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THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016:  
AN INEFFECTIVE REMEDY FOR RETURNING NAZI-LOOTED ART

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*During World War II, the Third Reich engineered the “greatest art theft in history,” stealing over 650,000 works of art from across Europe. Nearly a century later, many of these works are still missing or have yet to be reunited with their prewar owners. Despite substantial efforts to both facilitate and expedite the restitution process, it still remains relatively difficult for individuals to reclaim art stolen from their families by the Nazis during the war.*

*This Note first examines the processes through which countries—in particular, the United States—have handled art restitution. This Note then analyzes the Holocaust Expropriated Art Recovery Act (“HEAR”) and its potential effectiveness in providing a suitable remedy to the victims of the Nazi art theft. Ultimately, this Note suggests several modifications to HEAR so that it provides an effective remedy to the victims while still protecting the interests of good-faith purchasers.*

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*“Many . . . still struggle with seemingly endless roadblocks and obstacles to recovery set forth by people who value the artworks more than they value justice. It is time for these last prisoners of war to be returned.”*<sup>1</sup>

## I. INTRODUCTION

During World War II, the Nazi regime engineered what has since been nicknamed the “greatest art theft in history.”<sup>2</sup> From 1933 until 1945, Adolf Hit-

1. Randy Schoenberg, *The Last Prisoners of War: Inside the Battle to Recover Nazi-Stolen Artwork*, MSNBC (Apr. 1, 2015, 8:33 AM), <http://www.msnbc.com/msnbc/the-last-prisoners-war-inside-the-battle-recover-nazi-stolen-artwork>.

2. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Apr. 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

ler's Third Reich perpetrated these art crimes,<sup>3</sup> eventually stealing over 650,000 works of art.<sup>4</sup> To this day—over eighty years later—countless art pieces, including Old Masters, modern paintings, and sculptures, remain missing.<sup>5</sup> This massive theft<sup>6</sup> affected actual individuals—many of whom are still alive today<sup>7</sup>—and serves as a reminder that the end of a war does not solve all problems.

Since the collapse of the Third Reich, and subsequent conclusion of World War II in 1945,<sup>8</sup> there has been modest success in reuniting displaced works of art with their prewar owners. Perhaps most famously, in 2004, the Supreme Court of the United States decided the landmark case *Republic of Austria v. Altmann*<sup>9</sup> and ruled in favor of eighty-eight-year-old Maria Altmann, the sole heir of her uncle, Austrian sugar magnate Ferdinand Bloch-Bauer.<sup>10</sup> The Court's ruling allowed Altmann to sue the Austrian government for the return of five Gustav Klimt paintings that Nazis stole from her family in 1938.<sup>11</sup> The cache of paintings included a well-known painting of Altmann's aunt, officially titled *Adele Bloch-Bauer I* but known colloquially as "The Woman in Gold."<sup>12</sup> Since the end of the war, however, the Austrian government had retained possession of the painting.<sup>13</sup> Ultimately, in 2006, Altmann was at long last reunited with Klimt's painting of her beloved aunt.<sup>14</sup>

While the Supreme Court's ruling did allow Altmann herself to eventually obtain possession of *Adele Bloch-Bauer I*, Altmann's moving story of postwar reunion is unfortunately an exception—not the rule—in the overall story of Holocaust art restitution, and it has failed to provide prewar owners and their

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3. Sophie Hardach, *Art Theft: The Last Unsolved Nazi Crime*, THE ATLANTIC (Nov. 18, 2013), <https://www.theatlantic.com/international/archive/2013/11/art-theft-the-last-unsolved-nazi-crime/281566/>.

4. Shoumatoff, *supra* note 2.

5. Hardach, *supra* note 3.

6. "Art crime" encompasses the theft of art. See Brian R. Williams, *What is Art Crime?*, DAMFORST MUSEUM (Oct. 14, 2010), [http://www.damforstmuseum.org/what\\_is\\_art\\_crime.html](http://www.damforstmuseum.org/what_is_art_crime.html).

7. See, e.g., the story of Maria Altmann, memorialized in the film *Woman in Gold*. THE WOMAN IN GOLD (Origin Pictures 2015).

8. Michelle Hall, *By the Numbers: End of World War II*, CNN (Sept. 2, 2013, 4:05 PM), <http://www.cnn.com/2013/09/02/world/btn-end-of-wwii/index.html>.

9. 541 U.S. 677 (2004).

10. *Id.* at 681–82.

11. *Id.* at 702, 706.

12. Patricia Cohen, *The Story Behind 'Woman in Gold': Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html?mcubz=0> [hereinafter Cohen, *The Story*]. After seizing *Adele Bloch-Bauer I*, Nazi soldiers retitled the painting in an attempt to hide the subject's Jewish heritage. Susan Stamborg, *Immortalized as "The Woman in Gold," How a Young Jew Became a Secular Icon*, NPR (June 23, 2015, 4:48 AM), <https://www.npr.org/2015/06/23/416518188/immortalized-as-the-woman-in-gold-how-a-young-jew-became-a-secular-icon>. Out of respect for Adele Bloch-Bauer, the painting will hereinafter be referred to by its original name throughout this Note.

13. Cohen, *The Story*, *supra* note 12.

14. *Id.*

heirs with a consistent mechanism to reclaim stolen art.<sup>15</sup> Decades after the end of World War II, innumerable individuals have yet to be reunited with many of the over 650,000 works of art that the Nazi regime stole from them or their families<sup>16</sup> between 1933 and 1945.<sup>17</sup> Moreover, despite substantial efforts to both facilitate and expedite the restitution process, it still remains relatively difficult for individuals to reclaim art stolen from their families during the war by the Nazis.<sup>18</sup>

In order “[t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis,”<sup>19</sup> the United States took a substantial step in 2016 toward facilitating the return of Nazi-looted art. Specifically, President Barack Obama signed the Holocaust Expropriated Art Recovery Act of 2016 (“HEAR”) into law on December 16, 2016.<sup>20</sup> In short, this legislation gives victims of the Nazi art theft and their descendants six years from the “actual discovery”<sup>21</sup> of a work of art stolen between January 1, 1933, and December 31, 1945,<sup>22</sup> to establish their right of ownership.<sup>23</sup> By extending the statute of limitations for bringing these claims, Congress sought to “[t]o ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”<sup>24</sup> Indeed, unlike in Europe, “there is essentially no public component to the ownership of potentially looted art in the United States,” as neither the federal government nor the states actually own these pieces.<sup>25</sup>

Despite the fact that HEAR extends the statute of limitations during which victims can establish ownership after discovery, the legislation does not contribute much else of consequence to the facilitation of art restitution.<sup>26</sup> Stolen art is hidden in a myriad of locations, from private collections to state archives to museums across the globe<sup>27</sup> Auction houses and art dealers handle and facili-

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15. See, e.g., Andrew J. Extract, Note, *Establishing Jurisdiction Over Foreign Sovereign Powers: The Foreign Sovereign Immunity Act, the 'Act of State' Doctrine and the Impact of Republic of Austria v. Altmann*, 4 J. INT'L. BUS. & L. 103, 120–21 (2005).

16. Shoumatoff, *supra* note 2.

17. *Id.* World War II did not officially begin until Germany's invasion of Poland on September 1, 1939. Hall, *supra* note 8.

18. Cohen, *The Story*, *supra* note 12.

19. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524 (2016).

20. *Holocaust Expropriated Art Recovery (HEAR) Act Signed into U.S. Law*, CLAIMS CONFERENCE (Dec. 19, 2016), <http://art.claimscon.org/home-new/looted-art-cultural-property-initiative/advocacy/holocaust-expropriated-art-recovery-hear-act-signed-u-s-law/>.

21. §§ 4–5, 130 Stat. at 1524.

22. *Id.*

23. *Id.*

24. *Id.* at § 3.

25. NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART 309–10 (2017).

26. See generally 130 Stat. 1524.

27. See, e.g., Malcolm Gay, *After Decades-Long Saga, Lexington Family Settles Claim for Nazi-Looted Art*, BOSTON GLOBE (May 28, 2017), <https://www.bostonglobe.com/arts/art/2017/05/28/after-decades-long-saga-lexington-family-settles-claim-for-nazi-looted-art/M5dSIqhnkc3Ys6dlwXIPuO/story.html> (discussing a painting hidden in a private collection).

tate the movement of this art through sales.<sup>28</sup> HEAR, however, does not provide tangible assistance in actually discovering the works of art that have yet to resurface in the years following the end of the war.<sup>29</sup> Consequently, without a specific way to advance the discovery and subsequent restitution of the stolen art, hundreds of thousands of works will remain lost, and prewar owners will have no chance to bring claims. As a result, to best fulfill the statute's objectives, Congress should modify and expand HEAR to include enforced cooperation on the part of the key players—museums, auction houses, and private collectors.<sup>30</sup>

This Note argues that Congress should alter HEAR to require museums, auction houses, private collectors, and other storage facilities to participate in and enable the discovery of the missing Nazi-looted art. Part II of this Note will (1) define important terminology relating to the issue, (2) provide relevant historical background on the Nazi art theft during World War II, and (3) survey prior legal solutions used by the United States and various European nations to facilitate the restitution of Nazi-looted art. Part III of this Note will (1) analyze the effectiveness of earlier American legislation used to facilitate the restitution of this art and (2) discuss the potential ways in which the recent enactment of HEAR will change the landscape of Nazi art restitution in the United States. Part IV recommends broadening the scope of HEAR to require cooperation on the part of museums, auction houses, private collectors, and storage facilities.

## II. BACKGROUND

### A. Terminology

In order to fully comprehend the current landscape of Holocaust art restitution, it is necessary to first understand the specific terminology related to this issue.

#### 1. Restitution

Restitution is the act of returning an object to its previous owner.<sup>31</sup> In the context of the Nazi art theft, restitution focuses on returning art stolen by the Nazis to the prewar owners, often Jewish private collectors or their heirs.<sup>32</sup> There is no specific rule for restitution as each country handles the process differently.<sup>33</sup> For example, in 1998, Austria passed a law establishing procedures for restitution and later broadened it in 2009, thus giving rise to an increase in

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28. Patricia Cohen & Graham Bowley, *Dispute Over Nazi Victim's Art*, N.Y. TIMES (Oct. 24, 2014), <https://www.nytimes.com/2014/10/25/arts/design/christies-and-sothebys-differ-on-handling-of-2-schieles.html>.

29. See generally 130 Stat. 1524.

30. *Id.*

31. Hardach, *supra* note 3.

32. *Id.*

33. Max Fisher, *Why Nazi-Seized Art is Only Now Resurfacing—And How It Will Change the Art World*, WASH. POST (Nov. 6, 2013), [https://www.washingtonpost.com/news/worldviews/wp/2013/11/06/why-nazi-seized-art-is-only-now-resurfacing-and-how-it-will-change-the-art-world/?utm\\_term=.c50a0d367ce0](https://www.washingtonpost.com/news/worldviews/wp/2013/11/06/why-nazi-seized-art-is-only-now-resurfacing-and-how-it-will-change-the-art-world/?utm_term=.c50a0d367ce0).

ownership claims.<sup>34</sup> In 2017, a French court ordered the return of Camille Pissarro's *La Cueillette des pois*, stolen from Jewish art collector Simon Bauer by the French Vichy government during the war.<sup>35</sup> Despite the fact that the current owners had purchased the Pissarro in good faith, the Court determined the interests of the prewar owners were more compelling than those of the good faith purchasers.<sup>36</sup>

Not all countries have been quite as generous with their support of Nazi art restitution, however. For example, researchers have identified Italy, Hungary, Poland, Argentina, Spain, and Russia as countries who lag in promoting the restitution of art looted during the covered period of 1933 until 1945.<sup>37</sup> This "lag" is generally associated with failing "to address the cursory and usually badly inadequate laws enacted in the 1940s and 1950s, which quickly expired in that era."<sup>38</sup>

## 2. *Provenance*

Provenance is the "ownership history" of an art object.<sup>39</sup> Tracing the provenance of an art object—such as a painting—can be relatively complex, as it requires both consistent documentation of ownership and careful research into the history of ownership.<sup>40</sup> A "provenance gap" is an area during which the ownership of the art object cannot be documented.<sup>41</sup>

Generally, art that is undocumented for any period of time between 1933 and 1948 is at risk of having been affected by the Nazi art theft, thus potentially qualifying it as stolen property.<sup>42</sup> For example, a provenance gap in a painting could indicate that it "probably changed hands under the Nazis" or "[was] even just stolen" by the Nazi regime.<sup>43</sup> In recognition of the importance of provenance research, agreements such as the Washington Conference Principles on Nazi-Confiscated Art have supported improving this research in order to identify works of art potentially affected during the covered period.<sup>44</sup>

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34. See discussion *infra* Subsection II.C.3.b.

35. Annalisa Quinn, *French Court Orders Return of Pissarro Looted by Vichy Government*, N.Y. TIMES (Nov. 8, 2017), [https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?\\_r=0](https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?_r=0).

36. *Id.*

37. Graham Bowley, *Nations Called Lax in Returning Art Looted From Jews*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/arts/design/lax-efforts-on-wartime-looted-art-criticized-in-new-report.html>. It is beyond the scope of this Note to examine specific restitution policies of all countries.

38. O'DONNELL, *supra* note 25, at 342. See discussion *infra* Subsection II.C.3.

39. Phil Hirschhorn, *Why Finding Nazi-Looted Art is 'A Question of Justice'*, PBS (May 22, 2016, 10:13 AM), <http://www.pbs.org/newshour/updates/why-finding-nazi-looted-art-is-a-question-of-justice/>.

40. *Id.*

41. Fisher, *supra* note 33.

42. *Id.* This time frame constitutes World War II. Shoumatoff, *supra* note 2.

43. Fisher, *supra* note 33.

44. Bowley, *supra* note 37. Whether nations have actually invested in researching the provenance of art held in state-owned collections is another question. Certain countries, such as Italy, have been criticized for failing to dedicate resources to provenance research. See *e.g., id.* For further discussion of the Washington Conference Principles, see *infra* Subsection II.C.1.

### B. *History of the Nazi Art Theft*

During the course of World War II, the Nazi regime perpetrated what has since been nicknamed “the greatest art theft in history.”<sup>45</sup> Estimates indicate that “twenty percent of the great art of Europe was stolen by the Nazis during [the] World War.”<sup>46</sup> To this day, only a fraction of this art has been recovered and ultimately reunited with its prewar owners.<sup>47</sup>

#### 1. *Origins of the Crime*

The moving force behind the Nazi art theft came directly from Adolf Hitler, the leader of Germany’s Third Reich.<sup>48</sup> A failed artist himself,<sup>49</sup> Hitler divided all art into two distinct categories: “Great German Art” and “Degenerate Art.”<sup>50</sup> Works that qualified as “Great German Art” were generally traditionalist and portrayed “conventional depictions of conventional subjects” such as “bucolic landscapes” and “wholesome nudes.”<sup>51</sup> Conversely, “Degenerate Art” was cutting edge, modern art that encompassed “anything which challenged this idyllic world view.”<sup>52</sup> Ultimately, Hitler wanted to display only the “Great German Art” in his unrealized Führermuseum, a museum intended to house great art from across Europe.<sup>53</sup> The Nazi regime either destroyed the remaining “Degenerate Art” or sold it to overseas collectors.<sup>54</sup>

#### 2. *Implementation of the Crime*

To realize Hitler’s goal of building a collection of what he considered to be the finest art, the Nazi regime confiscated art primarily from Jewish collectors who had already amassed collections of great masterpieces.<sup>55</sup> This included artwork by masters such as Sandro Botticelli, Albrecht Dürer, Pierre-Auguste

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45. Shoumatoff, *supra* note 2.

46. Fisher, *supra* note 33.

47. *Id.*

48. *Holocaust Encyclopedia: Third Reich*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007331> (last visited Nov. 8, 2018).

49. Hitler initially wanted to be an artist and applied to the Vienna Academy of Art and was rejected from the college not once but twice. Interestingly, Hitler believed that his rejection was caused by a Jewish professor. See *Hitler Sketches That Failed to Secure His Place at Art Academy to be Auctioned*, THE TELEGRAPH (Mar. 24, 2010, 10:28 AM), <http://www.telegraph.co.uk/culture/art/art-news/7511134/Hitler-sketches-that-failed-to-secure-his-place-at-art-academy-to-be-auctioned.html>. A discussion of the causation between this rejection and his perpetration of the Nazi art theft is beyond the scope of this Note.

50. William Cook, *How Hitler Set Out to Destroy “Degenerate Art,”* BBC (Jan. 24, 2017), <http://www.bbc.co.uk/programmes/articles/13fZCx4RtJ0qjD8tCpQwkWV/how-hitler-set-out-to-destroy-degenerate-art>.

51. *Id.*

52. *Id.*

53. *Id.* See also O’DONNELL, *supra* note 25, at 6–7.

54. Cook, *supra* note 50.

55. O’DONNELL, *supra* note 25, at 6–7. See also *Hitler’s Austrian ‘Cultural Capital,’* BBC (Nov. 3, 2008, 11:25 AM), <http://news.bbc.co.uk/2/hi/europe/7705552.stm>.

Renoir, and Claude Monet.<sup>56</sup> Throughout the war, the Nazis plundered numerous famous and historically significant works of art including, but not limited to, Jan van Eyck's *Ghent Altarpiece*, Michaelangelo's *Madonna of Bruges*, and Johannes Vermeer's *The Astronomer*.<sup>57</sup> The Nazis even seized nontraditional works of cultural and historic significance. For example, Nazi soldiers stole the original manuscript of German composer Ludwig van Beethoven's Sixth Symphony and hid it among looted paintings and sculptures in a tunnel in Siegen, Germany, where Allied forces later recovered it.<sup>58</sup> In all, estimates indicate that the Nazis stole over 650,000 works of art during the six years of the war.<sup>59</sup>

In Hitler's attempt to amass a collection of what he considered to be "Great German Art," the Nazis specifically targeted certain art collections that the regime identified as containing such works.<sup>60</sup> For example, the Nazis particularly sought the acquisition of the 333-painting collection of Adolphe Schloss.<sup>61</sup> Schloss's valuable and historically significant collection contained works created by numerous Old Masters.<sup>62</sup> Through the use of the "police force" as well as "whistle-blowers," the Nazis discovered the collection, and the collaborationist French Gestapo eventually stole it in 1943.<sup>63</sup> The Nazis reserved the majority of the "Great German" paintings<sup>64</sup> in the Schloss collection for display in the Fürhermuseum.<sup>65</sup> As of 2008, 162 of the original 333 works, including paintings by Rembrandt and Rubens, had been reunited with the heirs to the Schloss collection.<sup>66</sup> Another 166 works have yet to be returned.<sup>67</sup> Rather, they hang "in foreign museums" or have been the subject of legal claims.<sup>68</sup> The last five works remain missing.<sup>69</sup> Indeed, museums are often hesitant to return works in their collections if there is even the slightest chance that the claimant's claim is illegitimate.<sup>70</sup>

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56. Henry Samuel, *Hermann Goering's "Full Catalogue" of Looted Nazi Art Published for First Time*, THE TELEGRAPH (Sept. 30, 2015, 6:00 AM), <http://www.telegraph.co.uk/history/world-war-two/11900625/Hermann-Goerings-full-catalogue-of-looted-Nazi-art-published-for-time.html>.

57. See Megan Willett, *These Incredible Works of Art Were Saved by the Real-Life "Monuments Men" of WWII*, BUSINESS INSIDER (Feb. 20, 2014, 3:37 PM), <http://www.businessinsider.com/monuments-men-famous-works-of-art-2014-2>.

58. *Id.*

59. Shoumatoff, *supra* note 2.

60. O'DONNELL, *supra* note 25, at 5.

61. ISABELLE LE MASNE DE CHERMONT & LAURENCE SIGAL-KLAGSBALD, *À QUI APPARTENAIENT CES TABLEAUX?* 107 (2008).

62. *Id.*

63. *Id.*

64. O'DONNELL, *supra* note 25, at 6–7.

65. LE MASNE DE CHERMONT & SIGAL-KLAGSBALD, *supra* note 61, at 108.

66. *Id.* at 109.

67. *Id.*

68. *Id.*

69. *Id.*

70. Patricia Cohen, *Museums Faulted on Restitution of Nazi-Looted Art*, N.Y. TIMES (June 30, 2013), <http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html> [hereinafter Cohen, *Museums Faulted*].



Despite the successful location and restitution of certain works of art, such as Vermeer's *The Astronomer* and Michaelangelo's *Madonna of Bruges*,<sup>71</sup> these restituted pieces constitute just a fraction of what the Nazi regime stole throughout the war.<sup>72</sup> Decades after the end of the war, countless works of art previously known to exist in European collections prior to the start of the war remain missing.<sup>73</sup> For example, Raphael's *Portrait of a Young Man* disappeared in 1945.<sup>74</sup> It was last seen at Hitler's Berlin residence that same year.<sup>75</sup> In 1938, Nazis seized *Portrait of Trude Steiner*, another painting by Gustav Klimt.<sup>76</sup> This painting disappeared three years later in 1941 when an unknown collector purchased it.<sup>77</sup> Three paintings by Peter Paul Rubens—along with the *Virgin Mary with Child and Baby Saint John*, a painting by Lucas Cranach the Elder—went missing from the Berlin Friedrichshain Flak Tower in early May 1945.<sup>78</sup> German soldiers confiscated Albert Gleizes' *Landscape Close to Paris* from the Landesmuseum in Hanover, Germany.<sup>79</sup> The whereabouts of these works of art—along with innumerable others—remain a mystery to this day. Accordingly, the mere existence of HEAR does not solve the problem of locating this stolen art. Over time, however, stolen art has had a tendency to resurface, and this legislation does provide a way to handle the reappearance of these works.<sup>80</sup>

### 3. Overview of Solutions<sup>81</sup>

While some countries have endeavored to facilitate restitution through restitution panels or international agreements, these efforts have been largely unsuccessful.<sup>82</sup> In 1998, the United States—along with forty-three other countries—signed the nonbinding Washington Conference Principles on Nazi-Confiscated Art.<sup>83</sup> These eleven principles encouraged the ratifying nations to

71. Vermeer's *The Astronomer* is now on display at the Louvre in Paris. *Œuvre: L'Astronome*, Le LOUVRE, <http://www.louvre.fr/oeuvre-notices/lastronome> (last visited Nov. 8, 2018). Michaelangelo's *Madonna of Bruges* sculpture is once again on display at the Church of Our Lady in Bruges, Belgium. Marc, *Church of Our Lady*, VISIT BRUGES (Jan. 9, 2016, 4:54 PM), <http://visit-bruges.be/see/churches/church-our-lady>.

72. Hardach, *supra* note 3.

73. Shoumatoff, *supra* note 2.

74. Alice Vincent, *The 10 Most-Wanted Missing or Stolen Paintings*, THE TELEGRAPH (Apr. 13, 2016, 9:41 AM), <http://www.telegraph.co.uk/art/what-to-see/the-most-wanted-missing-paintings/>.

75. *Id.*

76. Kharunya Paramaguru, *The Top 10 Most Wanted Missing Art Works from World War II*, TIME (Nov. 7, 2013), <http://world.time.com/2013/11/07/the-top-10-most-wanted-missing-art-works-from-world-war-ii/>.

77. *Id.*

78. *Additional Missing Works of Art*, MONUMENTS MEN FOUNDATION FOR THE PRESERVATION OF ART, <https://www.monumentsmenfoundation.org/join-the-hunt/additional-missing-works-of-art> (last visited Nov. 7, 2018).

79. *Id.* For a longer list of works of art still missing today, see *id.*

80. See, e.g., Fisher, *supra* note 33; see also Michael Kimmelman, *In a Rediscovered Trove of Art, a Triumph Over the Nazis' Will*, N.Y. TIMES, (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/arts/design/in-a-rediscovered-trove-of-art-a-triumph-over-the-nazis-will.html>.

81. For a more in-depth discussion of attempted solutions, see discussion *infra* Section II.C.

82. See Cohen, *The Story*, *supra* note 12. (“[M]ost countries have done little to live up to international agreements.”).

83. O'DONNELL, *supra* note 25, at 309–10.

identify Nazi-looted art, provide access to “relevant records and archives,” create a “central registry” of looted art, and develop “national processes to implement these principles.”<sup>84</sup> Despite the United States’ clear promise to support the restitution of Nazi-looted art, HEAR constitutes the first substantial step that has been taken by the American government in furtherance of the Washington Conference Principles.<sup>85</sup>

### C. *Legal Solutions*

Both the United States and Europe have attempted to create solutions to facilitate the restitution of stolen art. Some nations have been more successful than others.

#### 1. *Washington Conference Principles on Nazi-Confiscated Art*

In 1998, the United States Department of State hosted the Washington Conference on Holocaust-Era Assets.<sup>86</sup> The “twin purpose[s]” of this Conference were to (1) “forge a common approach to the issues still surrounding Holocaust assets” and (2) “advance Holocaust education, remembrance, and research.”<sup>87</sup> Forty-four countries attended, and the Conference ultimately adopted the Washington Conference Principles on Nazi-Confiscated Art (the “Washington Conference Principles”).<sup>88</sup> These principles functioned as a treaty, but they lacked “the force of law.”<sup>89</sup>

These eleven nonbinding principles<sup>90</sup> called for the signatories to take a variety of actions to provide adequate restitution to the victims of the Nazi art theft.<sup>91</sup> Specifically, the Washington Conference Principles called for the identification of nonrestituted, Nazi-looted art; the opening of records and archives to researchers; the advertisement of the location of nonrestituted art; the establishment of a “central registry of such information”; and the creation of balanced commissions to address ownership issues.<sup>92</sup> Furthermore, the Washington Conference Principles encouraged prewar owners and their heirs “to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.”<sup>93</sup> When such claims are brought forth, “steps should be taken expeditiously to achieve a just and fair solution” depending on

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84. *Id.* at 49–50.

85. *Id.*

86. *Id.* at 29.

87. *Id.* at 30.

88. Emmarie Huetteman, *Holocaust Survivors Score Victory in Reclaiming Stolen Art*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/2016/12/10/us/congress-holocaust-nazis-stolen-art.html>.

89. *Id.*

90. For a complete list of all eleven Washington Conference Principles, see O’DONNELL, *supra* note 25, at 49–50.

91. *Id.*

92. *Id.*

93. *Id.* at 50.

the facts of the specific case.<sup>94</sup> In the event that the owners of stolen art cannot be identified, every effort should still be made in order to “achieve a just and fair solution.”<sup>95</sup>

While these principles are nonbinding and do not carry the force of law, they have propelled several of the signatory nations into tangible action. For example, “some European countries have set up dedicated commissions and boards to address claims for art in national collections that the claimants allege was the subject of Nazi looting.”<sup>96</sup> Moreover, the Washington Conference Principles have “begun to assume greater prominence as part of the rules of decision in individual cases.”<sup>97</sup> Despite their lack of mandatory authority, their mere existence has prompted museums and private collectors alike to return stolen art held in their collections.<sup>98</sup> The Washington Conference Principles have also served as a basis for arguments presented to the United States Congress in favor of the passage of HEAR.<sup>99</sup>

## 2. *United States*

The United States has endeavored to facilitate the restitution of Nazi-looted art. For example, during World War II and immediately after, the Allied nations—including the United States—dispatched 345 men and women to war-torn Europe to locate, rescue, and return missing art stolen by the Nazis.<sup>100</sup> These “Monuments Men” eventually facilitated the return of “more than five million stolen cultural objects” to their prewar owners.<sup>101</sup> Some of the Monuments Men also defied orders from the American government and kept stolen works for themselves.<sup>102</sup> These thefts thus contributed to the growth of American museums since, “[a]fter World War II, some American museums expanded their collections by purchasing art or accepting donations without researching the objects’ ownership history in the Nazi era.”<sup>103</sup> Nonetheless, it is entirely possible that, until the enactment of HEAR, this effort to reunite works of art with their prewar owners is the most coordinated and long-lasting attempt on the part of the United States government to provide restitution to the victims of

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See, e.g.*, Joe Miller, ‘We Should Give Back Art Looted by the Nazis,’ BBC (Aug. 22, 2017), <http://www.bbc.com/news/business-41000756>.

99. *See* Halimah Abdullah, *Helen Mirren, Lawmakers Push to Recover Art Stolen by Nazis*, NBC NEWS (June 7, 2016, 2:35 PM), <https://www.nbcnews.com/news/us-news/helen-mirren-lawmakers-push-recover-art-stolen-nazis-n587311>.

100. Hardach, *supra* note 3.

101. *Id.*

102. *See, e.g.*, Tom Mashberg, *Returning the Spoils of World War II, Taken by Americans*, N.Y. TIMES (May 5, 2015), <https://www.nytimes.com/2015/05/06/arts/design/returning-the-spoils-of-world-war-ii-taken-by-our-side.html>.

103. *Why Aren’t American Museums Doing More to Return Nazi-Looted Art?*, THE CONVERSATION (May 7, 2015, 5:52 AM), <https://theconversation.com/why-arent-american-museums-doing-more-to-return-nazi-looted-art-41149>.

the Nazi art theft and their legal heirs, both during and after the conclusion of World War II. In fact, since the actions taken by the Monuments Men, there have been no similar coordinated, large-scale efforts to facilitate the return of this stolen art.<sup>104</sup>

In the years immediately after the end of World War II, American courts saw minimal litigation regarding the ownership of Nazi-looted art.<sup>105</sup> Following the efforts of the Monuments Men, the United States' biggest step toward advocating for the return of Nazi-looted art occurred in 1998 when it signed the nonbinding Washington Conference Principles, thus officially calling for the identification and restitution of Nazi-looted art.<sup>106</sup> Less than twenty years later, the United States Congress enacted HEAR in a culmination of increased efforts to effectively facilitate the restitution of Nazi-looted art.<sup>107</sup> For many interested parties, this legislation symbolizes a positive step forward for the support of the restitution of Nazi-looted art housed in American museums and collections as well as an implementation of the Washington Conference Principles.<sup>108</sup> HEAR's stated purpose is "[t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis."<sup>109</sup> This purpose meshes neatly with the Washington Conference Principles' primary goals of identifying nonrestituted, Nazi-looted art and returning it to the prewar owners and the heirs.<sup>110</sup>

### 3. *Europe*

In the decades following the end of World War II, European nations have differed on how to most effectively handle the restitution of Nazi-looted art.

#### a. *Germany*

Germany's substantial role in World War II has placed its treatment of Nazi-looted art under increased scrutiny from the rest of the world.<sup>111</sup> Overall, Germany has been widely criticized for its treatment of claims for stolen art,<sup>112</sup>

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104. *Id.*

105. "[R]elatively few claims for restitution of Holocaust art were filed in United States courts until more than fifty years following the close of World War II." Kevin P. Ray, *The Restitution, Repatriation, and Return of Cultural Objects*, GREENBERG TRAURIG (Mar. 19, 2015), <https://www.gtlaw-culturalassets.com/2015/03/restitution-of-cultural-objects-taken-during-world-war-ii-part-i/>.

106. O'DONNELL, *supra* note 25, at 49–50. *See also* Cohen, *The Story*, *supra* note 12 ("[T]he hoped-for widespread restitution never occurred, because of a combination of flagging governmental pressure and a variety of legal constraints.").

107. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

108. *Id.*

109. *Id.*

110. O'DONNELL, *supra* note 25, at 49–50.

111. *See, e.g.*, Mark Hudson, *Nazi Art: Does Germany Have a Problem Returning Art Stolen by the Nazis?*, THE TELEGRAPH (Nov. 4, 2013, 9:44 PM), <http://www.telegraph.co.uk/culture/art/art-news/10425983/Nazi-art-does-Germany-have-a-problem-returning-art-stolen-by-the-Nazis.html>.

112. *Id.*

and some have described its progress as “surprisingly regressive.”<sup>113</sup> In 1957, West Germany passed the *Bundesrückerstattungsgesetz*, also known as the Federal Restitution Law.<sup>114</sup> Designed to handle claims for stolen art, this law expired in the 1980s.<sup>115</sup> After this expiration, there was no significant progress toward facilitating restitution until the reunification of West and East Germany in 1990.<sup>116</sup> Less than a decade after reunification, the “Federal Republic of Germany endorsed the Washington [Conference] Principles.”<sup>117</sup> In 1999, Germany’s national government went a step further and adopted a joint declaration, known as the *Gemeinsame Erklärung der Bundesregierung, der Länder, und der kommunale Spitzenverbände zur Auffindung und zur Rückgabe NS-verfolgungsbedingt entzogenen Kulturgutes, insbesondere aus jüdischem Besitz* (“*Gemeinsame Erklärung*”), between the national government and the sixteen individual German federal states.<sup>118</sup> This declaration “pledg[ed] the public museums of the national and state governments to use their best efforts to identify affected items.”<sup>119</sup> Germany also established the advisory Limbach Commission to hear and resolve claims for stolen art.<sup>120</sup>

Despite these steps, some argue that Germany has failed to effectively implement the goals set forth in the Washington Conference Principles. For example, the Limbach Commission hears, on average, just one case per year.<sup>121</sup> Furthermore, the State of Bavaria still holds art it acquired during World War II in its collections<sup>122</sup> and has yet to publish a list enumerating the specific works held in these collections.<sup>123</sup> The Pinakothek der Moderne Museum in Munich possesses nine paintings it acquired in the immediate aftermath of the war.<sup>124</sup> The museum refuses to communicate with the prewar owner’s heirs.<sup>125</sup> Most notably, commentators have criticized Germany for keeping secret the 2012 discovery of 1,500 works of art in the possession of Cornelius Gurlitt.<sup>126</sup> Gurlitt’s expansive collection includes works of art that were either “confiscated by the Nazis” during the covered period or “sold cheaply by owners desper-

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113. O’DONNELL, *supra* note 25, at 318.

114. *Id.*

115. *Id.*

116. Andrew Glass, *West Germany, East Germany Reunite, Oct. 3, 1990*, POLITICO (Oct. 3, 2012, 4:30 AM), <https://www.politico.com/story/2012/10/this-day-in-politics-081922>.

117. O’DONNELL, *supra* note 25, at 318.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See, e.g.*, Hudson, *supra* note 111. *See also* Ulrike Knöfel, *US Congress Demands Actions on Nazi Looted Art*, DER SPIEGEL (Nov. 26, 2015, 5:35 PM), <http://www.spiegel.de/international/germany/bavarian-museums-reluctant-to-return-nazi-looted-art-a-1064113.html>.

123. *See, e.g.*, Hudson, *supra* note 111.

124. Knöfel, *supra* note 122.

125. *Id.*

126. Alison Smale, *Report of Nazi-Looted Trove Puts Art World in an Uproar*, N.Y. TIMES (Nov. 4, 2013), <http://www.nytimes.com/2013/11/05/arts/design/trove-of-apparently-nazi-looted-art-found-in-munich-apartment.html>.

ate to flee Hitler.”<sup>127</sup> These forced-sale works are generally treated with the same status as the paintings that the Nazis stole outright.<sup>128</sup> The German government discovered Gurlitt’s collection—then valued at \$1.4 billion—during a raid on Gurlitt’s apartment on February 28, 2012.<sup>129</sup> The German government, however, did not disclose the existence of this collection until nearly two years later.<sup>130</sup> While the government did not provide a reason for keeping this information confidential, it is likely that it was related to a tax evasion investigation into Gurlitt rather than an attempt to hide the discovery because of the questionable provenance of certain pieces in Gurlitt’s collection.<sup>131</sup>

Nevertheless, the German government has attempted to simplify the restitution process and provide prewar owners with closure. Current German law gives owners thirty years to file a claim of ownership.<sup>132</sup> As a result, under German law, the last possible date for filing a claim for an object stolen during the covered period was 1975.<sup>133</sup> In order to improve the restitution process, German authorities proposed in February 2014 to extend the statute of limitations for certain cases, including art stolen during World War II.<sup>134</sup> Moreover, despite the identified overall issues with the restitution process, Germany has facilitated the return of some art held in its national collection. For example, German authorities returned twenty-eight paintings and drawings to France in 1994.<sup>135</sup> The German government also supports the German Lost Art Foundation, which maintains the Lost Art Database, a searchable database for missing art.<sup>136</sup> Established in 2015, the Foundation seeks to further the objectives of the Washington Conference Principles.<sup>137</sup> The Foundation receives funding from the German federal and state governments as well as three leading municipal associations.<sup>138</sup> The Lost Art Database has already facilitated the reunion of artwork and books with their prewar owners. For example, an elderly man—the only member of his family to survive the Holocaust—was recently reunited with a treasured book stolen from him by the Nazis.<sup>139</sup>

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127. *Id.*

128. *See, e.g.,* Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1022 (9th Cir. 2010).

129. Smale, *supra* note 126.

130. *Id.*

131. Melissa Eddy, *Hidden Treasures of Nazis’ Art Dealer Finally Go on Display*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/arts/design/gurlitt-nazi-art.html>.

132. Melissa Eddy, *Germans Propose Law to Ease Return of Art Looted by Nazis*, N.Y. TIMES (Feb. 13, 2014), <https://www.nytimes.com/2014/02/14/world/europe/germany-considers-lifting-statute-of-limitations-on-cases-involving-stolen-art.html>.

133. *Id.*

134. *Id.*

135. LE MASNE DE CHERMONT & SIGAL-KLAGSBALD, *supra* note 61, at 192. Seven of the works were returned to either the prewar owner or that individual’s heir while the other twenty-one were displayed at the Musée d’Orsay in 1994 in an attempt to locate the rightful owners. *Id.*

136. *Frequently Asked Questions*, GERMAN LOST ART FOUNDATION, <https://www.kulturgutverluste.de/Webs/EN/Start/FAQs/Index.html> (last visited Nov. 7, 2018).

137. *Id.*

138. *Id.*

139. Rick Fulker, *Nazi-Looted Books Found in German Libraries*, DEUTSCHE WELLE (Aug. 6, 2017), <http://www.dw.com/en/nazi-looted-books-found-in-german-libraries/a-39984043>.

## b. Austria

Austria has also made some effort to reunite stolen works of art with their original owners, and observers have described its progress as both “meaningful and real.”<sup>140</sup> Like Germany and the United States, Austria signed the Washington Conference Principles in 1998.<sup>141</sup> That same year, the Austrian Parliament also “passed a law requiring museums to open up their archives for research and to return plundered property.”<sup>142</sup> Because of this law, the government has already returned 50,000 art objects to their prewar owners.<sup>143</sup> In addition, the Austrian government established the *Kunstrückgabebeirat*, or the Austrian Art Restitution Advisory Board, a restitution panel specifically designed to handle claims for stolen art.<sup>144</sup> This committee “systematically investigat[es] all works of art acquired between 1938 and 1945 which are now owned by Austria.”<sup>145</sup> It returns any works “that were not legally and justly obtained” to either the original prewar owners or their legal heirs.<sup>146</sup> In 2006, this panel denied restitution of *Adele Bloch-Bauer I* to Maria Altmann.<sup>147</sup> In 2015, the same panel also denied the restitution of Gustav Klimt’s *Beethoven Frieze* to the heirs of August Lederer, the painting’s prewar owner.<sup>148</sup> Overall, Austria’s efforts “at least give[] confidence that a particular claim will be heard seriously.”<sup>149</sup>

## c. France

France, a significant participant in the Nazi art theft, has also attempted to provide restitution to the heirs of individuals who were affected by this art crime. During World War II, Marshal Pétain’s Vichy government in the South of France wholeheartedly supported Hitler’s Third Reich<sup>150</sup> and collaborated in the Nazi art theft.<sup>151</sup> In the years following the end of the war, France established both the *Office des Biens et Intérêts Privés* (the Office of Private Goods and Interests, or “OBIP”) to “oversee [the] restitution of spoliated works” and the *Commission de Récupération Artistique* (the Commission for Art Recovery,

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140. O’DONNELL, *supra* note 25, at 318.

141. Cohen, *The Story*, *supra* note 12.

142. *Id.*

143. Bethany Bell, *Austria Panel Opposes Return of Klimt Freeze Looted by Nazis*, BBC (Mar. 6, 2015), <http://www.bbc.com/news/world-europe-31747759>.

144. O’DONNELL, *supra* note 25, at 310–11.

145. *Victims of National Socialism & Restitution Issues*, AUSTRIAN EMBASSY WASH., <http://www.austria.org/restitution/> (last visited Nov. 7, 2018).

146. *Id.*

147. Cohen, *The Story*, *supra* note 12.

148. Bell, *supra* note 143.

149. O’DONNELL, *supra* note 25, at 318.

150. Lorraine Boissoneault, *Was Vichy France a Puppet Government or a Willing Nazi Collaborator?*, SMITHSONIAN (Nov. 9, 2017), <https://www.smithsonianmag.com/history/vichy-government-france-world-war-ii-willingly-collaborated-nazis-180967160/>.

151. Annalisa Quinn, *French Court Orders Return of Picasso Looted by Vichy Government*, N.Y. TIMES (Nov. 8, 2017), [https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?\\_r=0](https://www.nytimes.com/2017/11/08/arts/design/french-court-pissarro-looted-nazis.html?_r=0).

or “CRA”) to implement this goal.<sup>152</sup> These organizations returned thousands of stolen works to the French government.<sup>153</sup> When the OBIP and CRA ceased to operate in 1949, the government sold any unclaimed pieces.<sup>154</sup>

In the 1990s, the French government established the *Commission pour l’indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l’Occupation* (the Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Second World War, or “CIVS”).<sup>155</sup> This independent investigatory commission creates nonbinding recommendations regarding only the ownership of objects possessed by the French government.<sup>156</sup>

The French courts are also involved in the restitution of Nazi-looted art. In 2017, the Tribunal de Paris ordered an American couple to return Camille Pissarro’s *La Cueillette des pois*, a painting they had purchased in good faith in 1995 through Christie’s, to the heirs of Simon Bauer, a Jewish art collector.<sup>157</sup> In 1943, the Vichy regime had confiscated and sold Bauer’s collection of artwork.<sup>158</sup> The French culture ministry also maintains a searchable database of about 2,000 works of art that have a questionable provenance.<sup>159</sup> Moreover, the Louvre Museum in Paris, controlled by the French government,<sup>160</sup> is currently showing an exhibition of unclaimed Nazi-looted art with the hope that the pre-war owners or their heirs will be able to locate the works.<sup>161</sup>

#### d. Italy

Noted for its collaboration with Nazi Germany, Italy has been subject to substantial criticism for its restitution—or lack thereof—of Nazi-looted art.<sup>162</sup> The Conference on Jewish Material Claims Against Germany and the World Jewish Restitution Organization jointly published a report in 2014, wherein they alleged that the Italian government had consistently failed to adequately

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152. O’DONNELL, *supra* note 25, at 341.

153. *Id.*

154. *Id.*

155. *Id.* at 341–42.

156. *Id.* at 342.

157. Jean Talabot, *La Cueillette des Pois: La Justice Restitue un Pissarro à une Famille Spoliée Sous l’Occupation*, LE FIGARO (Nov. 7, 2017, 7:05 PM), <http://www.lefigaro.fr/arts-expositions/2017/11/07/03015-20171107ARTFIG00172--la-cueillette-des-pois-la-justice-restitue-un-pissarro-a-une-famille-spoliee-sous-l-occupation.php>.

158. *Id.*

159. *Les MNR ou les Œuvres Issues de la Spoliation Artistique Confiées aux Musées de France*, MUSÉES NATIONAUX RÉCUPÉRATION, <http://www2.culture.gouv.fr/documentation/mnr/MnR-pres.htm> (last visited Nov. 7, 2018).

160. *Missions et Projets*, LE LOUVRE, <https://www.louvre.fr/missions-et-projets> (last visited Nov. 7, 2018).

161. Eleanor Beardsley, *France Hopes Exhibit of Nazi-Stolen Art Can Aid Stalled Search for Owners*, NPR (Feb. 23, 2018, 4:35 PM), <https://www.npr.org/sections/parallels/2018/02/23/588374670/france-hopes-exhibit-of-nazi-stolen-art-can-aid-stalled-search-for-owners>.

162. *See, e.g.*, Bowley, *supra* note 37.



research the provenance of art owned by the state.<sup>163</sup> According to this report, “[i]t does not appear that provenance research is taking place in Italy, nor is there a legislative background that would allow for the restitution of cultural and religious property.”<sup>164</sup>

#### D. Museum Response

Many museums hold art in their collections that the Nazis may have stolen during the covered period of 1933–1945.<sup>165</sup> Moreover, a number of these museums have overall been uncooperative with efforts to locate and return stolen art housed in their collections.<sup>166</sup> In fact, some argue that museums have actually “resorted instead to legal and other tactics to block survivors or their heirs from pursuing claims.”<sup>167</sup> For example, the Norton Simon Museum in Pasadena, California is currently in litigation over the ownership of *Adam and Eve*, two paintings by Lucas Cranach the Elder.<sup>168</sup> The claimant alleges that Nazi soldiers stole these paintings from her father-in-law in 1940 via a forced sale.<sup>169</sup>

Conversely, some museums have been quite cooperative with the efforts to locate and return stolen art. Specifically, certain museums have opened their collections to participate in the Nazi-Era Provenance Internet Portal (“NEPIP”).<sup>170</sup> NEPIP provides a searchable registry of potentially stolen artifacts currently housed in the collections of various American museums.<sup>171</sup> As of 2018, NEPIP is categorized as a legacy site as it is without “modern functionality.”<sup>172</sup> Its sponsor, the American Alliance of Museums, lacks legal authority to facilitate the actual restitution of stolen art or order museums to comply with the creation of the searchable registry.<sup>173</sup> Moreover, during its years of existence, NEPIP failed to generate much voluntary compliance regarding restitution, and it instead served primarily as a way to simply identify missing art.<sup>174</sup>

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163. *Id.*

164. O’DONNELL, *supra* note 25, at 343.

165. See, e.g., Geoff Edgers, *Why Two American Museums Are Fighting to Keep Art Stolen by the Nazis*, WASH. POST (June 30, 2015), [https://www.washingtonpost.com/entertainment/museums/why-two-american-museums-are-fighting-to-keep-art-stolen-by-the-nazis/2015/06/30/16aef5ae-1bad-11e5-bd7f-4611a60dd8e5\\_story.html?utm\\_term=.54df45398259](https://www.washingtonpost.com/entertainment/museums/why-two-american-museums-are-fighting-to-keep-art-stolen-by-the-nazis/2015/06/30/16aef5ae-1bad-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.54df45398259).

166. Cohen, *The Story*, *supra* note 12 (“[R]estitution tends to be the exception rather than the rule.”).

167. Cohen, *Museums Faulted*, *supra* note 70.

168. Sarah Cascone, *Supreme Court Declines to Hear Norton Simon’s Nazi-Loot Appeal*, ARTNET NEWS (Jan. 21, 2015), <https://news.artnet.com/exhibitions/supreme-court-declines-to-hear-norton-simons-nazi-loot-appeal-227465>.

169. *Id.*

170. *Nazi-Era Provenance*, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/nazi-era-provenance> [<https://web.archive.org/web/20170929225925/http://www.aam-us.org/resources/nazi-era-provenance>] (last visited Nov. 7, 2018) [hereinafter *Nazi-Era Provenance*]

171. *Id.*

172. *Id.*

173. *Id.*

174. Suzanne Muchnic, *Art Provenance Research Still ‘Far Behind,’* L.A. TIMES (July 26, 2006), <http://articles.latimes.com/2006/jul/26/entertainment/et-claims26>.

*E. Response by Private Collectors*

Attempts to return stolen artwork to the prewar owners are especially relevant to private collectors who may have purchased these items in good faith. While many art objects are housed in museums across the globe, numerous other cultural artifacts are held in private collections.<sup>175</sup> Unlike museums that display many of their artifacts at one point or another, private collectors can keep masterpieces in their collections for years without anyone knowing the location or existence of the objects. Indeed, numerous private collectors store their art collections in private storage spaces, far away from the public eye.<sup>176</sup> For example, at last estimate, there are at least 1.2 million works of art stored at the privately-owned Geneva Freeport in Switzerland.<sup>177</sup> Furthermore, some of these objects “ha[ve] not left the buildings in decades.”<sup>178</sup> As a result, art held in private collections can remain hidden for years or decades without ever seeing the light of day. For example, German authorities did not discover the Gurlitt collection until 2012.<sup>179</sup> If not for the government’s unrelated investigation into Gurlitt for tax evasion, it is entirely possible that this collection would remain hidden today.<sup>180</sup>

Private collectors also keep the art sales market active. While many collectors do purchase items in good faith, some purchase art with a questionable provenance.<sup>181</sup> Once purchased, such art may theoretically remain in the family’s collection for years. While works purchased through an established dealer such as Christie’s or Sotheby’s may have a substantial paper trail that enables the prewar owners to locate the whereabouts of these pieces, it is harder to

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175. For examples of art collections held in museums, see, e.g., *Highlights of the Collection*, NATIONAL GALLERY, <https://www.nationalgallery.ie/art-and-artists/highlights-collection> (last visited Nov. 7, 2018); *Catalogue des Œuvres*, MUSÉE D’ORSAY, <http://www.musee-orsay.fr/fr/collections/catalogue-des-oeuvres/recherche-simple.html> (last visited Nov. 7, 2018); *Collections*, ART INST. CHI., <http://www.artic.edu/aic/collections/> (last visited Nov. 7, 2018); For examples of art held in private collections, see, e.g., Dominique Froment, *Les Plus Grandes Collections d’Art Privées au Monde*, LES AFFAIRES (June 5, 2014, 4:31 PM), <https://www.lesaffaires.com/passions/art-de-vivre/les-plus-grandes-collections-d-art-privées-au-monde/569662>; Vanessa Guimond, *Une Collection Privée de Plus de 300 Œuvres*, JOURNAL DE MONTRÉAL (Oct. 16, 2014, 12:36 AM), <http://www.journaldemontreal.com/2014/10/15/une-collection-privée-de-plus-de-300-uvres>.

176. Graham Bowley & Doreen Carvajal, *One of the World’s Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES (May 28, 2016), <https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html>.

177. *Id.*

178. *Id.*

179. *Nazi Trove in Munich Contains Unknown Works by Masters*, BBC (Nov. 5, 2013), <http://www.bbc.com/news/world-europe-24818541>.

180. *Id.* For further discussion of the discovery of the Gurlitt collection, see discussion *supra* Subsection II.C.3.A.

181. See, e.g., Patricia Cohen, *Heirs Sue Bank Over Sale of Nazi-Looted Art*, N.Y. TIMES (Oct. 17, 2014), <https://www.nytimes.com/2014/10/18/arts/international/heirs-sue-bank-over-sale-of-nazi-looted-art.html> [hereinafter Cohen, *Heirs Sue*].

track works of art with a minimal paper trail.<sup>182</sup> Consequently, once sold, these artifacts may disappear and remain hidden for the foreseeable future.

The difficulty of locating art in private collections is substantial. For example, in Germany, “tainted art” remains in private collections.<sup>183</sup> Some private collectors have hired researchers in an attempt to determine what art in their possession has a questionable provenance.<sup>184</sup> The German government does support this provenance research, and it provides financial assistance to these collectors.<sup>185</sup> This has led to an increase in the restitution of stolen art.<sup>186</sup> For example, in 2017, the Oetker family returned Anthony van Dyck’s *The Portrait of Adrian Moens* to Marei von Saher, the only heir of Dutch art dealer Jacques Goudstikker.<sup>187</sup> Goudstikker had lost possession of the painting in 1940 when it was forcibly sold.<sup>188</sup> Luftwaffe Commander-in-Chief Hermann Göring owned the painting for a time, and private collector Rudolf-August Oetker purchased it from an art dealer in 1956.<sup>189</sup>

#### F. Response by Art Dealers

Art dealers and auction houses—such as Christie’s and Sotheby’s—are main players in this effort, as they are primary conduits through which art is sold.<sup>190</sup> Both Christie’s and Sotheby’s are noted for “their diligence in provenance research and their efforts to arrange restitution settlements with heirs of plundered art.”<sup>191</sup> Christie’s has published its own set of guidelines regulating the handling of art with “Nazi-era provenance issues.”<sup>192</sup> These guidelines include completing extensive provenance research, removing objects in controversy from sale, and working with the claimant and consignor to reach an agreement regarding the ownership and sale of the work.<sup>193</sup> After the resolution of provenance issues, Christie’s has sold several collections of art, such as the Bloch-Bauer Klimt collection, the John and Anna Jaffé collection, and the

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182. Ronald D. Spencer & Gary D. Sesser, *Provenance: Important, Yes, But Often Incomplete and Often Enough, Wrong*, ARTNET (June 26, 2013), <https://news.artnet.com/market/the-importance-of-provenance-in-determining-authenticity-29953>.

183. Catherine Hickley, *German Art Collectors Face a Painful Past: Do I Own Nazi Loot?*, N.Y. TIMES (Mar. 14, 2017), <https://www.nytimes.com/2017/03/14/arts/design/german-art-collectors-face-a-painful-past-do-i-own-nazi-loot.html>.

184. *Id.* (“I don’t want stolen goods hanging on the wall—it’s quite simple.”).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Laurence Boccara, *Comment Vendre une Œuvre d’Art*, LES ECHOS (Dec. 18, 2015), [https://www.lesechos.fr/18/12/2015/LesEchos/22090-159-ECH\\_comment-vendre-une-oeuvre-d-art.htm](https://www.lesechos.fr/18/12/2015/LesEchos/22090-159-ECH_comment-vendre-une-oeuvre-d-art.htm). See also Kerima Greene, *Christie’s Could Sell \$500 Million of Art in a Single Night*, CNBC (May 11, 2015, 1:07 PM), <https://www.cnbc.com/2015/05/10/christies-could-sell-500-million-of-art-in-a-single-night.html>.

191. Cohen & Bowley, *supra* note 28.

192. *Our Guidelines for Nazi-Era Art Restitution Issues*, CHRISTIE’S, <http://www.christies.com/services/restitution-services/guidelines/> (last visited Jan. 1, 2018). “Where concerns are identified or claims received for works of art consigned to Christie’s, we are committed to seeking fair and just resolutions.” *Id.*

193. *Id.*

Jacques Goudstikker collection.<sup>194</sup> Sotheby's has also handled the sale of Nazi-looted art that the Monuments Men recovered from different locations in Europe.<sup>195</sup>

Main players such as Sotheby's and Christie's have a business incentive to research the provenance of works of art sold through their auction houses since later litigation can be costly and damaging to their reputations.<sup>196</sup> On the other hand, smaller, lesser-known art dealers may not have the same incentive since their sales are less publicized and the sale of works of art can yield a substantial profit for the sellers.<sup>197</sup> Still, it is unlikely that these dealers wish to defend against future controversies since litigation is costly.<sup>198</sup>

### G. Current Relevance

The Nazi regime collapsed in 1945, over seventy years ago. Since then, many of those directly affected by Nazi art theft have died. Maria Altmann died in 2011, just five years after her reunion with *Adele Bloch-Bauer I*.<sup>199</sup> Anna Jaffe, who “left the art collection of her late husband John Jaffe to her nieces and nephews,” died in 1942—during the war.<sup>200</sup> At this point, it is often the heirs of the prewar owners who are pursuing their ancestors' claims.<sup>201</sup> As a result, this begs the question of *why* it is necessary—or even relevant—to focus on crafting solutions to facilitate the restitution of this stolen property. Generally, the original, prewar owners are long deceased, and the heirs pursuing their claims were not alive when the art was stolen, arguably lacking a personal connection to the pieces.

In short, the claims of the heirs of the victims of the art theft remain important in the United States because of the significant emphasis that its legal system places on the preservation of ownership rights. While the art in controversy was originally owned under European property regimes, a significant

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194. *Notable Restituted Collections and Works of Art*, CHRISTIE'S, <http://www.christies.com/services/restitution-services/restituted-art/> (last visited Nov. 7, 2018).

195. David D'Arcy, *Legacy of the Monuments Men*, SOTHEBY'S (Jan. 6, 2014), <http://www.clooneysopenhouse.com/t4472-sotheby-s-magazine-legacy-of-the-monuments-men>.

196. For example, in 2017, Christie's sold *Salvador Mundi*, a painting attributed to Leonardo da Vinci, for \$450.3 million dollars. See Philip Kennicott, *A "Leonardo" Sells for \$450 Million. But What Did the Buyer Actually Get?*, WASH. POST (Nov. 16, 2017), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/16/a-leonardo-sells-for-450-million-but-what-did-the-buyer-actually-get/?utm\\_term=.e44e62f71761](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/16/a-leonardo-sells-for-450-million-but-what-did-the-buyer-actually-get/?utm_term=.e44e62f71761).

197. *Id.*

198. See, e.g., *Un Marchand d'Art Mis en Examen dans une Affaire de Vol de Picasso*, LE POINT (Sept. 15, 2015, 12:40 AM), [http://www.lepoint.fr/justice/un-marchand-d-art-mis-en-examen-dans-une-affaire-de-vol-de-picasso-14-09-2015-1964743\\_2386.php](http://www.lepoint.fr/justice/un-marchand-d-art-mis-en-examen-dans-une-affaire-de-vol-de-picasso-14-09-2015-1964743_2386.php).

199. William Grimes, *Maria Altmann, Pursuer of Family's Stolen Paintings, Dies at 94*, N.Y. TIMES (Feb. 9, 2011), <https://www.nytimes.com/2011/02/09/arts/design/09altmann.html>.

200. Jonathan Jones, *Why a Swiss Gallery Should Return Its Looted Nazi Art Out of Simple Decency*, THE GUARDIAN (Jan. 27, 2016, 12:51 PM), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/jan/27/swiss-gallery-nazi-art-restitution-constable-painting-jaffe>.

201. Philippe Mastracci is pursuing restitution of Amedeo Modigliani's *Seated Man with a Cane*, confiscated from his grandfather by the Nazis during the war. See *Mastracci v. Helly Nahmad Gallery, Inc.*, 63 N.Y.S.3d 376, 401–02 (App. Div. 2017).

amount of this art is now held in the United States, thus subjecting the current owners to American law.<sup>202</sup> Criminal law prohibits both the actual theft of property as well as the receipt of stolen property.<sup>203</sup> Furthermore, real property law supports this premise, deeming an owner's right to exclude others from land "as one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>204</sup> Tort law also awards nominal damages for trespass to land as "[t]he law infers some damage from every direct entry upon the land of another."<sup>205</sup>

While real property and personal property—such as artwork—are different, both forms of property receive substantial protections and thus should be treated similarly. American law emphasizes the freedom of disposition and recognizes an owner's right to devise real or personal property to a beneficiary or beneficiaries of the owner's choosing at death.<sup>206</sup> As such, the deprivation of ownership results in the owner's loss of one of the sticks from the owner's bundle of rights. Even if the prewar owner dies before the postwar discovery of the stolen art, the decedent's right still exists in some form.<sup>207</sup> Certainly, "the rights of the dead are time-limited" and "[t]he longer a decedent has been dead, the less likely a court is to extend a certain right to him."<sup>208</sup> Nonetheless, the decedent's interest in his or her stolen art arguably survives death because a "record exists of the particular interest in question."<sup>209</sup> Such a record "could exist either in the mind of a surviving friend or family member, or it could be recorded in writing."<sup>210</sup> Under this rule, Maria Altmann's memory of *Adele Bloch-Bauer I* qualifies as a "record," and the Supreme Court recognized it as such.<sup>211</sup>

There is, however, a tension between the American legal system's strong protection of property rights and its emphasis on statutes of limitations. Statutes of limitations "aim to discourage potential claimants from sleeping on their rights."<sup>212</sup> Statutes of limitations seek to quickly resolve cases on their merits as the "passage of time will limit the availability of evidence," thereby diminishing the likelihood that disputes can be resolved on the merits.<sup>213</sup> Arguably, the

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202. See, e.g., Cohen, *Museums Faulted*, *supra* note 71. See also Jesse Singal, *Critics Say U.S. Museums Holding onto Nazi Looted Art*, USA TODAY (Dec. 21, 2013, 8:00 AM), <https://www.usatoday.com/story/news/world/2013/12/21/nazi-art-usa-museums/3650229/>.

203. See, e.g., MODEL PENAL CODE § 223.6(1) (AM. LAW INST. 1981) ("A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen. . . .").

204. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

205. *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 160 (1997).

206. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("In one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times.").

207. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 789 (2009).

208. *Id.*

209. *Id.* at 772.

210. *Id.*

211. *Id.*

212. Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 279, 303 (2013).

213. *Id.*

merits of a claim that arose during the covered period decades ago will be extremely difficult to adjudicate as key witnesses may be long-deceased and evidence may be nonexistent. Nonetheless, in the context of restituting Nazi-looted art, the United States' strong protection of property rights should take precedence over the law's similar commitment to statutes of limitations. Specifically, "[a]rtwork lost during the Holocaust is not just property. . . [t]o many victims and their families, it is a reminder of the vanished world of their families."<sup>214</sup> In the Washington Conference Principles, the United States reaffirmed its commitment to facilitating restitution.<sup>215</sup>

### III. ANALYSIS

This Analysis will first survey pre-existing efforts and tools that the United States government has used to facilitate the restitution of Nazi-looted art and discuss the effectiveness of these efforts. Next, it will consider the potential ways in which HEAR will change the current landscape of Nazi art restitution efforts in the United States.

#### A. *The Foreign Sovereign Immunities Act and Restitution*

Many parties, litigating over the ownership of art allegedly stolen by Nazis during World War II, have invoked the Foreign Sovereign Immunities Act ("FSIA") as a way to obtain jurisdiction over foreign countries in possession of this art in controversy.<sup>216</sup>

##### 1. *Republic of Austria v. Altmann*

The most well-known case dealing with Nazi art restitution and the FSIA may be *Republic of Austria v. Altmann*.<sup>217</sup> This particular case centered around the rightful ownership of *Adele Bloch-Bauer I*. In 1938, Nazis confiscated this painting, along with several others, from the collection of wealthy Austrian sugar magnate Ferdinand Bloch-Bauer.<sup>218</sup> The painting depicted Ferdinand's wife, Adele.<sup>219</sup> The painting eventually ended up in the collection of the Austrian Gallery.<sup>220</sup> The Gallery, controlled by the Austrian government, maintained that it had obtained the painting lawfully despite the fact it had purchased the painting—along with several other paintings by Klimt—from Nazi lawyer Erich Führer.<sup>221</sup> The Bloch-Bauer family disagreed with the Gallery's analysis,

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214. Huetteman, *supra* note 88.

215. O'DONNELL, *supra* note 25, at 49–50.

216. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022 (9th Cir. 2010). *See also Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

217. *See Altmann*, 541 U.S. at 677. *See also THE WOMAN IN GOLD* (Origin Pictures 2015) (memorializing the story behind this landmark case in a popular film).

218. *Altmann*, 541 U.S. at 681.

219. *Id.* at 682.

220. *Id.* at 682–83.

221. *Id.*

and Maria Altmann, “a niece, and the sole surviving named heir, of Ferdinand Bloch-Bauer” pursued the claim on his behalf.<sup>222</sup> At that time, Altmann, who became an American citizen in 1945, resided in California.<sup>223</sup>

Altmann originally attempted to gain restitution of the Bloch-Bauer Klimt paintings via the Austrian legal system; however, she voluntarily dismissed her case due in part to legal costs, so it is unknown if she could have prevailed through the Austrian court system.<sup>224</sup> Altmann then filed suit in the United States District Court for the Central District of California.<sup>225</sup> This case eventually went all the way to the Supreme Court of the United States.<sup>226</sup> In its decision, the Court held that the FSIA applied to conduct prior to the enactment of the legislation in 1976.<sup>227</sup> In effect, this ruling allowed Maria Altmann to sue the Austrian government for the return of the painting.<sup>228</sup> Eventually, Altmann regained ownership of *Adele Bloch-Bauer I*—as well as that of five other Klimt paintings stolen from her family by the Nazis and subsequently housed in the Austrian Gallery—through binding arbitration in 2006.<sup>229</sup>

## 2. Cassirer v. Kingdom of Spain

*Republic of Austria v. Altmann* is not the only case where the FSIA functioned as a tool to facilitate the restitution of Nazi-looted art. In *Cassirer v. Kingdom of Spain*,<sup>230</sup> the United States Court of Appeals for the Ninth Circuit held that Claude Cassirer could sue the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation<sup>231</sup> for the restitution of Camille Pissaro’s *Rue Saint-Honore, après midi effet de pluie*.<sup>232</sup>

Like *Altmann*, this case involved an American plaintiff bringing suit against a foreign government and “an instrumentality” of that entity.<sup>233</sup> The Nazi government confiscated *Rue Saint-Honore, après midi effet de pluie* in 1939 from Cassirer’s grandmother, Lilly.<sup>234</sup> Lilly, a German Jew, was forced to flee Germany in 1939 when it became apparent that she was unsafe due to the Third Reich’s treatment of German Jews.<sup>235</sup> Lilly was unable to take the paint-

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222. *Id.* at 681.

223. *Id.*

224. *Id.* at 684–85.

225. *Id.* at 685.

226. *Id.* at 688.

227. *Id.*

228. *Id.*

229. Nina Totenberg, *After Nazi Plunder, A Quest to Bring Home the “Woman in Gold,”* NPR (Apr. 2, 2015, 4:03 AM), <https://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home>.

230. 616 F.3d 1019 (9th Cir. 2010).

231. 616 F.3d at 1037.

232. *Id.* at 1022–23.

233. *Id.* at 1022.

234. *Id.* at 1022–23.

235. *Id.* at 1023. “By that time—as the district court judicially noticed—German Jews had been deprived of their civil rights, including their German citizenship; their property was being ‘Aryanized’; and the Kris-

ing with her as “permission was required both to leave and take belongings” from Germany.<sup>236</sup> Lilly asked for this permission; however, Jakob Scheidwimmer, the official art appraiser of the Nazi government, forbade Lilly from taking the Pissarro with her.<sup>237</sup> Consequently, she had no choice but to abandon the painting in Germany.<sup>238</sup>

In the years following 1939, *Rue Saint-Honore, après midi effet de pluie* changed hands several times.<sup>239</sup> In 1976, art dealer and private collector Baron Hans-Heinrich Thyssen-Bornemisza purchased the painting from a New York art dealer.<sup>240</sup> In 1988, Spain leased Thyssen-Bornemisza’s collection for a period of ten years.<sup>241</sup> Five years later, Spain purchased the collection outright.<sup>242</sup> The painting was then displayed at the Thyssen-Bornemisza Museum.<sup>243</sup> In 2000, Claude Cassirer, Lilly’s heir, discovered the painting and requested its return.<sup>244</sup> The Museum refused to return the painting, believing it was the rightful owner.<sup>245</sup>

After the museum denied his requests, Claude Cassirer filed suit in 2005 in the United States District Court for the Central District of California, suing Spain as well as Thyssen-Bornemisza’s foundation for return of the painting or, alternatively, damages for conversion.<sup>246</sup> On appeal, the Ninth Circuit determined that this case fell within the “expropriation exception to sovereign immunity” under 28 U.S.C. § 1605(a)(3).<sup>247</sup> This allowed the case to be litigated in an American court.<sup>248</sup> The Supreme Court denied *certiorari*, thus allowing the Ninth Circuit’s decision to stand.<sup>249</sup>

### 3. Freund v. Société Nationale des Chemins de Fer Français

While the outcome in certain cases such as *Republic of Austria v. Altmann* and *Cassirer v. Kingdom of Spain* has been favorable to the plaintiffs, the FSIA has not always been a reliable or effective tool for litigants seeking recovery of property looted by the Nazi regime during World War II. For example, in *Freund v. Société Nationale des Chemins de Fer Français*,<sup>250</sup> the Second Cir-

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tallnacht pogroms had taken place throughout the country. Permission was required both to leave and to take belongings.” *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 1022–23.

247. *Id.* at 1037.

248. *Id.*

249. *Spain v. Cassirer*, 564 U.S. 1037 (2011).

250. 391 F. App’x. 939 (2nd Cir. 2010).



cuit held that “SNCF’s foreign sovereign immunity deprived the federal courts of subject matter jurisdiction over this action.”<sup>251</sup>

In *Freund*, Holocaust survivors and their descendants brought suit against several foreign defendants, including the Republic of France, seeking the return of property taken by the defendants from Jews during “forced railroad deportations.”<sup>252</sup> The Supreme Court denied *certiorari*, thus allowing the Second Circuit’s decision to stand.<sup>253</sup> As a result, the plaintiffs were unable to proceed in recovering property confiscated from them by the defendants during World War II.<sup>254</sup>

In light of these various decisions, it is evident that the FSIA is an inconsistent tool when used to facilitate the restitution of Nazi-looted art. As a result, legislation that provides more consistent results is needed in order to further the goals of restitution outlined in the Washington Conference Principles.<sup>255</sup>

### B. Other Methods

The United States government has supported the restitution of Nazi-looted art in other ways, consistent with postwar agreements as well as the Washington Conference Principles.<sup>256</sup> For example, the American government has supported the expansion of NEPIP.<sup>257</sup> This support, however, is ineffective for two reasons. First, NEPIP is a legacy website, and the American Alliance of Museums rarely updates it.<sup>258</sup> Due to the lack of updated information, its usefulness is substantially limited. If the United States government would assume responsibility for updating the website and fund its maintenance, it could become a useful tool. Second, and perhaps more significantly, “the [American] government does not have any leverage to force [museum] compliance” with the database.<sup>259</sup> Specifically, “[w]ith the exception of a few federally owned and operated institutions, museums in the United States tend to be owned and operated privately, or by state or municipal authorities,” thus providing “no specific role for the federal government in the art restitution process.”<sup>260</sup> Therefore, unlike European museums—which are often state-run—American museums are generally free from government control.<sup>261</sup>

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251. *Id.* at 941.

252. *Id.* at 940.

253. *Freund v. Société Nationale des Chemins de Fer Français*, 565 U.S. 816 (2011).

254. *Freund v. Republic of France*, 592 F. Supp. 2d 540, 581 (S.D.N.Y. 2008).

255. O’DONNELL, *supra* note 25, at 49–50.

256. *Id.*

257. J. Christian Kennedy, *The Role of the United States Government in Art Restitution*, U.S. DEPT. OF STATE (Apr. 23, 2007), <https://2001-2009.state.gov/p/eur/rls/rm/83392.htm>.

258. *Nazi-Era Provenance*, *supra* note 170. As of August 2018, the American Alliance of Museums still receives 5–10 requests per year asking to update NEPIP. E-mail from Brooke Leonard, Chief of Staff, American Alliance of Museums, Soffia H. Kuehner Gray (Aug. 31, 2018, 08:35 AM) (on file with author).

259. Kennedy, *supra* note 257.

260. *Id.*

261. *Id.*

Instead of a top-down effort from the federal government to facilitate the restitution of Nazi-looted art, individual citizens and nongovernmental entities have shouldered the responsibility of reuniting stolen art with its prewar owners. For example, Cyrus R. Vance Jr., the District Attorney in Manhattan, New York, has made a concerted effort to seize art with a questionable provenance and return it to its prior owners.<sup>262</sup> Vance's focus, however, has not specifically been on the restitution of Nazi-looted art.<sup>263</sup> Rather, Vance works to return trafficked antiquities housed both in museum collections and private collections.<sup>264</sup>

While Vance's work certainly qualifies as an admirable start, leaving the treatment of stolen art to district attorneys who may or may not be inclined to focus on the restitution of Nazi-looted art is not a solution. For example, housed just miles away from Vance's Manhattan district is *Village in Winter*, a painting by Mihály Munkácsy that was allegedly stolen by Nazis from the Bleichroeder family in Germany during World War II.<sup>265</sup> Private art collector Imre Pakh currently possesses this painting and is allegedly "ignoring pleas to return [the] painting."<sup>266</sup> As this is outside his district, Vance has no power to assist in the restitution of this painting, even if it is determined that Pakh is not the rightful owner. Consequently, the American government's overall efforts to facilitate the restitution of Nazi-looted art has generally been piecemeal and ineffective.

### C. HEAR's Contribution

To date, HEAR's primary contribution to the restitution of Nazi-looted art is its attempt to eliminate the "procedural hurdles such as statutes of limitations" that bar restitution claims.<sup>267</sup> This is a positive step toward assisting claimants in pursuing successful cases for restitution since, prior to the enactment of HEAR, the statute of limitations barred numerous plaintiffs from recovering art allegedly stolen from their families by Nazis during World War II.<sup>268</sup>

Due to the relatively recent enactment of HEAR in December 2016, with the exception of several cases discussed below, this legislation has yet to with-

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262. James C. McKinley Jr., *Looted Antiques Seized From Billionaire's Home, Prosecutors Say*, N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/nyregion/antiques-seized-from-billionaire-michael-steinhardt-cyrus-vance.html>.

263. *Id.*

264. *Id.* See also Colleen Long & Verena Dobnik, *Prosecutors Become Treasure Hunters in Repatriation Campaign*, AP NEWS (Dec. 17, 2017), <https://www.apnews.com/c65502975a6246d6ad53d721fd7bf136>.

265. Kathianne Boniello, *Art Collector Won't Return Painting Stolen by Nazis: Suit*, N.Y. POST (Dec. 16, 2017), <https://nypost.com/2017/12/16/art-collector-wont-return-painting-stolen-by-nazis-suit/>.

266. *Id.*

267. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 958 (9th Cir. 2010).

268. See *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, at \*10-11 (E.D. Mich. Mar. 31, 2007).

stand numerous substantial legal challenges.<sup>269</sup> In addition to these cases, HEAR has also been cited as support in the briefs of several other cases currently pending in courts across the United States.<sup>270</sup>

### 1. Estate of Kainer v. UBS AG

In October 2017, the Supreme Court of New York decided *Estate of Kainer v. UBS AG*.<sup>271</sup> Margaret Kainer and her husband, Ludwig, were Jewish German private art collectors who owned a collection of over 400 works of art, including *Danseuses*, a painting by Edward Degas.<sup>272</sup> Prior to the start of World War II, Kainer fled Germany in 1932.<sup>273</sup> Three years later, the Nazi regime assumed ownership of the Kainer collection and sold it.<sup>274</sup> Kainer's heirs alleged that they had legitimate causes of action under HEAR against Christie's for the sale of the painting; however, the Court disagreed, stating that, at this point in the litigation, it was too early to determine whether this legislation was even applicable to the issues dealt with in *Estate of Kainer*.<sup>275</sup> Specifically, the Court was unable to rule on whether HEAR "may. . . revive plaintiffs' causes of action against Christie's" until the European court determined whether the plaintiffs were "Kainer's lawful heirs with rights to the Painting, and that the foundation was not also a legitimate heir or, if it was, that it did not have the authority to enter into the Restitution Settlement Agreement. . . ."<sup>276</sup> As of September 2018, no further updates related to the progression of this litigation are available.

### 2. Maestracci v. Helly Nahmad Gallery, Inc.

In November 2017, the Supreme Court of New York, Appellate Division, decided *Maestracci v. Helly Nahmad Gallery, Inc.*<sup>277</sup> The court applied HEAR and found that the statute of limitations set by HEAR did not bar Philippe Maestracci's claim for a painting possessed by the Helly Nahmad Gallery in Manhattan.<sup>278</sup> This case centers around *Seated Man with a Cane*, a painting by Italian artist Amadeo Modigliani.<sup>279</sup> Nazi soldiers confiscated *Seated Man with a Cane* from British art dealer Oscar Stettiner and sold it in July 1944.<sup>280</sup> After

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269. See, e.g., William D. Cohan, *A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art*, N.Y. TIMES (Feb. 27, 2017), [https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art.html?mcubz=0&\\_r=0](https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art.html?mcubz=0&_r=0).

270. *Id.*

271. 2017 NY slip op. 32316(U) (Sup. Ct. Oct. 30, 2017).

272. *Id.* at \*3.

273. *Id.*

274. *Id.*

275. *Id.* at \*44. "Final resolution of this important issue as to the scope of the Act would, however, be premature at this juncture." *Id.*

276. *Id.* at \*29–30.

277. 63 N.Y.S.3d 376 (2017).

278. *Id.* at 379–80.

279. *Id.* at 377–78.

280. *Id.* at 377–78.

the end of the war, Stettiner attempted to recover the painting but was ultimately unsuccessful.<sup>281</sup> In 1996, Christie's sold the painting to the International Art Center, also a defendant in this case.<sup>282</sup> Several museums, including the Helly Nahmad Gallery, later displayed this painting.<sup>283</sup>

Maestracci, Stettiner's heir, attempted to regain possession of the painting through other methods but was ultimately unsuccessful.<sup>284</sup> As a result, Maestracci sued both the International Art Center and the Helly Nahmad Gallery for return of the painting.<sup>285</sup> The defendants argued that Maestracci's claim was barred by the statute of limitations; however, HEAR's "applicable statute of limitations is six years from the date of 'actual discovery' of 'the identity and location of the artwork' and 'a possessory interest of the claimant in the artwork.'" <sup>286</sup> For his claim to be barred by the legislation, Maestracci must have had "actual knowledge of the identity and location of the artwork before December 22, 2011."<sup>287</sup> The Court ruled in Maestracci's favor, allowing the claim to proceed.<sup>288</sup> In June 2018, on appeal, the Supreme Court of New York agreed with the Appellate Court that the cause of action accrued in New York.<sup>289</sup> As a result, by applying HEAR, Maestracci's claim was not barred by the statute of limitations.<sup>290</sup>

### 3. Philipp v. Federal Republic of Germany

In 2017, a federal judge applied HEAR and ruled that the heirs seeking the return of the Guelph Treasure may sue Germany for the return of the collection.<sup>291</sup> This is "the first time a court has required Germany to defend itself in the US against charges of looted Nazi art."<sup>292</sup> The Guelph Treasure is a collection of medieval ecclesiastical objects with an estimated current value of \$250 million dollars.<sup>293</sup> The claimants—Jed Leiber, Gerald Stiebel, and Alan Philipp—allege that, in 1935, the Nazi regime forced their ancestors to sell the collection for a fraction of its market value.<sup>294</sup> Leiber, Stiebel, and Philipp had already attempted to regain ownership of the Guelph Treasure via the German

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281. *Id.* at 378.

282. *Id.*

283. *Id.*

284. *Id.* at 377–78.

285. *Id.* at 378.

286. *Id.* at 379.

287. *Id.* at 380.

288. *Id.*

289. *Gowen v. Helly Nahmad Gallery*, 2018 NYLJ LEXIS 1992, \*34 (Sup. Ct. June 11, 2018).

290. *Id.*

291. *Philipp v. Fed. Rep. of Germany*, 248 F. Supp. 3d 59, 87 (D.D.C. 2017). *See also* Sam Hananel, *Descendants of Jewish Art Dealer Win US Court Case in Bid to Recover Relics Looted by the Nazis*, THE INDEPENDENT (Apr. 6, 2015, 1:00 PM), <https://www.independent.co.uk/arts-entertainment/art/jewish-art-dealer-descendants-nazi-looted-relics-us-court-case-win-lawsuit-precedent-germany-guelph-a7670431.html>.

292. Hananel, *supra* note 291.

293. *Id.*

294. *Id.*

legal system; however, they were unsuccessful.<sup>295</sup> Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia ruled in favor of the plaintiffs, and Germany has appealed the decision.<sup>296</sup> While the bulk of Judge Kollar-Kotelly's ruling centered on the expropriation exception to the FSIA, the recent enactment of HEAR was key for the case's ability to proceed.<sup>297</sup> In July 2018 the D.C. Court of Appeals affirmed the District Court's denial of the motion to dismiss, except with respect to the Federal Republic of Germany.<sup>298</sup>

#### 4. Reif v. Nagy

The litigation in this case has centered over the ownership of two gouaches by Egon Schiele: *Woman in a Black Pinafore* and *Woman Hiding Her Face*.<sup>299</sup> Nazi soldiers allegedly stole these two works of art—along with over 400 others—from the collection of Austrian Jews Fritz and Elisabeth Grünbaum.<sup>300</sup> The defendant, art dealer Richard Nagy, alleged that he had rightful ownership of the paintings due to the fact that they were not owned by Grünbaum but instead by Grünbaum's sister-in-law.<sup>301</sup> The judge rejected Nagy's argument, stating that “even the Gallery on which the defendants rely as the source of their provenance has confirmed that Mr. Grünbaum had owned the works.”<sup>302</sup> The Court applied the HEAR Act and determined that the plaintiffs—which include Grünbaum's heirs—had filed their claim within the statute of limitations since they had discovered the paintings three years prior in November 2015.<sup>303</sup> Ultimately, in “one of the first successful applications of . . . HEAR,” the Court ordered the return of the two paintings to Grünbaum's heirs.<sup>304</sup> Specifically, the Court gave the defendants ten days to deliver the paintings to Christie's to be sold.<sup>305</sup>

Overall, HEAR has so far provided some relief to heirs seeking the return of art stolen from their families by the Nazi regime during World War II. On its own, however, the legislation simply does not require enough to effectively ac-

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295. *Id.*

296. Philipp v. Fed. Rep. of Germany, 253 F. Supp. 3d 84, 86 (D.D.C. 2017).

297. *Id.*

298. Philipp v. Fed. Rep. of Germany, Nos. 17-7064, 17-7117, 2018 U.S. App. LEXIS 18664, at \*27 (D.C. Cir. July 10, 2018).

299. Erik Larson, *Nazi-Looted Art Ordered Returned to Holocaust Victim's Heirs*, BLOOMBERG (Apr. 5, 2018, 6:23 PM), <https://www.bloomberg.com/news/articles/2018-04-05/nazi-looted-art-returned-to-holocaust-victim-s-heirs-in-new-york>.

300. Reif v. Nagy, 52 N.Y.S.3d 100 (N.Y. App. Div. 2017).

301. Larson, *supra* note 299.

302. Reif v. Nagy, 2018 WL 1638805, at \*3 (N.Y. Sup. Ct. Apr. 4, 2018).

303. *Id.* at \*5.

304. William D. Cohan, *Two Schiele Drawings Ordered Returned to Heirs of Nazi Victim*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/arts/two-schiele-drawings-ordered-returned-to-heirs-of-nazi-victim.html>.

305. Andrew Denney, *Judge Orders Nazi-Looted Paintings to Be Sent to Auction House*, N.Y.L.J. (June 11, 2018) <https://www.law.com/newyorklawjournal/2018/06/11/judge-orders-nazi-looted-paintings-to-be-sent-to-auction-house/>.

comply with the goals set forth in the 1998 Washington Conference Principles on Nazi-Looted Art.<sup>306</sup> While HEAR constitutes an important component of Holocaust-era restitution facilitated by the United States government, it does not solve the entire problem. Rather, in its current state, the legislation simply provides just another short-term patch to this persistent problem.

#### IV. RECOMMENDATION

While HEAR is a positive step in the right direction toward reuniting stolen works of art with their prewar owners, several modifications should be made to the statute in order to best further its proposed goal of “fulfill[ing] the commitments [the United States] has made to the families of Holocaust victims.”<sup>307</sup>

##### A. *Extend the Expiration Date of the Statute*

First, HEAR should be modified to extend the expiration date of the statute so that it does not expire on January 1, 2027.<sup>308</sup> The ten-year time frame between 2017 and 2027<sup>309</sup> simply does not give enough time to the victims of the art theft to search for and locate works of art stolen from their families as well as bring claims against the current owners. Over seventy years after the end of the war, hundreds of thousands of works of art remain missing.<sup>310</sup> For example, it was not until 2012—sixty-seven years after the end of the war<sup>311</sup>—that authorities discovered Cornelius Gurlitt’s cache of 1,039 works of art with a “questionable ownership history.”<sup>312</sup> As a result, it stands to reason that, in the coming years, more hidden works of art will surface, potentially found in the private collections of American art collectors.

The 2027 expiration date of HEAR incentivizes art collectors to hide works of art with questionable ownership histories for ten years until the statute expires. For example, it would be easy for private collectors to simply store works of art with provenance gaps during the war in foreign or domestic free-

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306. See O’DONNELL, *supra* note 25, at 49–50.

307. TED CRUZ, THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT: A BRIEF BACKGROUND 1 (June 6, 2016), [https://www.cruz.senate.gov/files/documents/Backgrounders/20160606\\_HEARact\\_Backgrounder.pdf](https://www.cruz.senate.gov/files/documents/Backgrounders/20160606_HEARact_Backgrounder.pdf).

308. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1527 (2016) (“This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027.”).

309. HEAR was enacted in December 2016, essentially creating a ten-year period during which claims can be brought. See 130 Stat. 1524.

310. Shoumatoff, *supra* note 2.

311. World War II ended in 1945. Hall, *supra* note 8.

312. Melissa Eddy, *First Public Showing of Monet, Rodin and Maillols From Gurlitt Trove*, N.Y. TIMES (June 27, 2017), [https://www.nytimes.com/2017/06/27/arts/design/first-public-showing-of-monet-rodin-and-maillols-from-gurlitt-trove.html?mcubz=0&\\_r=0](https://www.nytimes.com/2017/06/27/arts/design/first-public-showing-of-monet-rodin-and-maillols-from-gurlitt-trove.html?mcubz=0&_r=0). Additional works of art in Gurlitt’s collection were found at his second home in Salzburg, Austria. See, e.g., Danielle Wiener-Bronner, *Sixty More Works Discovered in Hidden Nazi Art Trove*, THE ATLANTIC (Feb. 11, 2014), <https://www.theatlantic.com/entertainment/archive/2014/02/more-nazi-art-loot/357951/>.

ports until the expiration date.<sup>313</sup> In effect, this would make it impossible for the heirs of the prewar owners of this art to identify and locate it before 2027. Furthermore, it is entirely plausible that after the expiration of the statute, current owners could remove art hidden away in storage and then display it for the world to see. The heirs of the prewar owners would then be able to finally see the art, but there would be no legal remedy available to them. This would likely add further insult to injury to these heirs. Consequently, by extending the expiration date—but not making it unlimited—this problem will be reduced. In the decades following the war, more and more of the missing art has resurfaced. Through the discovery of the Gurlitt collection alone in 2011, over 1,400 works of art—including works by Henri Matisse, Marc Chagall, Auguste Renoir, Henri de Toulouse-Lautrec, and Pablo Picasso—have reappeared.<sup>314</sup> During the war, the Nazi regime stole 20% of Europe’s great art.<sup>315</sup> To this day, tens of thousands of pieces remain missing.<sup>316</sup> It is therefore unlikely that these discoveries of missing art will cease any time in the near future. Rather, it stands to reason that, as art collectors die, more hidden art will come to light.<sup>317</sup> Consequently, by extending HEAR’s expiration, heirs will have an increased opportunity to bring claims.

On the other hand, HEAR only affects art objects that changed hands between January 1, 1933, and December 31, 1945.<sup>318</sup> It does not limit the claims for art or artifacts illegally seized during other conflicts in history.<sup>319</sup> In fact, by the time HEAR expires in January 2027, it will have been nearly a century since the start of the legislation’s covered period. At some point, it is necessary to draw a line and protect the ownership interests of an individual or organization that may have been the piece’s custodian for the past century or purchased it in good faith. As a rule, the law does not indefinitely protect property owners who sleep on their rights.<sup>320</sup> For example, the adverse possession doctrine assumes that after a nonowner occupies land for a period of time, the owner of record has slept on his or her rights and therefore no longer has claim to the property.<sup>321</sup> The majority of states require at least ten years of possession be-

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313. See, e.g., Diana Wierbicki & Amanda A. Rottermund, *Freeports for the Art World: A Guide to Their Uses*, WEALTH MANAGEMENT (Feb. 19, 2016), <http://www.wealthmanagement.com/art-auctions-antiques-report/freeports-art-world>.

314. Melissa Eddy, Alison Smale, Patricia Cohen & Randy Kennedy, *German Officials Provide Details on Looted Art*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/arts/design/german-officials-provide-details-on-looted-art-trove.html>.

315. Fisher, *supra* note 33.

316. *Id.*

317. Julia Edwards, *‘Monuments Men’ Veteran Predicts More Nazi-Seized Art Will Surface*, REUTERS (Nov. 21, 2013, 8:05 AM), <https://www.reuters.com/article/us-germany-art-monumentsmen/monuments-men-veteran-predicts-more-nazi-seized-art-will-surface-idUSBRE9AK0R320131121>.

318. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, 1526 (2016).

319. *Id.*

320. See, e.g., *Pennsylvania R. Co. v. Donovan*, 145 N.E. 479, 482 (Ohio 1924).

321. The period of time required to adversely possess land varies by state; however, many states set the period at five, ten, fifteen, or twenty years. See, e.g., CAL. CIV. PROC. CODE § 325 (West 2011); 735 ILL. COMP. STAT. §§ 5/13-105, 107, 109 (1982); IOWA CODE § 614.17A (2013); MICH. COMP. LAWS § 600.5801 (1961). New Jersey requires thirty years before adverse possession is effective. N.J. STAT. §2A:14-30 (2018).

fore the non-owner adversely possesses the land and assumes title.<sup>322</sup> As such, claimants should have at least ten years to reclaim this property. Since numerous states allow between ten and twenty years, HEAR's expiration date should be extended from ten years to twenty years, thus causing the statute to expire in 2037.<sup>323</sup>

While it is plausible that any heir asserting a claim after 2027 has effectively slept on his or her rights, locating and reclaiming stolen art is arguably quite different from ejecting an adverse possessor from real property. A twenty-year statute of limitations extends the statute's expiration date to over a century after the start of HEAR's covered period.<sup>324</sup> Nonetheless, there are significant hurdles to these claimants asserting their rights. Moreover, heirs could have been actively searching for their families' art since the end of the war. The missing art may be hidden away in the depths of a museum or in a private collection.<sup>325</sup> If an heir does not know that the art still exists or where to find it, the heir cannot be expected to bring a claim. In fact, claims have often been brought as soon as the heir learns the location of the art, which may be decades after the end of the war.<sup>326</sup> Therefore, the interest in a just and fair resolution outweighs the interests of a speedier resolution.

#### B. *Require Museum Compliance with Restitution*

Through the creation of a database similar to NEPIP, the Act should also require compliance by museums that receive government funding.<sup>327</sup> This database should contain information regarding art with an unknown provenance that may fall into HEAR's covered period of 1933 to 1945.<sup>328</sup> Indeed, creating a database that contains images and information regarding art that may have been in Europe during World War II and potentially stolen by the Nazi government will allow the descendants of the previous owners to better identify stolen works.

On the other hand, many museums have already endeavored to make information available regarding artworks with a questionable provenance. Indeed, enforced cooperation may be counterproductive. For example, it may be too costly for museums to make information regarding provenance and ownership public. Furthermore, museums may simply not want to make that information public as easy access to this information may increase the likelihood that they would be targeted by thieves. Even museum professionals who are supportive of Nazi art restitution efforts are reticent to publicize information regarding the

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322. Emily Doskow, *State-by-State Rules on Adverse Possession*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-state-rules-adverse-possession.html> (last visited Nov. 7, 2018).

323. *Id.*

324. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 4, 130 Stat. 1524 (2016).

325. Shoumatoff, *supra* note 2.

326. *See, e.g.,* Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023 (9th Cir. 2010). Plaintiff Claude Cassirer discovered the location of the paintings in 2000 and, not long after, asked for their return. *Id.*

327. *Nazi-Era Provenance*, *supra* note 170.

328. § 4, 130 Stat. at 1526.



provenance of works in their own collections.<sup>329</sup> Therefore, rather than making this information generally accessible, access could be limited solely to those heirs with a justified claim regarding particular works of art that may be held in the collection. Still, this is likely unnecessary since there are no reports of issues arising out of publishing collection information on NEPIP.

Arguably, requiring museum compliance with restitution may be outside the purview of HEAR and may even be ineffective in attaining Congress's goal of resolving these claims "in a just and fair manner."<sup>330</sup> Requiring museum compliance with restitution, however, will reduce future claims against objects in museum collections.<sup>331</sup> In order to incentivize museum cooperation, the ten-year statute of limitations could be left in place for museums who fully cooperate with providing access to their collection databases. Furthermore, it is arguable that publication of the specific items in a museum collection does not cause significant security issues. For example, certain museums that have already uploaded information onto NEPIP maintain a publicly searchable collection database that allows the public to view the museum's entire database of artifacts.<sup>332</sup>

### C. *Require Private Collector Compliance with Restitution*

HEAR should also require cooperation on the part of private art collectors. These private collectors own significant collections of fine art, and many of these collections are consistently unavailable for viewing by the public eye.<sup>333</sup> Certainly, remedies such as requiring private collectors to provide a listing of all works of art in their collections or present documentation for all art that changed hands during World War II would be costly. Furthermore, it would likely be inconvenient to collectors, and the extra requirements could potentially alienate them. The creation of such a list, however, is important to protect both the rights of the prewar owners and the current owners. Certainly, publication will assist heirs in searching for missing art. Likewise, after the eventual expiration of the modified version of HEAR, private collectors will be certain that there will be no claims against their works of art. Finally, it is entirely plausible that collectors already have a list of works in their collections

329. Serge F. Kovaleski, *Ronald Lauder, Advocate of Art Restitution, Says His Museum Holds a Clouded Work*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/arts/design/ronald-lauder-art-restitution-neue-galerie.html?mcubz=0>.

330. § 2, 130 Stat. at 1526.

331. See, e.g., Jonathan Stempel, *New York's Met Is Sued Over Picasso Sold in Nazi, Fascist Era*, REUTERS (Sept. 30, 2016, 11:55 AM), <https://www.reuters.com/article/us-picasso-lawsuit/new-yorks-met-issued-over-picasso-sold-in-nazi-fascist-era-idUSKCN12028U>.

332. For example, The Spurlock Museum in Urbana, Illinois has registered ninety artifacts on NEPIP. NAZI-ERA PROV. INT. PORTAL, *Search Results*, [http://www.nepip.org/public/search/itemsearch.cfm?action=itmresults&menu\\_type=search&museum\\_id=37816](http://www.nepip.org/public/search/itemsearch.cfm?action=itmresults&menu_type=search&museum_id=37816) (last visited Nov. 7, 2018). Moreover, the Museum's entire collection is searchable via its official website. *Search the Collection*, SPURLOCK MUSEUM OF WORLD CULTURES, <http://www.spurlock.illinois.edu/collections/search-collection/> (last visited Nov. 7, 2018).

333. See Bowley & Carvajal, *supra* note 176.

for insurance purposes.<sup>334</sup> In that way, the creation of a list will protect the ownership interests of these private collectors and allow them to eventually devise these works to their own heirs without concern that claims may arise in the future.

Additionally, in order to better meet the goals of the Washington Conference Principles, HEAR should place the greatest burden on the mechanisms through which private art collectors both transfer and store their art. Specifically, the legislation should require auction houses and dealers that specialize in fine art, such as Christie's or Sotheby's, to engage in due diligence and ensure that all art sold does not have a questionable Nazi-era provenance. These large dealers generally do conduct thorough provenance research; however, it is not always sufficient.<sup>335</sup> For example, in 2009, Christie's auctioned Edgar Degas's painting *Danseuses* pursuant to a "restitution agreement with the 'heirs of Ludwig and Margret Kainer.'"<sup>336</sup> After the sale, several relatives of the Kainers objected to the sale on the grounds that Christie's had failed to notify them of it.<sup>337</sup> In fact, Christie's had dealt not with Ludwig and Margret Kainer's relatives but instead with a "foundation created by Swiss bank officials."<sup>338</sup> This sort of tale is not uncommon. Indeed, "[I]ike many families who survived the Holocaust, the Kainer descendants were not even aware that their relatives had lost or left behind valuables to which they might have a claim" until years, or even decades, later.<sup>339</sup>

HEAR should also require compliance on the part of art storage facilities in order to ensure that the art stored there does not have a questionable provenance. In particular, freeports are a haven for private collectors looking to store their art collections.<sup>340</sup> Private collectors like to use these duty-free storage facilities "where goods may be handled with less intervention from taxing and customs authorities."<sup>341</sup> Specifically, private collectors like them because they "provide for long-term and even permanent storage of luxury goods, such as fine art, rare books, historical artifacts, classic cars, vintage wine, jewelry, precious coins, classic musical instruments, sports memorabilia, entertainment and pop culture collections and gold."<sup>342</sup> Moreover, certain storage facilities, such as the Geneva Freeport, specialize in housing fine art and therefore are poised to handle issues associated with art.<sup>343</sup>

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334. See generally *7 Assureurs En Ligne pour Souscrire une Assurance Art*, INDEX ASSURANCE, <https://www.index-assurance.fr/selections/art> (last visited Nov. 7, 2018).

335. See, e.g., Cohen, *Heirs Sue*, *supra* note 181.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Wierbicki & Rottermund, *supra* note 313.

341. *Id.*

342. *Id.*

343. Silke Koltrowitz & Paul Arnold, *Freeports Boom Highlights Risks of Shady Activities*, REUTERS (Sept. 22, 2016, 11:36 AM), <https://www.reuters.com/article/us-swiss-freeports/freeports-boom-highlights-risks-of-shady-activities-idUSKCN11S10L>.

While many freeports do require collectors to declare the contents of their collections to customs,<sup>344</sup> there is already some concern that these storage facilities will become a haven for the storage of stolen art.<sup>345</sup> Therefore, imposing tightened regulations on these facilities may increase their compliance. In the event that stolen art is located in a freeport, sanctions could be reduced against those facilities acting in good faith. This approach is reminiscent of the approach taken by the American government against those hiding assets overseas to evade taxes.<sup>346</sup> While the Department of Justice aggressively prosecutes Americans who hide assets abroad in order to evade taxes,<sup>347</sup> the government has been more forgiving toward the financial institutions who have cooperated with disclosing the identities of American customers who may have violated American tax laws.<sup>348</sup>

On the other hand, these facilities may see a loss in business and thus discourage compliance with these proposed requirements. In addition, facilities like the Geneva Freeport are not located in the United States, rendering them difficult to reach. The focus would then shift solely to the freeports located in Delaware—the only freeports located within the United States.<sup>349</sup> If additional scrutiny was then placed on the Delaware freeports, private collectors may simply choose to transfer their collections to the overseas freeports, such as the ones in Geneva or Hong Kong.<sup>350</sup> Consequently, the practical effect of this modification would be that American art collectors would simply transfer their collections from the United States to another country. Nonetheless, requiring freeport compliance still provides a form of protection for both claimants and current owners. Claimants are able to identify and locate their family's works of art. Current owners, who may have purchased this art in good-faith, are also protected by knowing that their art may not be subject to claims later on.

To solve this problem, Congress should specifically target art brought into the United States. The United States already inspects items at the border and regulates what can and cannot be brought in.<sup>351</sup> In fact, the United States already “restrict[s] the importation of specific categories of art,” including Native American, Byzantine, Cambodian, and pre-Columbian artifacts.<sup>352</sup> It is possible to expand this scope of authority, and the American government can require

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344. Wierbicki & Rottermund, *supra* note 313.

345. Koltrowitz & Arnold, *supra* note 343.

346. *Government Won't Target More Swiss Banks on Tax: U.S. Diplomat*, REUTERS (July 24, 2010, 2:42 PM), <https://www.reuters.com/article/us-swiss-usa-tax/government-wont-target-more-swiss-banks-on-tax-u-s-diplomat-idUSTRE66N1YJ20100724>.

347. *Id.*

348. Robert E. McKenzie, *Swiss Bank Secrecy Succumbs to U.S. Tax Enforcers*, FORBES (Feb. 3, 2014, 1:35 AM), <https://www.forbes.com/sites/irswatch/2014/02/03/swiss-bank-secrecy-succumbs-to-u-s-tax-enforcers/#53c955dd2283>.

349. Wierbicki & Rottermund, *supra* note 313.

350. *Id.*

351. *Prohibited and Restricted Items*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/us-citizens/know-before-you-go/prohibited-and-restricted-items> (last modified Jan. 12, 2017).

352. *Id.*

individuals bringing art objects into the country to either produce documentation regarding the item's location during HEAR's covered period or place it on a registry of art objects. The government has both the ability and the capacity to do so. In fact, Immigration and Customs Enforcement ("ICE") has already successfully located and returned art stolen by Nazis to their prewar owners.<sup>353</sup> For example, in 2009, ICE located and returned a Hebrew Bible that the Nazis stole during World War II.<sup>354</sup> The Bible had been illegally imported into the United States that year.<sup>355</sup> In 2003, ICE seized a fourteenth-century Hebrew manuscript stolen by Nazis and later smuggled into the United States.<sup>356</sup> ICE has also intervened in similar cases after stolen art was discovered in the United States.<sup>357</sup> For example, in 2010, ICE located and returned eleven paintings stolen from Germany's Pirmasen Municipal Museum.<sup>358</sup> Evidently, there is precedent for this increase in responsibilities as ICE has both the skills and expertise required to intervene in these situations.<sup>359</sup> ICE should therefore receive increased training to identify art with a questionable provenance that is being brought into the United States and require substantial documentation.

#### D. Create a Government-Sponsored Registry

Finally, HEAR should be expanded to create a government-sponsored registry to catalog art that has a questionable provenance. The government should require compliance on the part of museums as well as storage facilities such as the freeports. Freeports can require cooperation as a condition of membership. Without such cooperation, collectors will not be allowed to store their art in the freeports. This registry will ultimately allow prewar owners and their heirs to identify missing works of art and file claims seeking their return. The creation of such a registry furthers the original goals of the Washington Conference Principles, which state that "[e]fforts should be made to establish a central registry of such information" and that "[r]esources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted."<sup>360</sup> The establishment of such a registry also furthers Congress's goal of "ensur[ing] that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."<sup>361</sup>

Arguably, the creation of such a database will be costly. Critics may even say that it is perhaps not the best use of limited government resources. Still, as

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353. *Cultural Property, Art and Antiquities Investigations*, U.S. CUSTOMS & IMMIGR. ENFT (Dec. 12, 2011), <https://www.ice.gov/factsheets/cultural-artifacts>.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *See generally id.*

360. O'DONNELL, *supra* note 25, at 49–50.

361. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1526 (2016).

demonstrated by the recent enactment of HEAR, the United States has committed itself to righting the wrongs perpetrated by Hitler's Nazi regime. Furthermore, the establishment of this database will organize in one place the various restitution efforts in the United States as well as provide a single solution to those seeking the return of their family's art. As a result, the cost of creating such a database is likely justified.

## V. CONCLUSION

During World War II, the Nazi regime perpetrated the "greatest art theft in history."<sup>362</sup> To this day, hundreds of thousands of paintings, sculptures, frescoes, and mosaics have yet to be reunited with their prewar owners.<sup>363</sup> While HEAR is a step in the right direction, neither it nor this Note's proposed solution is ultimately perfect. Rather, in order to provide an effective legal remedy, the focus should be on creating cost-justified improvements. Therefore, to achieve this goal, HEAR's reach should be expanded. Although the legislation does extend the statute of limitations for making an ownership claim after discovery, the statute's expiration date should be extended past 2027 in order to allow individuals to pursue claims related to hidden collections of stolen art likely to surface in the coming years. Moreover, HEAR should shift the burden and require cooperation on the part of museums, private collectors, and storage facilities in order to facilitate the identification of works of art that have a questionable provenance. Finally, HEAR should mandate the creation of a national registry for art with a questionable provenance throughout the statute's covered period.

Through these modifications, HEAR will become a strong tool that can help facilitate the restitution of Nazi-looted art, finally fulfilling the United States' promise to "[t]o provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis."<sup>364</sup>

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362. Shoumatoff, *supra* note 2.

363. *Id.*

364. § 3, 130 Stat. at 1524.

