### *E. What Effect Will the HEAR Act Have on Von Saher's Third Appeal?*

The HEAR Act cites *Von Saher's* invalidation of California Code of Civil Procedure Section 354.3 as the reason to create a new federal statute of limitations.<sup>219</sup> However, the HEAR Act would not have changed the result in *Von Saher I* or *II*, nor will it have any effect on *Von Saher's* continuing litigation.<sup>220</sup>

As *Von Saher* was not dismissed as a result of a statute of limitations defense, it is unlikely the HEAR Act will help Ms. von Saher gain title to her family's artwork. However, the HEAR Act may provide some effective help in *Von Saher's* forthcoming appeal, as under the HEAR Act claims are to be fairly adjudicated although, as of yet, the Norton Simon Museum has not been sanctioned for previously violating ethical standards. Thus, it is doubtful that the HEAR Act could be enforced against the museum now, and if the museum were to violate ethical standards again, there is no legislative body that will see to the enforcement of sanctions.

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<sup>216</sup> *Id.* at 37.

<sup>217</sup> *Id.* at 38.

<sup>218</sup> *Id.*

<sup>219</sup> S. Res. 2763, 114th Cong. § 2(7).

<sup>220</sup> *Id.*

RACHEL SKLAR

## Part V

### *Proposed Amendments to the HEAR Act*

As currently enacted, the HEAR Act expires on December 31, 2026. If a claimant files a claim after this date in New York or in another jurisdiction that relies on the statute of limitations rule defined in New York, it is almost certain that defendants will challenge this claim as adversely affected by the legislative history of the HEAR Act, which already includes the statement made by Senator Cornyn during the hearings that “the ability to find art is better now and claimants should be given a chance, but that chance should not last forever”.<sup>221</sup>

Proposed amendment 1: Section 5 of the legislation be amended to state that upon the expiration of this Act, all statute of limitations rules in existence prior to the enactment of this Act shall remain in effect, and after December 2026, a claimant should not be barred from bringing a claim or cause of action under the statute of limitations rules in existence prior to the enactment of the HEAR Act.

Proposed amendment 2: Amend the HEAR Act to specifically bar defendants from invoking the laches defense. Since the laches defense can be applied on a discretionary basis by a judge regardless of a statute of limitations defense, the defense can defeat the congressional intent to entertain claims on their merits. In order to achieve the legislative intent of allowing claims to be decided only on their merits, laches defenses should be barred, at the very least until the advent of the sunset provision.

Proposed amendment 3: Amend the HEAR Act so the AAM actively monitors and regulates its member museums. The AAM Accreditation Commission should consider the accreditation status of museums that violate museum standards and ethics in handling claims for looted art, and if a museum is found in violation of the standard of ethics, the

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<sup>221</sup> Letter from Pierre Ciric, Director of Holocaust Art Restitution Project, Inc. to Members of the Senate Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, June 14, 2016.

museum should lose its accreditation or face a serious penalty.<sup>222</sup> This could be a possible solution to hold museums accountable and not allow free reign by museum directors. If the AAM is to continue to be a self-regulating body, it must abide by its own codes in regulating and monitoring its museums and enforcing ethical standards.<sup>223</sup>

#### 4. Conclusion

The United States State Department becomes increasingly relevant in Nazi-era looted art cases that involve foreign nations since the claims are closely tied to Holocaust experiences, and monetary compensation is not always the result a claimant is willing to consider.<sup>224</sup> Concern over soured foreign relations and barriers to restitution due to litigation are valid with cases such as *Republic of Austria v. Altmann*<sup>225</sup> serving as an archetype.<sup>226</sup> *Portrait of Wally*<sup>227</sup> raised similar international concerns,

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<sup>222</sup> World Jewish Restitution Organization, *supra* note 67, at 7.

<sup>223</sup> *Id.* at 10.

<sup>224</sup> Mullery, *supra* note 9, at 661.

<sup>225</sup> *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>226</sup> Mullery, *supra* note 9, at 661; see also Marilyn Henry, *Talking Looted Art*, JERUSALEM POST, Aug. 23, 2008, at 14, available at <http://www.jpost.com/Opinion/Columnists/Metro-Views-Talking-looted-art>. (Noting that it is unlikely that Austria wants to deal with restitution again post-*Altmann*. It is estimated that the Austrian Gallery stood to lose \$300 million due to loss of the artworks, and also loss of revenue due to declined tourism).

<sup>227</sup> *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009); see also Katharine N. Skinner, *Restitution Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 710 (2013). In 1997, MoMA exhibited a painting on loan from the Austrian Leopold museum. The painting (“Wally”) had a long and tangled history of ownership, and the estate of its 1930s Austrian-Jewish owners asserted that the painting had either been stolen by the Nazis or granted to them under duress when their ancestor fled the country to avoid persecution. After the MoMA exhibit ended, the New York District Attorney’s Office issued a subpoena for the painting, claiming that the Leopold Museum had violated the National Stolen Property Act by knowingly shipping a stolen artifact into the United States. The court, after many years of litigation, ruled that a triable issue of fact existed as to whether the Leopold knew that “Wally” had been stolen, and therefore knew its illegal status when exporting it to the United States. Before a jury could resolve the issue, the two parties settled. The painting was eventually returned to the Leopold after the museum paid the heirs \$19 million.

RACHEL SKLAR

specifically among museums seeking to loan artwork from foreign collectors and galleries.<sup>228</sup>

Passion for art should not displace respect for justice. If museums are not held to any kind of standard the whole restitution process continues to be a sham because, at the end of the day, everyone continues to profit from the theft except the victim.

Nazi-era looted art restitution claims represent more than the theft of a particular family's private collection—they instead symbolize the profound depths of the Nazis' crimes against humanity. The equitable resolution of claims for restitution of Nazi-era looted art would be beneficial to all concerned. The effective resolution of restitution claims will provide justice and equity and, at the same time, in small measure, right odious crimes against humanity.<sup>229</sup> If nothing is done, the trade in stolen art will continue to flourish under the art market's current practices, and museums will continue to avoid living up to ethical standards.<sup>230</sup>

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<sup>228</sup> Mullery, *supra* note 9, at 661.

<sup>229</sup> Shapiro, *supra* note 5, at 1153.

<sup>230</sup> Schlegelmilch, *supra* note 31, at 96.