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## Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016

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## Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016

HERBERT I. LAZEROW\*

### I. Introduction

In the waning days of the Obama presidency, Congress passed and the President signed the Holocaust Expropriated Art Recovery Act (HEAR).<sup>1</sup> That law purports to extend the statute of limitations for actions to recover a large group of items, principally art, stolen during the Holocaust.<sup>2</sup> The new statute of limitations would be either the old statute or a six-years-from-actual-discovery statute, whichever is longer, to expire at the end of 2026.<sup>3</sup> This article analyzes the likely results of HEAR.<sup>4</sup>

Part I sets forth the problems leading up to HEAR's enactment, including the typical parties to these controversies, the informational difficulties

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1. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1528. [hereinafter HEAR].

2. See *id.* at Sec. 5(a).

3. See *id.* at Sec. 5(a), (g).

4. The earliest attempt was by Jennifer Anglim Kreder before the Senate Report on the law became available. See *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAPMAN L. REV. 1 (2017). An article by Charles Cronin of the University of Southern California, written shortly after HEAR's passage, is helpful in understanding the law. See *Ethical Quandaries: The Holocaust Expropriated Art Recovery Act and Claims for Works in Public Museums* (Feb. 10, 2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2915276](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2915276).

confronting both claimants and purchasers of art, and the elements of recovery suits. Part II discusses the functions of statutes of limitations, adverse possession, and prescription. Part III analyzes the details of HEAR and explains its effect in typical jurisdictions. Part IV speculates on the law's likely impact on the resolution of Holocaust art disputes. Part V concludes that the effect of HEAR will be small in volume but large in particular cases.

## **II. Problems of Art Recovery Cases**

### **A. THE PLAYERS**

#### *1. Original Owner's Representatives*

Judging from current cases, the original owners of art seized around the time of the Holocaust are dead.<sup>5</sup> As such, the cases are being brought by their heirs.<sup>6</sup> Some of the heirs are the grandchildren and great-grandchildren of the original owners. A curious aspect of these cases is that often, the heirs are not direct descendants, but rather the descendants of siblings or companions of the original owners.<sup>7</sup> The main reason for this is that a high percentage of the original owners did not have children.<sup>8</sup>

In most cases, the original owner's representatives are individuals or, more commonly, a group of individuals who had the consanguinity to the original owner.<sup>9</sup> One original owner left a foundation to support several colleges as

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5. The only original owner I have found among the cases and newspaper articles is Erna Menzel. Her case was first decided in 1966, more than half a century ago. Her husband was already deceased. *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup. Ct. NY County 1966), *modified on other grounds* 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification reversed* 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

6. *See id.*

7. As a legal matter, the closeness of the heir to the ancestor in consanguinity should make no difference for purposes of inheritance. To paraphrase Gertrude Stein, "an heir is an heir is an heir."

8. The author is unaware of whether the lack of procreation among European dealers and art collectors is unusual in general or whether it was unusual for European Jewish circles at the time. It should be noted that the author's sample is quite small, composed of court opinions and newspaper articles in which the author can determine the identity of the person from whom the art was stolen and whether that person had children. In total, this sample consists of twenty-two owners, only eleven of whom had children. A demographer who studies the Jewish people reported that the highest childless percentage of a population he had found was twenty percent. E-mail from Sergio DellaPergola, Professor, Hebrew University Jerusalem (Sept. 24, 2017) (on file with author). *See* Sergio DellaPergola & Judith Evan, *Some Fundamentals of Jewish Demographic History*, in *PAPERS IN JEWISH DEMOGRAPHY* 11–33 (1997).

9. *See, e.g., Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 959 (9th Cir. 2010) (representative was only surviving heir of deceased art dealer).

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his residuary legatee.<sup>10</sup> It is possible that an original owner's representative might be a museum or a government,<sup>11</sup> though such a case has yet to arise.

Most of the original owners were either art dealers or major collectors.<sup>12</sup> This is reasonable. In order to make a claim, one must have proof of ownership. A dealer would have kept regular business records indicating all the transactions of his gallery. A major collector is more likely to keep records than someone who has only a few artworks. Further, when dealers' businesses were taken over in the process of Aryanization, it is likely that the new owners would have retained the records of the business, causing the survival of those records, absent war damage.<sup>13</sup> Sometimes original owners, unable to take their art with them, made notebook inventories of their collections for easy portability.<sup>14</sup>

## 2. *The Lawyers*

It appears that each heir of an original owner tends to be represented by the same lawyer in all his claims.<sup>15</sup> This should not be surprising. Being represented by the same lawyer has the advantage of economy, as many of the facts that need to be proven will be the same from one claim to the next. In the case of a wholesale confiscation, the circumstances of the confiscation will be the same for all works. A second common fact that must be proven is that the claimant is the heir of the original owner.

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10. In *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008), the claimant was the Max and Iris Stern Foundation, which benefits Concordia and McGill Universities in Canada and The Hebrew University of Jerusalem. See *Max Stern Art Restitution Project*, CONCORDIA, <https://www.concordia.ca/arts/max-stern.html> (last accessed Jan. 31, 2018). As of February 2017, the Foundation had recovered sixteen of Stern's works. *Amah-Rose Abrams, FBI Restitutes Nazi-Looted Painting to the Max and Iris Stern Foundation*, ARTNET NEWS (Feb. 9, 2017), <https://news.artnet.com/art-world/fbi-returns-painting-max-stern-foundation-853031>. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (where the claimants were nine heirs).

11. Some people leave their property to institutions or the state. The intestacy statutes in some jurisdictions provide that if a decedent is not survived by a spouse or a relatively close blood relative, the property goes to the state. See, e.g., UNIF. PROBATE CODE §§ 2-101 to 2-105 (amended 2010) (stating if no surviving spouse or heirs of grandparents [first cousins or their progeny], property goes to the state). Given the carnage of World War II, it is entirely possible that an owner of art might have died without leaving a single surviving close relative.

12. See, e.g., *Von Saber*, 592 F.3d at 959.

13. For example, many of the records of the German Lempertz Auction House were destroyed by bombing during World War II. See *Vineberg*, 548 F.3d at 53.

14. The Dutch dealer Jacques Goudstikker so listed his inventory or more than a thousand works. See *Von Saber*, 592 F.3d at 959.

15. Local counsel may be involved if the litigation takes place outside lead counsel's jurisdiction, but it is likely that lead counsel will be the same in all cases. For procedural rules in federal court, see *Commencing a Federal Lawsuit: Overview Practical Law Practice Note* 5-509-1323, WESTLAW PRACTICAL LAW (2017).

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Several lawyers have represented different claimants in different cases.<sup>16</sup> This suggests that a specialized bar has emerged focusing on art recovery cases. Two lawyers have represented several different current possessors, indicating a level of specialization on that side.<sup>17</sup> One lawyer has worked both sides of the street.<sup>18</sup> Both claimants and current possessors seem to be represented by large law firms.<sup>19</sup>

It is likely that the fee arrangement with claimants' counsel(s) will be a contingent fee.<sup>20</sup> A claimant may win on some artwork and lose on others. The contingent fee allows the lawyer to not charge for time spent on the unsuccessful claims. Rather, it allows the lawyer to use the successful claims to subsidize the time spent on the unsuccessful claims. It is likely that lawyers for the current possessor charge on an hourly basis.

### 3. *Third-Party Financing*

It is not known whether it is common to provide third-party financing for these claims. As noted below, there may be significant research costs incurred to prove a claim.

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16. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011); *Matter of Flamenbaum*, 1 N.E.3d 782 (N.Y. 2013); *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) (claimants represented by Mr. Raymond Dowd). See also *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (claimants represented by Mr. Thomas J. Hamilton). See also *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990) (claimants represented by Mr. Thomas R. Kline).

17. See, e.g., *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010); *De Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013) (current possessors represented by Sarah E. Andre and Thaddeus J. Stauber).

18. Howard N. Spiegler represented the current possessor in *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011) and in *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002), *summary judgment denied* 2009 U.S. Dist. LEXIS 91464. Spiegler represented the original owner in *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) and in *Republic of Turkey v. OKS Partners*, 1998 U.S. Dist. LEXIS 23526, at \*9 (D. Mass. 1998).

19. See, e.g., *Orkin*, 487 F.3d 734 (Weil, Gotshal & Manges); *Vineberg*, 548 F.3d 50 (Andrews Kurth); *Autocephalous Greek-Orthodox Church*, 917 F.2d 278 (Andrews Kurth).

20. In an ordinary contingent fee case, the recovery sought is money damages, which is easily divided. In art recovery cases, the remedy sought is the recovery of the artwork *in specie*. One wonders how carefully the implications of a contingent fee based on the recovery of an asset that might have sentimental value and is not terribly liquid are explained. See generally Eric Helland et. al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971 (2017).

#### 4. *Current Possessors*

Current possessors are either museums or private individuals.<sup>21</sup> Most current possessors that have been involved in litigation are museums.<sup>22</sup> This is likely because of the difficulty of discovering artworks that are held privately, whereas museum items are more likely to appear in exhibitions, in published works, or on the Internet.

One might note that most museums in the United States are either private or run as though they are private.<sup>23</sup> These museums rely on substantial private fundraising to accomplish their work and are usually sensitive about their public image.

Some cases involve museums located outside the United States.<sup>24</sup> Museums outside the United States are usually either part of national governments or instrumentalities of governments.<sup>25</sup> Some of these museums operate under rules set down by legislation or regulations.<sup>26</sup> They usually have political or bureaucratic accountability but do not raise significant funds from private donors.<sup>27</sup>

Some individual current possessors have purchased the art, while others have inherited it from someone who bought it. Museums have occasionally purchased the art<sup>28</sup> but are more likely to have received it as a gift or bequest

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21. See, e.g., *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) (possessor was Museum of Modern Art); *Orkin*, 487 F.3d 734 (possessor was actress Elizabeth Taylor).

22. See, e.g., *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 2 (1st Cir. 2010) (current possessor was Museum of Fine Arts, Boston); *Grosz*, 772 F. Supp. 2d at 476 (current possessor was Museum of Modern Art); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006) (current possessor was Toledo Museum of Art).

23. See KARL E. MEYER, *THE ART MUSEUM: POWER, MONEY, ETHICS* 26-27 (1979) (discussing how the New York Metropolitan Museum, while built using public funds and maintained by the city, remained under private control). See also *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 187 (E.D.N.Y. 1999) (where authorizing documents referred to the relationship between local government and a group of private citizens as a “joint partnership”).

24. See, e.g., *De Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013).

25. See Geoffrey D. Lewis, *Operation of Museum*, ENCYC. BRITANNICA, available at <https://www.britannica.com/topic/operation-of-museums-398828> (last accessed Feb. 12, 2018) (discussing the “national status” of museums outside the United States).

26. See *id.* (discussing the regulation of museums in France and legislation pertaining to British municipal museums).

27. See Martha Lufkin, *Portrait of Wally Case Settled for \$19M*, THE ART NEWSPAPER (Jul. 20, 2010), <https://goo.gl/KjvLqt> (discussing the Austrian government’s role in settlement negotiations and its influence over the museum foundation’s board). See also MEYER, *supra* note 23, at 19–21, 64–67 (discussing the tradition of publicly-funded museums in Europe); but see Geraldine Fabrikant, *European Museums Adapt to the American Way of Giving*, N.Y. TIMES (Mar. 15, 2016), available at <https://www.nytimes.com/2016/03/17/arts/design/european-museums-are-shifting-to-american-way-of-giving.html> (discussing the general shift away from public and toward private funding for museums in Europe).

28. See, e.g., *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 805 (N.D. Ohio 2006).

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from someone who purchased it.<sup>29</sup> With a few exceptions, the current possessors were unaware that the art had been stolen during the Holocaust.

**B. INFORMATION PROBLEMS**

**1. *Heirship***

In 1945, Europe resembled a vast demolition derby. From London to Stalingrad and from Sicily to Dresden, rubble was the most common sight. World War II was by far the deadliest conflict in human history; between sixty and eighty million people perished as a result of the war.<sup>30</sup> In Austria, it is estimated that over six percent of the population perished, while over nine percent of Germany's population died.<sup>31</sup> Soviet deaths are estimated at twelve percent of the population<sup>32</sup> Roughly sixty percent of Europe's Jews died.<sup>33</sup> In Poland, which had the largest concentration of Jews on the continent, more than eighty percent of Jews died.<sup>34</sup>

In addition to deaths, there was massive displacement.<sup>35</sup> Many people were forcibly deported, while others left their homes either to escape forcible deportation or to get out of the active war zone. When families were deported, they sometimes ended up in the same concentration camp but often found themselves separated. Sometimes people used false documents to avoid deportation to concentration camps.<sup>36</sup> Some young men

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29. See, e.g., *Meyer v. Bd. of Regents*, 2014 U.S. Dist. LEXIS 68510, at \*4 (S.D.N.Y. 2014) (gift); *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029, 1032 (W.D. Wash. 1999) (bequest).

30. See Iris Kesternich, et al., *The Effects of World War II on Economic and Health Outcomes Across Europe*, 96.1 REV. OF ECON. & STATISTICS, PMC 103-118 (2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4025972/pdf/nihms461498.pdf> (stating that between sixty-two and seventy-eight million people died during World War II).

31. See *id.*, at Fig. 1.A.

32. See *id.*

33. See Michael Lipka, *The Continuing Decline of Europe's Jewish Population*, PEW RESEARCH CTR. (Feb. 9, 2015), <http://www.pewresearch.org/fact-tank/2015/02/09/europes-jewish-population/> (explaining that Europe's Jewish population declined from 9.5 million before the war to 3.8 million after the war).

34. See DONALD NIEWYK & FRANCIS NICOSIA, *THE COLUMBIA GUIDE TO THE HOLOCAUST* 421 (2000).

35. See Giada Zampano, Liam Maloney & Jovi Juan, *Migrant Crisis: A History of Displacement*, WALL STREET J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-a-history-of-displacement/> (explaining that World War II displaced an estimated sixty million people).

36. See Pamela Druckerman, *'If I Sleep for an Hour, 30 People Will Die'*, N.Y. TIMES (Oct. 2, 2016), available at <https://www.nytimes.com/2016/10/02/opinion/sunday/if-i-sleep-for-an-hour-30-people-will-die.html> (discussing how members of a Jewish resistance cell operated a "clandestine laboratory to make false passports for children and families about to be deported to concentration camps").

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even resorted to escaping to the forests.<sup>37</sup> As one child put it, “They went to the other end of the earth and they did not return.”<sup>38</sup>

After the war, some Jewish survivors tried to return home. They often found that their old homes were occupied by others who were not prepared to hand them over.<sup>39</sup> Jews were also sometimes victims of violence.<sup>40</sup> Some survivors were unable or unwilling to return home and lived in camps established by refugee organizations until they could be resettled elsewhere, often in Israel.<sup>41</sup>

In short, it was often impossible to determine which members of a family had survived the war and which had perished. Considerable resources were devoted to reuniting families or to determining who had died by organizations such as Yad Vashem,<sup>42</sup> the American Jewish Joint Distribution Committee,<sup>43</sup> the International Red Cross,<sup>44</sup> and the International Tracing Service (ITS).<sup>45</sup> Efforts to reunite families are still ongoing. Even in 2017, families torn apart by the war are being reunited.<sup>46</sup>

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37. See Franziska Reiniger, *Solidarity in the Forest—The Bielski Brothers*, YAD VASHEM, [http://www.yadvashem.org/yv/en/education/newsletter/28/bielski\\_brothers.asp](http://www.yadvashem.org/yv/en/education/newsletter/28/bielski_brothers.asp) (last accessed Feb. 12, 2018).

38. “Ils allèrent au bout de la terre et ils ne sont pas revenus[.]” This is the central inscription in Mémorial des Martyrs de la Déportation (Memorial to Martyrs of the Deportation), located on the east end of the Ile de la Cité in Paris. Mémorial Des Martyrs De La Déportation, MUSÉE DE LA RÉSISTANCE EN LIGNE, <http://museedelaresistanceenligne.org/media5761-MA> (last accessed Jan. 28, 2017).

39. See *The Survivors*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007736> (last accessed Feb. 12, 2018).

40. See Sheryl Silver Ochayon, *Anti-Jewish Violence in Poland After Liberation*, YAD VASHEM, [http://www.yadvashem.org/yv/en/education/newsletter/33/anti\\_jewish.asp](http://www.yadvashem.org/yv/en/education/newsletter/33/anti_jewish.asp) (last accessed Feb. 12, 2018).

41. See *The Aftermath of the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005129> (last accessed Feb. 12, 2018) (estimating that “as many as 170,000 Jewish displaced persons refugees had immigrated to Israel by 1953”).

42. Yad Vashem tries to collect as much information about the Holocaust as it can. The organization tries to document those who died and those who survived. See *Names Recovery Project*, YAD VASHEM, <http://www.yadvashem.org/remembrance/names-recovery-project.html> (last accessed Feb. 12, 2018); see also *Testimonies*, YAD VASHEM, [http://www.yadvashem.org/yv/en/holocaust/resource\\_center/item.asp?gate=4-5](http://www.yadvashem.org/yv/en/holocaust/resource_center/item.asp?gate=4-5) (last accessed Feb. 12, 2018).

43. See *About Us*, AM. JEWISH JOINT DISTRIB. COMM., <http://www.jdc.org/about/> (last accessed Feb. 12, 2018).

44. See *Restoring Family Links*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/what-we-do/restoring-family-links> (last accessed Feb. 12, 2018).

45. *About ITS*, INT’L TRACING SERV., <https://www.its-arolsen.org/en/about-its> (last accessed Jun. 17, 2017). In 2013, the International Tracing Service opened its archives to the public and sent copies to a repository in each of its constituent nations. *The History of the ITS as an International Institute*, INT’L TRACING SERV., <https://www.its-arolsen.org/en/about-its/history/#c1802> (last accessed Jun. 17, 2017). The United States repository is the United States Holocaust Memorial Museum in Washington DC. *Research Services*, U.S. HOLOCAUST MEM’L MUSEUM, [www.ushmm.org/remember/the-holocaust-survivors-and-victims-resource-center/international-tracing-service/submitting-a-request-for-research](http://www.ushmm.org/remember/the-holocaust-survivors-and-victims-resource-center/international-tracing-service/submitting-a-request-for-research) (last accessed Jun. 17, 2017).

46. In 1941, a Jewish married couple from Lublin who had fled east left their two-year-old daughter in a non-Jewish orphanage in Russia. The war separated the couple. In 1945, neither



Because so many people were displaced after the war, a question remains over who might be the current heir of someone who owned artwork that was expropriated. Uncertainty regarding heirship has two consequences: first, a person who thinks he might be such an heir will experience difficulties in proving it; second, a person in possession of art stolen during the Holocaust will experience difficulties in finding the person to whom it should be restored.

This unanswered question of heirship has recently induced the French government to enlist the volunteer efforts of the French Genealogical Society to try to find the heirs of certain owners.<sup>47</sup> To my knowledge, it has

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parent knew whether the other had survived the war. The mother came to the orphanage and took the girl. The father was locked away in a gulag in Siberia for eight years. The mother remarried, and the girl took the name of her adoptive father. They went to Israel in the 1950s, settling in Karmiel. On release from the gulag, the father called at the orphanage, but the girl was gone, and the people at the orphanage could provide no useful information. The father searched for his little girl, his only evidence being a photo of all the children in the orphanage, including his daughter, which he hung near his bed, the last image he saw before going to sleep. He remarried and had a family. In 1991, the father and his family arrived in Haifa, about an hour's drive from his former wife and his daughter in Karmiel—if he had known where they were. An American genealogist, Meyer Denn, spent 1997-2002 in Israel. He located the father as one of his distant relatives. The genealogist met the father, his two sons, and a twelve-year-old grandson, heard the story, and saw the photo. He could think of nothing further that might locate the mother and daughter. Twenty years later, the genealogist received a Facebook friend request from the grandson. He explained that his grandfather had died in 2003, but he had taken up the quest for his aunt. He contacted the Jewish Historical Institute in Warsaw. They provided the name of the mother's second husband, the girl's married name, the address in Karmiel and a phone number. The problem: the phone number no longer worked and she was no longer at that address. Could Meyer Denn help? The genealogist posted a note on the Jewish genealogy chat group, [www.JewishGen.org](http://www.JewishGen.org), looking for help in Karmiel. Twenty people offered help. One was an attorney. When the woman sought was identified, he responded that not only could he help, but he could provide precise information with the woman's permission. She was his client whom he represented in the sale of her flat the previous year. She moved to a retirement home. Contact was made, and on June 9, 2017, the little girl from the orphanage, now seventy-eight, met her two half-brothers, and the father's grandson met her children, his cousins. The grandson presented his aunt with the old photo that had sustained her father's hope for more than half a century. The story is told in much more detail by Meyer Denn of Dallas, Texas on the JewishGen Digest for June 7, 2017. Meyer Denn, *Memory Lane: How My Research Led to a Family Reunion and Summer Research Trip*, JEWISHGEN DIGEST (Jun. 7, 2017). For a similar Denn success in the 1990s in reuniting cousins from Czechoslovakia who hid in cellars during war, see Andrea Hyman, *90's Family: The Roots of Ourselves*, L.A. TIMES (June 8, 1994), [http://articles.latimes.com/1994-06-08/news/ls-1850\\_1\\_family-history/2](http://articles.latimes.com/1994-06-08/news/ls-1850_1_family-history/2). See also *Holocaust [sic] Survivor, 102, United with Nephew*, SAN DIEGO UNION TRIBUNE (Nov. 20, 2017) (Polish escapee to Russia learns that one of his younger brothers did not perish in the war.).

47. The only compensation received by the genealogists is the fun of the chase and the right to be present at the restoration ceremony. *The Ministry of Culture and Communication and Genealogists of France Team Up to Search for Rights Holders of Identified Owners of Looted Works of Art Recovered after the Second World War*, MINISTRY OF CULTURE (Jun. 24, 2015), <http://www.culturecommunication.gouv.fr/Presse/Archives-Presses/Archives-Communiqués-de-presses-2012-2017/Annee-2015/Recherche-des-ayants-droit-des-proprietaires-identifies-d-oeuvres-d-art-spoliees-recuperees-apres-la-Second-guerre-mondiale>. A Degas drawing of three ballerinas has been returned to the heirs of one of them, Maurice Dreyfus. Henry Samuel, *France Returns*

not induced the French government to provide compensation for any such effort.

Aside from the question of heirship, widespread dislocation after World War II and the passage of time have probably reduced the ability of the heirs, once they know they are heirs, to know what artwork their ancestors owned that might have been stolen during the Holocaust. People who were alive in 1945 who might have had contact with art that they remember would be at least eighty years old today. For the most part, grandchildren and great-grandchildren of pre-war owners are today's claimants. The fact that many heirs are collateral rather than direct descendants of owners makes it even less likely that they would have lived in or visited the homes in which the art was kept. Claimants must rely on either records or family stories in their search efforts for the current location of the art.

## *2. Potential Purchasers: Information Problems Relating to Chain of Title*

A person seeking to purchase an artwork, like a purchaser of anything else, wants to know that he will acquire title to the work. One does not want to pay money for an item that may be taken away by the appearance of the owner. If the purchaser wants some assurance that he will not lose the artwork to its true owner, he can attempt to establish provenance through *catalogues raisonnés*, auction catalogs, or documentation proving that the art has not been stolen (obtained using a registry of stolen art). As set forth below, none of these is a satisfactory solution to the problem faced by the potential purchaser. I will discuss four tools to address authenticity and chain of title issues (provenance, art registries, implied and express warranties, and insurance) and show that each tool fails to meet the challenges associated with Holocaust art.

### *a. Provenance*

Provenance is significant because it can “help to shed light on legal title.”<sup>48</sup> Provenance means “the history of the whereabouts of an artwork” from its creation to the present day.<sup>49</sup> A “gap-free provenance” takes an artwork from its creator to its present owner, with each transfer being a legitimate

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*Nazi-Stolen Degas Drawing to Rightful Owners*, THE TELEGRAPH (May 10, 2016), <http://www.telegraph.co.uk/news/2016/05/10/france-returns-nazi-stolen-degas-drawing-to-rightful-owners/>. A 16th century Flemish portrait (perhaps by Joos van Cleve) was returned to the heirs of Henry and Hertha Bromberg. Thomas Adamson, *Healing Wounds, Looted Art Reunited with Nazi Victims' Heirs*, THE SEATTLE TIMES (Nov. 28, 2016), [www.seattletimes.com/nation-world/healing-wounds-looted-art-reunited-with-nazi-victims-heirs](http://www.seattletimes.com/nation-world/healing-wounds-looted-art-reunited-with-nazi-victims-heirs).

48. Lawrence M. Shindell, *Provenance and Title Risks in the Art Industry: Mitigating These Risks in Museum Management and Curatorship*, 31 MUSEUM MGMT. & CURATORSHIP 406 (2016), <http://www.tandfonline.com/doi/full/10.1080/09647775.2016.1227569> (explaining that provenance, which is based on physical possession, is distinct from legal title).

49. *Id.*

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movement from an owner or another person with the right to sell or loan the work.<sup>50</sup>

In the old days, the reason for establishing provenance for an artwork was to bolster other evidence, such as connoisseurship or scientific evidence, that the work was properly attributed to the artist who created it. Whenever something is expensive, there are people who will attempt to turn a profit by producing a similar work that they can sell for almost as much money. One way of doing this is to create a copy of a known work of value; another way is to create a work in the style of an artist whose work sells for high prices.<sup>51</sup> Even a young Michelangelo created a statue of Cupid in the Roman style and aged it to make it look as if it had been created in ancient Rome and was newly discovered in order to sell it for a higher figure.<sup>52</sup>

Provenance became important to assure that art was legitimately transferred and legally exported in the 1980s and 1990s due to several developments. In 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) made available for signature the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention), which contains provisions related to illegally exported property and certain stolen property.<sup>53</sup> It was intended to help stem the flow of stolen or illegally exported artifacts from source countries to buyer countries, primarily by requiring that an item either have a document supporting its legal export or be located outside the source country by 1970.<sup>54</sup> While not aimed at Holocaust art, the UNESCO Convention's provisions were drafted broadly enough to apply to some such art. The UNESCO Convention's main effect was focusing attention on provenance. By the 1990s, a sizable number of countries adhered to the UNESCO Convention and enacted domestic implementing legislation.<sup>55</sup>

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50. *Id.*

51. See Colin Moynihan, *Dealer in Art Fraud Scheme Avoids Prison*, N.Y. TIMES (Jan. 31, 2017), available at <https://www.nytimes.com/2017/01/31/arts/design/dealer-in-art-fraud-scheme-avoids-prison.html> (discussing the sentencing of a woman who fraudulently marketed paintings by an unknown artist as works by Robert Motherwell, Willem de Kooning, and Jackson Pollock). For other similar cases, see generally ANTHONY M. AMORE, *THE ART OF THE CON* (2015).

52. *Michelangelo Biography.com*, BIOGRAPHY.COM, <https://www.biography.com/people/michelangelo-9407628> (last accessed June 6, 2017).

53. U.N. Educational, Scientific and Cultural Organization [UNESCO], *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 823 UNTS 231 (Nov. 14, 1970), available at <http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf>.

54. See *id.* at arts. 8-12.

55. The United States ratification was effective in 1983. U.N. Educational, Scientific and Cultural Organization [UNESCO], *Signatories to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO.ORG, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last accessed Feb. 12, 2018). The U.S. Convention on Cultural Property Implementation Act was passed in the same year. See 19 U.S.C. §§ 2601-2613 (2016); Bureau of Educational and Cultural Affairs, *Cultural*

Another factor, which elevated the importance of provenance if all you are worried about is theft during the Holocaust, was the Washington Conference Principles on Nazi-Confiscated Art, a non-binding agreement calling on museums to research the provenance of their works to assure that they were not illegally obtained during the Holocaust.<sup>56</sup> In addition, the Association of Art Museum Directors promulgated guidelines instructing its members to obtain as much provenance information as possible in research regarding existing collections as well as research regarding future gifts, bequests, and purchases.<sup>57</sup>

Provenance begins with assessing the physical item to be authenticated from all sides.<sup>58</sup> Important elements to consider include materials, measurements, inscriptions, changes in the mounting, and documents such as customs stamps, exhibition stickers, wax seals, dealer marks, other stickers or stamps, and transport labels. Because many works are similar, it is important to be sure you are tracing the provenance of the work you are seeking to purchase. Sometimes the physical item contains important clues about its whereabouts at particular times.

Provenance can be pre-fabricated, do-it-yourself, or a combination of the two. The main sources of pre-fabricated provenances are *catalogues raisonné*, auction sales catalogs and private dealer representations, and museum websites. Comments in the case law generally overstate the utility of these items.<sup>59</sup>

i. *Catalogue Raisonné*

A *catalogue raisonné* is an attempt by a scholar or a group of scholars to survey all the works by a single artist.<sup>60</sup> It usually includes only the works that the author believes are done by the artist, though sometimes an author will include a special section for works of doubtful authenticity. Each work is dated, described, and illustrated with a photograph, usually black-and-

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*Heritage Protection: Cultural Property Protection*, U.S. DEP'T OF STATE, <https://eca.state.gov/cultural-heritage-center/cultural-property-protection/process-and-purpose/background> (last accessed Feb. 12, 2018). By December 1989, sixty-five countries had signed or accepted the UNESCO Convention.

56. See U.S. DEP'T OF STATE, WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART (1998), <https://fcit.usf.edu/holocaust/resource/assets/princ.htm> (last accessed Feb. 12, 2018).

57. *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945)*, ASS'N OF ART MUSEUM DIRS., at 3 (Jun. 4, 1998), <https://goo.gl/sfppB3>. CODE OF PROFESSIONAL ETHICS, §§ 2.2–2.3 (INT'L COUNCIL OF MUSEUMS 2004), available at [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/ICOM-code-En-web.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/ICOM-code-En-web.pdf).

58. See NANCY H. YEIDE, KONSTANTIN AKINSHA & AMY L. WALSH, THE AAM GUIDE TO PROVENANCE RESEARCH 11–15 (2001) (discussing the various aspects of a work of art that should be examined to track its provenance).

59. See *De Weerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987), where the judge says that the owner could have discovered the whereabouts of a Monet stolen in 1945 from its entry in Monet's *catalogue raisonné*, but that book was not published until 1974.

60. See *Catalogues Raisonnés*, INT'L FOUND. FOR ART RESEARCH, [https://www.ifar.org/cat\\_rais.php](https://www.ifar.org/cat_rais.php) (last accessed Feb. 12, 2018).

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white. A *catalogue raisonné* describes a work's publicly known history of purchases, inheritances, exhibitions, shows, and sometimes references in books.

To determine the utility of *catalogues raisonnés*, the author looked at a few. No sensible businessperson would rely on the provenance contained in a *catalogue raisonné* for the proposition that the artwork was never stolen. A good example of provenance provided by a *catalogue raisonné* is Claude Monet's Vernon (1886): bought from Monet by Durand-Ruel,<sup>61</sup> October 1890; Samuel Untermyer, New York 1892; Durand Ruel, 1892; Potter Palmer, Chicago 1892; private collector, United States around 1973.<sup>62</sup> This is a good provenance because it appears that the art was not located in Europe between 1933 and 1945. If you are buying from someone representing the American private collector, you have a complete chain of ownership from the artist. Presumably, you are buying from a dealer or at an auction and, unless the dealer who is trying to sell the work reveals the name of the American collector (and they usually will not), you do not know their identity. This provenance also does not specifically state that each purchase was from the previous owner.<sup>63</sup> While it is theoretically possible that Potter Palmer sold the work in 1973 to the private collector, it is more likely that Palmer died before 1973, and the work was included in his probate estate. In short, it looks like a perfect provenance, but it is hardly one on which the author would be willing to risk a million dollars; you cannot verify that the provenance is accurate.<sup>64</sup>

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61. Paul Durand-Ruel (1831-1922) bought about 1,000 works by Monet and similar numbers from other Impressionists. Durand-Ruel was one of Monet's major dealers. He barely averted bankruptcy but promoted the work of his stable of Impressionist artists by carefully controlling the amount of their work that hit the market at any time and by assuring—sometimes by purchasing works himself—that each auction set a record. He staged lavish shows of their work, used artist biographies to stir interest, and went abroad—most spectacularly to the United States—to promote their work. See Ken Johnson, *Paul Durand-Ruel: The Paris Dealer Who Put Impressionism on the Map*, N.Y. TIMES (Jul. 22, 2015), <https://www.nytimes.com/2015/07/24/arts/design/paul-durand-ruel-the-paris-dealer-who-put-impressionism-on-the-map.html>.

62. Translated by the author from DANIEL WILDENSTEIN, *CLAUDE MONET: BIOGRAPHY ET CATALOGUE RAISONNÉ* (TOME II: 1882-1886) 188 (1979). The French is: “acheté à Monet par Durand-Ruel octobre 1890–Samuel Untermyer, New York, 1892–Durand-Ruel, 1892 – Potter Palmer, Chicago, 1892 – P.A., U.S.A. c. 1973.”

63. The Saint Louis Art Museum's online provenance for Max Beckmann's Portrait of Valentine Tessier is a good example of a transparent provenance. It sets forth the owners and dates of ownership, and states the method of acquisition and the documents on which the museum relied in assembling the provenance. See *Collections: Max Beckmann's Portrait of Valentine Tessier*, ST. LOUIS ART MUSEUM, <http://emuseum.slam.org:8080/emuseum/view/objects/asitem/13738/416/displayDate-asc?t:state=flow=e4b0a934-4c12-415a-a1da-c3f4867fa35e> (last accessed Feb. 12, 2018).

64. For examples of false provenances, see *United States v. Schultz*, 333 F.3d 393, 396 (2d Cir. 2003) (where a dealer created a false provenance in a fictional collection in order to sell a sculpture); AMORE, *supra* note 51, at 15-16 (detailing Wolfgang Baltracchi's creation of a false provenance by dressing his wife in period clothing and taking photographs of her pretending to be her grandmother with the artwork); Laney Salisbury & Aly Sujo, *PROVENANCE: HOW A*

More important to the purchaser, he does not want to buy a work that was ever stolen. While it is comforting to know that the work was not in Europe during the war, that is no guarantee that it was never stolen.<sup>65</sup>

The Vernon (1866) provenance is not typical. A more typical provenance was one the author found for a work supposedly stolen during the Holocaust, restored to the granddaughter of the supposed owner, and donated to the Los Angeles County Museum of Art (LACMA). This is Bernardo Strozzi's 1615 St. Catherine of Alexandria. The provenance begins, "1947 private collection Genoa." That provenance is obviously of no utility in determining whether the work had been stolen during the Holocaust. From 1947, the work has a perfect provenance to the Samuel H. Kress collection in 1949 and then at some unspecified date after 1961 to the Columbia Museum of Art in Columbia, South Carolina.<sup>66</sup> The 1949 and post-1961 transfers can be easily verified, but can we know that the Genoa collector actually owned the work if there is a 330-year gap in the provenance?

Complicating the search even more, the author went to the Columbia Museum's website, which repeats the provenance from the *catalogue raisonné*. But, how could the work still be in Columbia when the author knew from a newspaper article that it is at LACMA?<sup>67</sup> Further down in the Columbia Museum website, it is revealed that Strozzi painted at least three representations of St. Catherine. A trip to LACMA's website revealed that

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CON MAN AND A FORGER RE-WROTE THE HISTORY OF MODERN ART 73–79, 83–84, 95–97, 105–113, 115–119, 199–207 (2010) (discussing how a purveyor of forged art fabricated a provenance by using fake catalogues for exhibitions and by smuggling works into major British art libraries).

65. As a practical matter, a purchaser of artwork wants to avoid financial loss. One can argue that all that is necessary to avoid financial loss is assurance that the work has not been stolen within the statute of limitations. One of the longer statutes of limitations provides for a period of six years. See CAL. CIV. PROC. CODE § 338(c)(3)(A) (West 2016). It should be enough to establish the provenance of the work during the last six years. That would be comforting, but it is insufficient. There are reasons for which the statute of limitations will be tolled. For example, the statute of limitations does not run while the work is outside the jurisdiction or while the work is fraudulently concealed. See Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 79 (1995). The statute of limitations does not begin to run until the cause of action accrues which, as noted below, may be as late as when the owner demands the return of the work and that demand is refused. See *id.* at 74–75. Some buyers are not only concerned about possible financial loss. As a matter of their personal ethics, such buyers may not wish to buy stolen art under any circumstances. The theory might be that by purchasing stolen art, they are creating a market that may encourage the theft of more art.

66. See Luisa Mortary, BERNARDO STROZZI 100 (1995).

67. See Christopher Knight, *Recovered Nazi-Looted Painting on View at LACMA*, L.A. TIMES (Nov. 26, 2013), <http://articles.latimes.com/2013/nov/26/entertainment/la-et-cm-nazi-art-lacma-20131126>.

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St. Catherine was at LACMA, but told nothing about the LACMA St. Catherine's provenance.<sup>68</sup>

Re-examining the Strozzi *catalogue raisonné*, the author discovered a listing of no fewer than eighteen other paintings of this saint, including three that the author of the *catalogue raisonné* finds are not likely attributable to Strozzi.<sup>69</sup> Some can easily be eliminated from consideration as the work we would like to purchase by using the black-and-white photos in the *catalogue raisonné*, but that still leaves about a dozen similar representations, most of which have little or no provenance. Would you buy the Columbia St. Catherine if it were for sale? Would you buy the LACMA St. Catherine if it were for sale?

"The degree of accuracy and completeness of the provenance varies dramatically from text to text, depending upon the interest and skill of the author. Generally, however, the author will have been in contact with dealers and collectors and will be up-to-date on the movement and location of the paintings."<sup>70</sup> What the author must mean is that of the published provenances, the *catalogue raisonné* is likely to be the most accurate and up-to-date—at least on the date of its publication. A *catalogue raisonné* for an artist is normally not published more than once a generation. It may become dated.

ii. Auction Catalogs

The provenance set forth in auction catalogs, if you can find your work listed in one, is equally summary. Here is the provenance for Egon Schiele's *Danaë* (1909):

Herr Kohn,<sup>71</sup> Vienna (probably until 1928)  
Rob Verlag, Vienna (acquired by 1930)  
Siegfried & Gesche Poppe, Hamburg (acquired by 1961)  
Dr Rudolf Leopold, Vienna  
Achim Moeller Fine Arts, New York  
Private Collector (acquired from the above in the early 1980s)  
[Seller] Acquired from the above in 2007  
The item was withdrawn from the sale at the last minute.<sup>72</sup>

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68. See *Saint Catherine of Alexandria*, LACMA, <https://collections.lacma.org/node/2111858> (last accessed Feb. 12, 2018).

69. Mortary, *supra* note 66, at 105, 106, 115, 121, 122, 126, 128, 131, 134, 137, 149, 157, 176, 179, 193-94, 206, 208, 215 (1995). Typically, *catalogues raisonnés* separate those catalogues into three sections: works that the author believes were produced by the artist, works that the author believes were not produced by the artist, and works about which the author is undecided. Within those categories, most *catalogues raisonnés* are chronological; Mortari's is organized by last known place of the work.

70. Yeide et al, *supra* note 58, at 22.

71. Given how common the name "Kohn" must have been in Vienna at the time, one wonders about the utility of this listing.

72. *Sotheby's Impressionist & Modern Art Evening Sale, New York, May 16, 2017*, SOUTHEY'S, <http://www.sothebys.com/en/auctions/2017/impressionist-modern-art-evening-sale-n09710>

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Or the provenance for Max Pechstein's *Still Life* (1919), from the same sale:<sup>73</sup>

Galerie Gurlitt, Berlin (until 1923)

Dr. Karl Lilienfeld, Leipzig, Berlin & New York (acquired by 1932 and until the 1950s or 1960s)

(possibly) Weintraub Gallery, New York

Emile E. Wolf, New York (acquired in the 1950s or 1960s)

Each of these provenances raises red flags because each passed through the hands of dealers who handled Holocaust-stolen art. It is only a red flag, rather than a condemnation. Each dealer also has a history as an independent art dealer handling perfectly innocent sales transactions, both before 1933 and after 1945. Leopold and the Leopold Gallery were implicated in a notable New York case, again involving a Schiele.<sup>74</sup> Hildebrand Gurlitt was one of Hitler's major art dealers,<sup>75</sup> so anything that passed through his hands is a warning for the provenance researcher. Because Hitler did not take power until 1933, the provenance might be satisfactory if you can verify the 1923 sale date. But, do we know who Lilienfeld was? If you were a potential purchaser, could you be sure that neither of these works had been stolen during the Holocaust?

These questions are relevant assuming that you can find an auction catalog for a sale in which your work was sold. The first thing to know is

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.html (last accessed Jan. 27, 2018) ("Danaë" was this sale's Lot Number 27; a visit to this link shows that Lot Number 27 had been pulled). The high and low estimates were thirty to forty million dollars. Nate Freeman, *Sotheby's Totals \$173.8 M. at Sleepy Imp-Mod Sale, With \$21.2 M. Malevich, Without \$30 M. Schiele*, ART NEWS (May 16, 2017, 11:09 PM), <http://www.artnews.com/2017/05/16/sothebys-totals-173-8-m-at-sleepy-imp-mod-sale-with-21-2-m-malevich-out-front-and-without-a-30-m-schiele/>.

73. *Impressionist & Modern Art Evening Sale, #21, Still Life by Max Pechstein*, SOUTHEY'S (May 16, 2017, 7:00 PM EDT), <http://www.sothebys.com/en/auctions/ecatalogue/2017/impressionist-modern-art-evening-sale-n09710/lot.21.html>.

74. *United States v. Portrait of Wally, A Painting by Egon Schiele*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002), *summary judgment denied* 2009 U.S. Dist. LEXIS 91464. The parties settled. The Leopold Foundation paid the Bondi heirs U.S. \$19 million. The U.S. withdrew its action. The Leopold Museum kept the work, and will permanently display signage with the work detailing the painting's Nazi-looted history, and stating that the New York court found that it had been the property of Lea Bondi Jaray from whom it was stolen by Friedrich Welz, a member of the Nazi party. Dr. Leopold proposed that the Leopold Museum offer the Bondi heirs U.S. \$2 million, but the Austrian government refused to authorize that offer. The Leopold's legal bills exceeded \$4 million, and the case never went to trial. Martha Lufkin, *Portrait of Wally Case Settled for \$19M.*, THE ART NEWSPAPER (Jul. 20, 2010), <http://www.theartnewspaper.com/articles/%3Ci-Portrait-of-Wally-i-case-settled-for-19m/21273>.

75. Hildebrand Gurlitt (1895-1956) was an art historian and art dealer who, despite being one quarter Jewish, was "one of four dealers to work for the Nazi regime" and was a collector for the museum Hitler planned to open in Linz. Ruben Kalus, *Hitler's Art Dealer: Why a Jewish Avant-Gardist Worked for the Nazis*, DEUTSCHE WELLE (Mar. 15, 2016), <http://www.dw.com/en/hitlers-art-dealer-why-a-jewish-avant-gardist-worked-for-the-nazis/a-19118028>. See also SUSAN RONALD, *HITLER'S ART THIEF* (2015); CATHERINE HICKLEY, *THE MUNICH ART HOARD* (2015).

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that the fancy auction catalog is an artifact of the twentieth century and is more likely to appear with what was then considered high-end art. Even with good catalogs, sales of particular works are hard to find. Many catalogs are not indexed. Catalogs that are indexed tend to be indexed neither by artist nor by name of the work but rather by the collector or by the date or location of the sale.<sup>76</sup>

iii. Do-It-Yourself Provenance

Even where a provenance is perfect for your purposes, the “bible” on the subject demands that we verify each step. “Published provenance information must be critically evaluated and not blindly accepted, as inaccurate information may have been repeated from one secondary resource to the next without independent corroboration. Thus, it is vital that every fact be confirmed and its source documented.”<sup>77</sup>

If pre-fabricated provenances are less than conclusive in assuring a prospective purchaser of art that she is acquiring title to the work, she might consider a “do-it-yourself” provenance. This is a custom-made provenance. It is put together from all extant records. What sort of records might there be? Begin with the artist. Some artists kept careful records of their production and disposition, while others did not. One might ask where an artist’s records are now. The answer is that those records, if they survived, are probably in some archive. But, what archive? It would probably be an archive near where the artist lived. It might be an archive where the artist received university training. It might be at none of the above.<sup>78</sup>

Few archives have indices to their contents online. You may need to actually go to an archive to discover if they have anything of interest. If you are looking for records of dealers, some archives, such as the Getty Research Institute, specialize in collecting the records of dealers.<sup>79</sup> For some artists, we know who their dealers were. That does not mean that the same dealer will handle all initial sales by the artist. It most certainly does not mean that the same dealer who originally sold the piece as the artist’s agent will handle a resale by the first collector to buy the work. Collectors have their own dealer relationships.

Another locational problem is that most archives are organized on the basis of the person or agency that created the record. If you know the name

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76. See also YEIDE ET AL., *supra* note 57, at 243-45 (providing bibliographic information about auction sales).

77. *Id.* at 10.

78. Archives may also be found in private collections. For example, a collection of approximately 4,000 items related to Edward Hopper (1882-1967) was held privately by the Sanborn family. In 2017, the Arthayer R. Sanborn Hopper Collection Trust donated the collection of archival materials to the Whitney Museum of American Art, which has the world’s largest collection of Hopper works and gave the artist his first solo exhibition in 1920. See *Major Gift of Hopper Archival Materials Received by the Whitney*, ART DAILY, <http://artdaily.com/news/97834/Major-gift-of-Hopper-archival-materials-received-by-the-Whitney#.WX7AlaKQxjU> (last accessed Feb. 11, 2018).

79. See YEIDE, *supra* note 57, at 214-42 (listing dealer archives and locations).

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of the artist or dealer who created the record, that is fine. If you want to know whether art was stolen during the Holocaust and whether it was restituted after the war, those records may be scattered over different government agencies of different governments. It is fortunate that many records of the German government and its affiliates were taken by the Allies and can now be found at the National Archives and Records Administration (NARA) in the Washington, D.C. area.<sup>80</sup>

Once you locate the right archive and the right record originator, you are then faced with the problem that archives generally store materials in boxes. There is usually no index to the contents of any box other than a general description of the kind of records the box contains. That means many tedious hours of sorting through irrelevant papers trying to find the one that mentions your artwork.

Also, not everything ends up in an archive. Heirs sometimes destroy records that seem of no further use to them. Or, they move and take along with them whatever was in the attic, to be examined at a later time. The records of a small German dealer might be found in a dusty box in the Iowa home to which his heirs moved in the 1960s.<sup>81</sup>

Then, there is the linguistic problem. Take the case of a French Impressionist painting that you know is now in the hands of a German collector who wishes to sell it. You suspect that it initially went from the hands of the artist to the hands of a French dealer, and at some point in its life, it went from a French dealer to a German dealer. The records of the artist and any French dealers will surely be in French; the records of German dealers will be in German. So, your search for provenance will require reading ability in French and German as well as some knowledge of how the art world operates and how archives work. For those buyers of expensive art who lack the requisite archival research skills, it is probably more efficient to hire trained art historians than to do the research.

Of course, even when there is a published provenance, one should always add do-it-yourself activity to provide extra assurance of its accuracy. This option may require less cost than starting from scratch. In addition to the matter of cost, there is the matter of time. Unless the prospective purchaser pays for an option, she is not the only potential buyer for the work she is considering purchasing. If the provenance research will require two months and \$50,000, including travel expenses for the researcher, she is likely to find that the work has already been sold before the provenance research has been

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80. For a list of Holocaust-related records held at NARA, see YEIDE, *supra* note 57, at 55-104. Some of the most important U.S. groups that trace provenance include the Office of the Military Governor (OMGUS), the Office of Strategic Services (OSS), the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (Roberts Commission), and the Department of State. See *id.* at 55-56. German records held at NARA include Nazi shipping records and inventories of confiscated collections. See *id.* at 64.

81. Email from Nancy Karrels, author of *PROVENANCE: A FORENSIC HISTORY OF ART* (Jul. 20, 2017) (on file with author).

completed. At the outset, it is impossible to state how long such research will take or how costly it will be.<sup>82</sup>

Justice Holmes reminded us that “[C]ertainty generally is illusion, and repose is not the destiny of man.”<sup>83</sup> One cannot expect provenance to be as certain as a real estate title search. “. . . [A] great deal of provenance research is, even for professionals, largely inconclusive because of incomplete sources or imperfect access to information.”<sup>84</sup> The question for the purchaser should not be whether the provenance is perfect, but whether it is good enough to assure a reasonable person that he will receive good title to the artwork. That will depend on the individual’s taste for risk, but courts’ incorporation of provenance in determining diligence and other legal matters makes the decision of whether to buy when the provenance is inconclusive more than an individual’s taste for risk.<sup>85</sup>

Sometimes the provenance is perfect, but the art is not. Mrs. Wallis, embarrassed financially, borrowed money on the security of the paintings hanging in the home she shared with her husband, a noted movie director.<sup>86</sup> She did not want her husband to learn that she was pledging the paintings to borrow money.<sup>87</sup> She hired an artist to make copies of the paintings to hang on the walls, while the originals went into the vaults of the lenders.<sup>88</sup> A purchaser of the copy from Mrs. Wallis would find that she had a perfect provenance, but he was buying a copy.

From the above, the author concludes that it is impractical for a prospective purchaser to obtain a reassuring provenance indicating that he will receive good title to the work. If the prospective purchaser is only interested in a Holocaust provenance, that will be easier to establish than a complete provenance, but it is still impractical in terms of time or cost.

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82. Experienced provenance researchers working for museum clients normally charge seventy-five to one hundred dollars per hour plus expenses. Law firms involved in litigation will often pay considerably more. Email from Nancy Karrels, author of *PROVENANCE: A FORENSIC HISTORY OF ART* (Jul. 24, 2017) (on file with author). In the case of artworks recovered from the homes of Cornelius Gurlitt, the German government undertook to establish the provenance of over 1,200 works over a two-year period and budgeted the equivalent of \$2 million, hiring a dozen accomplished researchers with experience researching in Germany, France, and the United States. They identified 507 works that could not have been looted during the Holocaust. Five works have been identified as looted; more than 500 works require further work to determine their provenance. Melissa Eddy, *Few Answers on True Owners of Art Found in Gurlitt Trove*, N.Y. TIMES (Jan. 14, 2016), <https://www.nytimes.com/2016/01/15/world/europe/gurlitt-art-collection-germany.html>.

83. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

84. Email from Nancy Karrels, author of *PROVENANCE: A FORENSIC HISTORY OF ART* (Jul. 20, 2017) (on file with author).

85. For three good examples of provenance problems, two of which are unresolved and the third in which a woman had four different names, see NANCY KARRELS, *PROVENANCE: A FORENSIC HISTORY OF ART* (2017).

86. See *Wildenstein & Co. v. Wallis*, 756 F. Supp. 158 (S.D.N.Y. 1991).

87. See *id.*

88. See *id.*

b. Registries of Stolen Art

Taking a page from the law of property, there should be a registry naming the current owner of every artwork that potential purchasers can consult before buying art. Each United States jurisdiction has such a registry for real property located within its jurisdiction.<sup>89</sup> Each state likewise has a registry for security interests in personal property.<sup>90</sup> If such a registry existed for art, all a potential purchaser need do is consult the registry to determine if they are buying from the true owner. If the true owner is unregistered, property law generally protects a good faith purchaser.<sup>91</sup>

Such art registries do not exist for many reasons. Real property cannot move, whereas art is portable. The appropriate registry is the one maintained by the governmental unit where the realty is located. Furthermore, while agreed-upon descriptors make the identification of the real estate certain, the physical descriptors for art such as medium, base, size, and a description of the work, are nowhere near precise enough for a registry. Additionally, many art owners are unwilling to register their art because of privacy concerns, such as fear of theft, fear of the tax collector, or unwillingness to be pestered.<sup>92</sup>

The law has not established incentives for registry. It is unclear that any government would be equipped to handle the registry of all significant art unless it could take advantage of economies of scale. The only perceived benefit of registration is in case of theft, and no one believes that an art theft will happen to them—until it does.

However, art theft registries do exist. Most theft registries are maintained by “art squads” established by law enforcement agencies such as the United States Federal Bureau of Investigation, London’s Metropolitan Police Service, The International Criminal Police Organization (INTERPOL), or the Carabinieri.<sup>93</sup> They cannot be searched by the public. The main art theft registry, where a member of the public can order a search, is the Art Loss Register (ALR). It claims to be the registry with the largest number of

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89. RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* 1045 (abr. ed., Matthew Bender 1968).

90. U.C.C. § 9-501 (AM. LAW INST. & UNIF. LAW COMM’N 2016).

91. There are four types of real property registries in the United States. In a notice jurisdiction, a bona fide purchaser is protected against a true owner whose ownership is not detectable from the record; in a race-notice jurisdiction, a bona fide purchaser is protected against a true owner whose ownership is not detectable from the record if the bona fide purchaser records first; in a race jurisdiction, a person who records his deed first is protected; and a period-of-grace jurisdiction operates like a notice jurisdiction once the period of grace for recording has expired. See POWELL & ROHAN, *supra* note 89, at ¶¶ 913-18, at 1047-58.

92. See Judith L. Pearson, *Establishing Clear Title to Works of Art*, WEALTHMANAGEMENT.COM (Mar. 25, 2015), <http://www.wealthmanagement.com/art-auctions-antiques-report/establishing-clear-title-works-art>.

93. See Noah Charney, M.A. et al., *Protecting Cultural Heritage from Art Theft*, FBI: LAW ENF’T BULLETIN (Mar. 1, 2012), <https://leb.fbi.gov/articles/featured-articles/protecting-cultural-heritage-from-art-theft-international-challenge-local-opportunity>.

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items recorded, but that claim is not verified.<sup>94</sup> ALR is run as a private English company that is owned by individuals, major auction houses, and insurance companies. In 2012, the company made a \$1.25 million profit, ‘mostly in fees for database searches, and much of the rest in recovery fees.’<sup>95</sup> While ALR encourages people to register their art and antiques, one suspects that there are few such registrations. What is mostly registered is art that has been stolen. The fee to register a work is small.<sup>96</sup> Some major auction houses subscribe to the ALR’s catalogue search service “to assist in their due diligence process.”<sup>97</sup>

Likewise, the fee to search ALR’s database for an item is small, though larger than the registration fee.<sup>98</sup> ALR will also help the owner recover a stolen work on a contingent fee basis for up to twenty percent of the value of the work when recovered.<sup>99</sup> Private individuals must request a search of ALR’s database; the registry is not available to the public.<sup>100</sup> Requested searches are carried out by ALR’s “trained art experts.”<sup>101</sup> Whether ALR’s staff will honestly report the results of searches is unknown. There are unverified rumors that ALR has occasionally falsely reported an item not

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94. In 2013, the Art Loss Register claimed to list 350,000 stolen items. By contrast, Interpol claimed it listed 40,000; Scotland Yard claimed 57,500; the FBI claimed 8,000; the Carabinieri in 2014 claimed 5.7 million. Tracking Stolen Art, For Profit, and Blurring a Few Lines, N.Y. TIMES 9/20/2013, [www.artdaily.org](http://www.artdaily.org) 4/4/2014. The author finds those figures doubtful. One can register stolen art with a police organization for free, while registering it with the Art Loss Register involves a small cost. In 2017, the Art Loss Register claims 500,000 items, <http://www.artloss.com/services/loss-registration>, last accessed 20 June 2017.

95. See Kate Taylor & Lorne Manly, *Tracking Stolen Art, for Profit, and Blurring a Few Lines*, N.Y. TIMES (Sept. 20, 2013), available at <http://www.nytimes.com/2013/09/21/arts/design/tracking-stolen-art-for-profit-and-blurring-a-few-lines.html> (stating that the Art Loss Register reported having “more than 350,000 stolen, looted or missing works” in its database); see also *Loss Registration*, THE ART LOSS REGISTER, <http://www.artloss.com/services/loss-registration> (last accessed Feb. 13, 2018) (stating that the Art Loss Register’s database currently has 500,000 items). But see Christa Roodt & Bernadine Benson, *Databases for Stolen Art: Progress, Prospects and Limitations*, 52 INST. FOR SEC. STUDIES S. AFR. CRIME Q. 5, 9 (2015), available at <https://journals.assaf.org.za/sacq/article/view/26> (stating that Carabinieri, Italy’s art crime unit, manages the “largest databank on stolen art in the world” with one database “carr[ying] details on some 5.7 million objects”). The Art Loss Register’s figures are doubtful because one can register stolen art with a police organization for free, while registering it with the Art Loss Register involves a small cost. See *Loss Registration*, *supra* note 95 (stating the rates for loss registrations).

96. See *Loss Registration*, *supra* note 95 (cost of loss registration is fifteen dollars).

97. *Current Subscribers*, THE ART LOSS REGISTER, <http://www.artloss.com/searching/auction-houses> (last accessed Feb. 13, 2018).

98. See *Searching*, THE ART LOSS REGISTER, <http://www.artloss.com/services/searching> (last accessed Feb. 13, 2018) (cost for subscription for twenty-five searches is \$800 and cost of single search is ninety-five dollars).

99. See *Terms and Conditions*, THE ART LOSS REGISTER, <http://www.artloss.com/content/terms-and-conditions-of-registration> (last accessed Feb. 14, 2018) (stating under Section 5.1 that the “Recovery Fee” is twenty percent of the “ultimate net benefit to the client”).

100. See *Searching*, *supra* note 98.

101. *Id.*

stolen only to notify the police about the potential buyer who is then left with the problems, expenses, and time-consuming matter of dealing with the recovery and the potential loss of his purchase price.<sup>102</sup> Sometimes, items that are cleared by ALR are later the objects of restitution claims.<sup>103</sup>

In 2016, Art Recovery International (ARI), another major stolen art registry, announced the launch of Artive, a non-profit organization to manage a digital art registry database.<sup>104</sup> Artive was created to “function as an expansion of Artclaim, ARI’s pre-existing database project.”<sup>105</sup> Artive’s website proclaims that registration is free.<sup>106</sup> Artive’s online database is public and individuals may submit searches after signing up for a free online account.<sup>107</sup> The organization’s database is funded by “independent, philanthropic capital,” and Artive does not appear to charge any fees for searches.<sup>108</sup>

Because not all stolen items are registered, searching art registries does not provide a guarantee that the prospective buyer will acquire good title.

### c. Implied and Express Warranties

A purchaser can protect himself from financial loss by obtaining a warranty from the seller. An implied warranty, unless validly disclaimed, exists automatically in the sale of every item of personal property. The seller impliedly represents that he has the right to convey title to the property.<sup>109</sup> But, that assurance can be illusory protection for a purchaser. The statute of limitations for recovering under sales law is usually four years from the date of the transfer of title.<sup>110</sup> Many purchasers do not discover that their seller

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102. See Eileen Kinsella, *The Art Loss Register is Entangled in Three Major International Art Disputes*, ARTNET NEWS (June 5, 2015), <https://news.artnet.com/market/art-loss-register-embroiled-least-three-international-art-disputes-305134> (discussing the story of a collector, “who had a valuable Cezanne painting stolen in 1978 and recovered more than two decades later, was forced to sell it in order to pay ALR’s \$2.6 million fee, which was based on the fair market value of the painting”).

103. Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment and In Support of Defendants’ Cross-Motion for Summary Judgment, at 10–11, *Reif v. Nagy*, 52 N.Y.S.3d 100 (N.Y. App. Div. 2017).

104. See Caroline Elbaor, *Art Recovery International Launches Global Database to Protect Cultural Heritage*, ARTNET NEWS (Nov. 16, 2016), <https://news.artnet.com/art-world/art-recovery-international-artive-non-profit-cultural-heritage-749840>.

105. See ARTIVE, <https://artive.org/> (last accessed Feb. 15, 2018).

106. See *Artive Account Registration*, ARTIVE, <https://db.artive.org/Account/Register> (last accessed Feb. 15, 2018).

107. See *id.*

108. See ARTIVE, *supra* note 105.

109. See U.C.C. § 2-312(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977); *but see* J. P. Ludington, *Construction and Effect of UCC Art. 2 – Dealing with Sales*, 17 A.L.R.3d 1010, \*22. Convention on Contracts for the International Sale of Goods art. 41, Apr. 11, 1980, S. Treaty Doc. No. 98-9, 1489 U.N.T.S. 3 (governing international sales between merchants).

110. U.C.C. § 2-725; Convention on the Limitation Period in the International Sale of Goods art. 8-11, June 14, 1974, 1511 U.N.T.S. 3, [http://www.uncitral.org/pdf/english/texts/sales/limit/limit\\_conv\\_E\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/sales/limit/limit_conv_E_Ebook.pdf) (as of June 1, 2017, thirty nations had placed this Convention in

did not own the property until the purchaser tries to sell it, which is often more than four years after she purchased it.<sup>111</sup> In fact, I have found no case in which a purchaser of art that was allegedly stolen during the Holocaust discovered that possibility within four years of purchase.<sup>112</sup>

An additional problem, not present with most personal property, is that the market for art fluctuates considerably. Recent fluctuations have largely been upward.<sup>113</sup> Receiving the return of your purchase price from your seller is not usually the same dollar value as receiving the current fair market

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force, including the United States, which ratified it in 1994). There are ways in which the statute can be extended. For example, if the seller made a promise conditional on the occurrence of a future event, such as “if you are ever deprived of possession, I will pay you the fair market value of the work on the date you lose possession,” the statute of limitations would not begin to run until the purchaser is deprived of possession. Incorporation of such a clause in the contract of sale might not secure the seller’s assent. Even when the seller agrees, the utility of the clause depends both on the seller continuing to have assets that can satisfy the promise, *e.g.* *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 291 (7th Cir. 1990) (where purchaser bought from a con man who might also have been the thief; had someone bought from Goldberg, the promise would have been worthless because of the Goldberg bankruptcy), and in the case of an international sale, the vicissitudes of suing in a foreign country if that is the only place where jurisdiction to adjudicate can be secured over the seller. For an example of such a case, but no indication of whether the buyer was able to collect on it, *see* *United States v. An Antique Platter of Gold*, 184 F.3d 131(2d Cir. 1999). *See also* *Balog v. Center Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556 (D. Haw. 1990) (where there was no clause making the promise a future promise, but the court found several ways under the facts to extend the statute of limitations).

111. *See, e.g.*, *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008) (forty-eight years); *Greek Orthodox Patriarchate v. Christie’s, Inc.*, 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y.) (at least sixty-eight years).

112. *See, e.g.*, *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup. Ct. NY County 1966), *modified on other grounds* 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification reversed* 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) (7 years, 1955-1962); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir 1982) (20 years, 1946-1966); *Cassirer v. Thyssen-Bornemisza Museum*, 153 F.Supp.3d 1154 (C.D.Cal. 2015) (8 years 1993-2001); *Detroit Inst. of Arts v. Ullin*, 2007 U.S. Dist. LEXIS 28364, 2007 WL 1016996 (E.D.Mich) (more than 55 years, from at least 1959 to 2004); *Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802 (N.D. Ohio 2006) (75 years, 1939-2004); *von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) cert. den. 131 S.Ct. 1355 (2011), *complaint dismissed* 2012 U.S. Dist. LEXIS 39291 (46 years, 1971-2007); *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007), *cert. denied* 128 S. Ct. 491 (2007) (27 years, 1963-1990). *Grosz v. Museum of Modern Art*, 772 F.Supp.2d 473, 477, 480, 481 (S.D.N.Y. 2010) (51 and 58 years, 1953-2003 & 1946-2003); *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987) (25 years, 1957-1982); *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008) (66 years, 1937-2003); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (59 years, 1948-2007); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010) (probably 62 years, 1946-2008?); *Rosenberg v. Seattle Art Museum*, 124 F.Supp.2d 1207(W.D.Wash. 2000) (probably 44 years, 1954-1998?). In neither *Altmann* nor *Portrait of Wally* nor *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C.Cir. 2013) was the possessor a purchaser. In each case, the possessor was either the thief or someone related to the thief.

113. *See* Katya Kazakina, *Art Market Trends Poised to Captivate Investors Next Year*, BLOOMBERG (Dec. 23, 2016, 9:01 AM), <https://www.bloomberg.com/news/articles/2016-12-23/these-art-market-trends-are-poised-to-captivate-investors-in-17>.

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value of the work. It is unclear whether either the Uniform Commercial Code (UCC) or the United Nations Convention on Contracts for the Sale of International Goods (CISG) awards damages measured by the current fair market value of the work.<sup>114</sup>

An express warranty might cure this problem by providing a future promise and by specifying damages equal to fair market value.<sup>115</sup> Express warranties require agreement of both parties, which may not be forthcoming. Express and implied warranties are vulnerable to the bankruptcy of the seller. In the case of a foreign seller, it is likely that the case will need to be litigated in a court outside the United States in order to get jurisdiction over the seller and to be litigated under non-United States choice of law principles.<sup>116</sup> There is also the problem that enforcing your rights under either an express or implied warranty will require that you incur legal fees that may not be reimbursable—even if you win.<sup>117</sup>

Provisions assuring title are a second-best solution. Most purchasers want to know that they are receiving title. Also, the commercial system works better—but is costlier—if people do not buy unless they are certain that they are receiving title.

d. Insurance

Generally, insurance will not cover the loss of artwork because someone else has superior title.<sup>118</sup> The loss is more than just the fair market value of

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114. The New York court awarded present fair market value in a replevin action, but it appears that its reasoning was to induce the possessor to give up the art object itself, which he did. *See Menzel*, 267 N.Y.S.2d at 303.

115. *But see Antique Platter of Gold*, 184 F.3d at 133 (where parties agreed to “Terms of Sale” in which seller promised to reimburse buyer for any loss due to government confiscation of impounding, but there was no specification of how loss would be measured).

116. The jurisdiction problem can be solved by inserting a choice of forum clause in an express warranty contract; the choice-of-law problem by inserting a clause choosing the law to be applied. Both clauses need to be drafted carefully, and the express warranty needs to use the terms in use in the legal system whose law is chosen. For a case where the exclusivity of the forum choice was lost due to imprecise drafting, *see AAP Implantate AG v. MI Glob. Grp. USA LLC*, 2017 U.S. Dist. LEXIS 116167, \*9 (S.D.Fla.) (ambiguity of whether the choice of forum was exclusive construed strictly against party who drafted the clause).

117. One may always insert a provision for legal fees in a contract providing an express warranty if the other party agrees. In some states, that provision is automatically reciprocal. *See, e.g., CAL. CIV. CODE* § 1717 (Deering 2016).

118. One can argue that this is theft, but it is not theft of the artwork, even though the net result is the same: you no longer have the artwork, or the purchase price. Policies have specific perils that they cover and specific exclusions. A sample homeowner’s policy is found at KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 195-198 (6th ed. 2015). One exclusion is the seizure of property “by order of any governmental or public authority,” which would presumably include the courts. *Id.* at 186. Many insurance policies will have a clause requiring that the insured have “unconditional and sole ownership” as a prerequisite to coverage. Such a clause is violated if someone else has paramount title. 6A *CROUCH ON INSURANCE* §91:51 (3d ed. 2012).



the work; there are usually legal fees, investigative costs, and other expenses of determining whether a claim to your artwork is valid.<sup>119</sup>

It is now possible to buy ownership insurance from at least one company, but it is not cheap.<sup>120</sup> The one-time premium varies from 1.75% to 6.75% of the amount insured if the company is willing to insure you.<sup>121</sup> The face amount does not change with inflation.<sup>122</sup>

### 3. *Information Problems of the Original Owner's Representatives*

In order to bring suit to recover the property, the original owner's representative must discover either the identity of the current possessor or the location of the work. In most cases, discovery of one will be discovery of the other. If the identity of the possessor is discovered, the original owner's representative may sue based on *in personam* jurisdiction; if only the location of the artwork is discovered, she may sue based on *in rem* jurisdiction.<sup>123</sup> In other words, the use of provenance for the original owner's heirs of a work stolen in the Holocaust will be different from that of a potential purchaser. The potential purchaser knows who currently possesses the work—or who the current possessor's agent is. The potential purchaser is concerned with its history. The original owner's heirs, by contrast, are initially unconcerned with the work's history after it was stolen from their ancestor; their quest is for its current whereabouts and custodian. Discovering either is usually not easy or cheap.<sup>124</sup>

But, it may be both easy and cheap if the current possessor is a museum that maintains a website with a full inventory of its possessions that is indexed. Most museums do not list such an inventory online. An exception is the San Diego Museum of Art,<sup>125</sup> though getting to the place to start the search is not obvious.

It may be convenient to divide a museum's possessions into three categories. When an item arrives at the museum, the museum must decide whether to add that item to its collection. That decision is called *accession*. If

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119. See Kate Taylor, *Insurance for Art Collectors Covers Ownership Disputes*, N.Y. SUN (July 10, 2008), <https://www.nysun.com/arts/insurance-for-art-collectors-covers-ownership/81553/>.

120. See *id.* (citing the challenging process of searching for art title as one of the reasons services from ARIS, a company offering art title insurance, come at a high cost).

121. See *id.*

122. See *id.*

123. See Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1365–74 (2011). See generally Morris E. Cohn, *Jurisdiction in Actions in Rem and in Personam*, ST. LOUIS L. REV. 170 (1929).

124. In the case of the Max and Iris Stern Foundation, it required substantial work to identify the work of which Stern was deprived. This work involved using auction records, Mr. Stern's client cards—some of which were preserved, and substantial original research on the part of the Foundation's staff. The Foundation has now identified 400 works, about a quarter of which are in museum or municipal collections. Telephone conversation Interview with Clarence Epstein, Director, Max and Iris Stern Foundation (July 20, 2017).

125. See *Search the Collection*, SAN DIEGO MUSEUM OF ART, <http://collection.sdmart.org/kiosk/search.htm?sid=4957&x=57307> (last accessed Feb. 18, 2018).

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the museum decides to make the item an accession, the museum registrar or some other official will record the addition of the item to the collection. If the museum decides not to proceed to accession, its possession is noted in other records.

There are reasons to receive an item but not add it to the collection. It might not fit the museum's collection but might be salable after some years to produce funds that would permit the museum to buy something it wants.<sup>126</sup> Alternatively, accepting the item may be an accommodation to an art owner who is a trustee of the museum, a big donor of money or art, or someone who owns other work that the museum would like to add to its collection. Accepting the item would allow its donor to claim a charitable deduction for its fair market value on his income tax return.<sup>127</sup>

Most museums have only a fraction of the amount of display space that would be required to simultaneously show their entire collections.<sup>128</sup> One might make a distinction between works that are regularly displayed and works that are displayed only infrequently. It would be expected that the art placed first on a museum's website would be items regularly displayed. Items that are not part of the collection will not normally be placed online even if they are in the museum's possession.<sup>129</sup> If the work was listed on a museum website, it would be both easy and cheap to discover that the museum was in possession of the art. A quick search with your browser would tell you.<sup>130</sup>

Before effective websites were available, museums would post works that they thought had questionable Holocaust provenance to the Nazi-Era Provenance Internet Portal (NEPIP).<sup>131</sup> It currently lists almost 30,000

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126. See I.R.C. §§ 170(e)(1)(B), (e)(7)(D) (2017) (requiring that the property be retained by the museum for at least three years for use in its exempt function for the donor to receive a deduction for the full fair market value of the item). The addition of subparagraph (7) made this operation more difficult by requiring a certification by the museum of the planned use for the item that is consistent with the museum's educational purpose.

127. See *id.* at § 170(e).

128. The San Diego Museum of Art has over 18,000 works in its permanent collection. It probably does not regularly display ten percent of them. See *Browse Highlights*, SAN DIEGO MUSEUM OF ART, <http://collection.sdmart.org/> (last accessed Feb. 18, 2018). By contrast, the next-door Timken Museum of Art displays all of its collection that is not on loan or in conservation.

129. The San Diego Museum of Art claims that its entire 18,000 piece collection can be searched on its website. The search engine requires that the searcher provide the name of the artist or the work.

130. See Britta Lokting, *A Famous MoMA Painting Makes Its Way Home—80 Years Later*, FORWARD (Dec. 6, 2015), <https://forward.com/culture/325794/80-years-later-a-famous-art-work-makes-its-way-home/> (discussing the story of how the heirs of Max Fischer found Kirchner's "Sand Hills in Engadine" by scrolling through MoMA's Provenance Research Project).

131. Many European countries maintain comparable websites. For a list with links, see *Links*, COMMISSION FOR LOOTED ART, <http://www.lootedartcommission.com/NFVHQY50452> (last accessed July 19, 2017).

objects from 179 participating United States museums.<sup>132</sup> Thirty-two additional museums have certified that they have surveyed their entire collections and found no objects with questionable Holocaust provenance.<sup>133</sup> The database can be searched by artist name, nationality of artist, place or culture of object, object title, object type, or description, and it accommodates Boolean searches.<sup>134</sup> Some museums continue to post works with questionable Holocaust provenance to NEPIP as well as to their own websites.

If the work is not on a museum website or is in the possession of a private party, finding it or its owner would be much more difficult. In most cases, provenance would tell you nothing.<sup>135</sup> If from an auction catalog, it might tell you where the work had been most recently, though even that is doubtful given the insistence of most art owners on secrecy.<sup>136</sup> You would know the name of the auction house, but most auctioneers will refuse to name the seller or buyer unless that party has authorized release of his name. A New York court held that despite a statute that seems to point in the other direction, an auctioneer need not disclose the name of the seller as long as the auctioneer discloses that he is the seller's agent.<sup>137</sup> For the same reason, a *catalogue raisonné* provenance is unlikely to reveal the name of the current owner. A museum show label or catalog might reveal the name, but they more often designate the owner as a private collector.

In short, it is unlikely that the heir of an original owner would be able to discover the current location or possessor of the work unless it were listed on a museum website or on NEPIP's webpage. Beyond that, discovery would be largely serendipitous.

### C. ISSUES IN A HOLOCAUST ART RECOVERY CASE

A series of issues are typical in a suit to recover Holocaust-expropriated art in the United States. Not all issues appear in every case, and additional

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132. See *The Nazi-Era Provenance Internet Portal Project*, NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org> (last accessed Feb. 18, 2018).

133. See *Museums Holding No Relevant Objects*, NAZI-ERA PROVENANCE INTERNET PORTAL, [http://www.nepip.org/public/info/nocov.cfm?&menu\\_type=info](http://www.nepip.org/public/info/nocov.cfm?&menu_type=info) (last accessed Feb. 18, 2018).

134. See *Advanced Search*, NAZI-ERA PROVENANCE INTERNET PORTAL, [http://www.nepip.org/public/search/itemsearch.cfm?action=itmdtlsrch&menu\\_type=search](http://www.nepip.org/public/search/itemsearch.cfm?action=itmdtlsrch&menu_type=search) (last accessed Feb. 18, 2018).

135. For an exception where both the *catalogue raisonné* and the auction catalog identified the current possessor, see *Orkin v. Taylor*, 487 F.3d 734, 737 (9th Cir. 2007) (where owner was Elizabeth Taylor, an internationally-known entertainment figure). See *De Weerth v. Baldinger*, 836 F.2d 103, 105–06 (2d Cir. 1987) (where the work was stolen in 1945 and the *catalogue raisonné* was not published until 1974, at which point the original owner had enough information to bring suit to force the Wildenstein Gallery to disclose the name and address of the purchaser).

136. See *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987) (where the Wildenstein gallery refused to identify the purchaser of an artwork until ordered to do so by a court).

137. See *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 478–79 (2013).

issues may be litigated in any particular case. It appears that these cases can be extraordinarily complicated.

The first issue likely to be litigated—especially after the enactment of HEAR—is choice of law for determining which jurisdiction’s statute of limitations should apply.<sup>138</sup> There has been little litigation on that point. The one case on the question, *Cassirer v. Thyssen-Bornemisza Museum*,<sup>139</sup> is to be commended for the clarity, sophistication, and completeness of its choice of law analysis. Most cases assume that a single choice of law is appropriate for all the issues in a case. Scholars agree that the laws of different jurisdictions may be properly applied to different issues in the same case when different jurisdictions have closer connections to different issues. This is called *dépeçage*.<sup>140</sup> Generally, the statute of limitations applied is the statute of the forum state, either because it is procedural or as a result of the Second Restatement.<sup>141</sup>

The next issue is whether the statute of limitations has expired. That issue is explored with all the exceptions found in the jurisdiction whose law is selected.<sup>142</sup> If the statute of limitations has expired, the litigation is over. If the statute of limitations has not expired, there may be issues relating to the application of the doctrine of laches to bar the suit. It may be necessary to perform a choice of law analysis to determine which jurisdiction’s version of the doctrine of laches should apply.<sup>143</sup>

The doctrine of laches will bar a suit if the plaintiff or one of his ancestors knew about the cause of action and delayed bringing suit, and the defendant

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138. See Symposium, *International Legal Dimensions of Art and Cultural Property*, 38 VAND. J. TRANSNAT’L L. 921, 925–26 (2005), for a partial discussion of choice of law problems. Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT’L L. 927, 937 (2005); see Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177 (2005).

139. See generally *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F.Supp.3d 1154 (C.D. Cal. 2015), *rev’d and remanded on other grounds* 862 F.3d 951 (9th Cir. 2017).

140. See generally Christopher G. Stevenson, *Depeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303 (2003). See also *Schoeps v. Museum of Modern Art*, 594 F. Supp. 3d 461, 465 (S.D.N.Y. 2009) (where court held that German law would determine whether property was stolen, while New York law would determine whether laches applied and the legal effect of a sale to a good faith purchaser).

141. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 1977) (providing for application of forum law if the forum has a substantial interest in the maintenance of the claim and there are no exceptional circumstances that make such a result unreasonable). See also *McCarrell v. Hoffmann-La Roche, Inc.*, 227 N.J. 569, 599 (2017) (adopting the Second Restatement position).

142. Typically, the statute of limitations does not run while the cause of action is being fraudulently concealed or while the possessor of the property is not present in the jurisdiction. Plaintiff bears the burden of proving the tolling of the statute of limitations and the length of the tolling. See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220–22 (1950); see CAL. CODE CIV. PROC. § 351 (Deering 2012).

143. A federal court sitting in diversity is obligated to follow the choice of law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

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would suffer significant injury if the suit proceeded.<sup>144</sup> Significant injury might include expenditure of substantial sums in reliance on ownership, such as for conservation or restoration,<sup>145</sup> or the fact that an important witness has died in the interim.<sup>146</sup> Determining whether laches exists requires discovery to develop evidence about when the original owner's representative or his ancestor discovered the facts that he needed, what the detriment was, and when it occurred.

It is possible that there will be controversy about whether the claimant is the correct representative of the original owner. The author has never seen such an issue litigated but notes that there are two cases in which different people were advanced as the heirs of Fritz Grünbaum.<sup>147</sup> Contention is also possible with respect to which jurisdiction's law should be chosen to determine who the rightful heir might be, though that would require an unusual situation.<sup>148</sup>

There might also be controversy about whether the ancestor actually ever owned the art. This might involve a choice of law inquiry about which law should decide the requirements for obtaining title, depending on the facts of the case, as well as satisfaction of the substantive requirements of that law with adequate evidence.

In most cases, the most significant question is whether the artwork was stolen from the claimant's ancestor. Artwork, like other property, can be transferred by a number of means. No case has held that the owner abandoned his art during the Holocaust.<sup>149</sup> In some cases, it is unclear

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144. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991) (action not barred by the statute of limitations, but evidence should be taken on defendant's laches claim).

145. See, e.g., *Huntington Library Launches 2-Year Restoration of 'Blue Boy'*, U.S. News (Aug. 3, 2017, 5:12 PM), <https://www.usnews.com/news/best-states/california/articles/2017-08-03/huntington-library-launches-2-year-restoration-of-blue-boy>.

146. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011), *aff'd per curiam* 2012 U.S. App. LEXIS 21042 (where "perhaps the only person who could have elucidated" how defendant came to possess the artwork or whether defendant owned it at all had died).

147. The heirs of Fritz Grünbaum in 1997 were Kathryn and Rita Reif. See *People v. Museum of Modern Art*, 93 N.Y.2d 729, 733 (1999). Less than a decade later, Fritz's heirs were Milos Vavra and Leon Fischer. See *Bakalar v. Vavra*, 2008 U.S. Dist. LEXIS 66689, \*2 (S.D.N.Y. 2008). It is possible that the Reifs assigned their interests to Fischer and Vavra or that the Reifs died in the interim.

148. But, such a situation would perhaps not be so unusual for art collectors. Wealthy people who collect art often have more than one residence, so the location of a person's domicile at death might be in doubt. For a case where four states claimed that decedent died as their domiciliary, see *Texas v. Florida*, 306 U.S. 398, 401 (1939). See also *In re Dorrance's Estate*, 309 Pa. 151, 174 (1932) and *In re Estate of Dorrance*, 115 N.J. Eq. 268, 281 (1934) (each authorizing its own state to claim that Mr. Dorrance was domiciled in its state at the time of his death for purposes of imposing its inheritance tax).

149. See *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (Sup. Ct. NY County 1966), *modified on other grounds* 28 A.D.2d 516, 279 N.Y.S.2d 608 (1967), *modification reversed* 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969) (holding that leaving your art in your residence under duress does not constitute the sort of intent to abandon required by abandonment).

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whether the transfer of possession was a bailment or a gift, but the question was not litigated.<sup>150</sup> A person may also, on death, leave a piece of art to someone who is not the residuary legatee,<sup>151</sup> subject to the forced heirship laws of some jurisdictions.<sup>152</sup>

Whether property was stolen or sold is the most frequently litigated question relating to the original owner's disposal of their property. Some typical scenarios exist: property may be taken without compensation;<sup>153</sup> property may be sold, but the government prevents transmission of the proceeds to the owner;<sup>154</sup> the owner may be forced to sell his property at an extremely low price to a Nazi in the process of Aryanization;<sup>155</sup> or the owner may "exchange" the artwork for exit visas so that his family might leave the country. In all these cases, the decision maker is likely to find that the property was stolen. In other cases, the owner might have sold the property to raise money to buy an exit visa or to raise money because otherwise, the owner would be penniless.<sup>156</sup> In these cases, the decision maker is likely to find that the property was sold, not stolen. The key distinction is that property is stolen when it is physically taken from you or from your premises or when it is taken using duress applied by the person who receives the property, or someone with a family or institutional relationship to that person. General economic distress is not enough to re-characterize a sale as theft of property. In New York, the general rule is that once a person proves that he owned the property and that defendant possesses it and refuses to

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150. In a number of cases, artwork was sent to friends, relatives, or clients that might have been gifts, bailments, or consignments. See, e.g., *Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 31 (N.Y. App. Div. 2006); see also *Wertheimer v. Cirkor's Hayes Storage Warehouse*, 300 A.D.2d 117, 117-18 (N.Y. App. Div. 2002).

151. See, e.g., *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004) (where the court refused to honor Adele Bloch-Bauer's request that her husband leave the golden portrait to Austria because it was only a request, not a disposition, and because she did not own the painting at the time of her death).

152. See, e.g., CODE CIVIL [C. CIV.] [CIVIL CODE] arts. 913 to 914-1 (Fr.).

153. See, e.g., *Menzel*, 267 N.Y.S.2d at 807.

154. See, e.g., *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 (9th Cir. 2010) (plaintiff alleged that his ancestor was forced to sell her Pissarro for the equivalent of \$360, which would be deposited in a blocked account to which she would not have access).

155. See, e.g., *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, \*4 (S.D.N.Y. 2002).

156. For example, Richard Semmel, a Berlin underwear manufacturer, was warned by a friend in 1933 not to return from his Swiss vacation house. His German assets were confiscated. Deprived of his regular source of income, Semmel had only what was available in his vacation house. Running short of funds, he moved to Amsterdam and auctioned paintings there. See Dan Hinkel, *Lawsuit Settled over Renoir Painting Purportedly Lost in Nazi Persecution*, CHICAGO TRIBUNE (Dec. 6, 2011), [http://articles.chicagotribune.com/2011-12-06/news/ct-met-renoir-follow-20111206\\_1\\_renoir-painting-pierre-auguste-renoir-nazi-persecution](http://articles.chicagotribune.com/2011-12-06/news/ct-met-renoir-follow-20111206_1_renoir-painting-pierre-auguste-renoir-nazi-persecution); see also Catherine Hickley, *Heirs Outraged as Dutch Panel Rejects Nazi-Era Art Claim*, THE COLUMBIAN (May 7, 2013, 5:00 PM), <http://www.columbian.com/news/2013/may/07/heirs-outraged-as-dutch-panel-rejects-nazi-era-art/>.

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deliver it, the burden shifts to the current possessor to prove that the property was not stolen.<sup>157</sup>

In the typical Holocaust art recovery case, the thief has not retained the property taken. The art was usually transferred several times after it was taken.<sup>158</sup> There may have been transfers at auctions where members of the general public could bid and did so. Other transfers were sales to galleries and to private collectors for fair market value. Under United States law, these transfers are irrelevant. Numerous consecutive good faith purchasers may intervene and none will receive good title. In many European countries, with legal systems based on that of Rome, a transfer to a good faith purchaser will give the good faith purchaser good title.<sup>159</sup> In other civil law countries, the period required to obtain a prescriptive title may be shortened.<sup>160</sup> Thus, for each purported transfer of rights to the artwork, a preliminary question is what jurisdiction's laws will apply to determine the legal effect of that transfer.<sup>161</sup> That determination will be followed by arguments about how that law applies to the facts of the case.

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157. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y. 2d 311, 320 (N.Y. 1991) (cross-referencing the Appellate Division opinion, which is quite brief on this subject); see also *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153 (N.Y. App. Div. 1990).

158. In *Menzel v. List*, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966), *modified on other grounds* 28 A.D.2d 516 (N.Y. App. Div. 1967), *modification reversed* 24 N.Y.2d 91 (N.Y. 1969), we do not know how the Chagall got from Brussels to the Galerie Moderne in Paris. Galerie Moderne sold it to the Perls Gallery in New York, who resold it to List. In *Bakalar v. Vavra*, 819 F.Supp.2d 293 (S.D.N.Y. 2011), *aff'd per curiam* 2012 U.S. App. Lexis 21042, we do not know how the Schiele drawing got from Vienna to Mathilde Lukase in Brussels. She sold it to the Galerie Guntkunst in Bern, who re-sold it to the Gallery St. Etienne in New York, who re-sold it to Bakalar.

159. See, e.g., *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1376 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). Germany's provision is phrased a bit differently. The German Civil Code (BGB) § 937 provides that title to moveable property is acquired by prescription after ten years, but not if the person was not in good faith when he acquired the property or at any time during the succeeding ten years.

160. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 139-40 (2d Cir. 2010) (parenthetical). For an American example, see LA. CIV. CODE ANN. arts. 3489-91 (2017) (where the period for acquisitive prescription is three years for a good faith purchaser under color of title and ten years otherwise).

161. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6,222, 246 (AM. LAW INST. 1977). Courts generally do not engage in serious discussions of this choice of law question. It was not necessary in *Autocephalous Greek-Orthodox Church of Cyprus*, 717 F. Supp. 1374 because it was clear that the buyer was not acting in good faith to the extent required by Swiss law. In *Bakalar*, 619 F.3d 136, the court slid around the discussion by assuming that no Swiss person had an interest in the case, where the Swiss seller in fact would have been liable to the New York gallery for delivering nonconforming goods but for the possible expiration of the statute of limitations. A serious discussion was avoided in *Schoeps v. Museum of Modern Art*, 594 F.Supp.2d 461 (S.D.N.Y. 2009), by disregarding the interest of the Swiss seller because it was wholly owned by a German. A better analysis is found at *Cassier v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 962-64, 974-75 (9th Cir. 2017).

Another potential issue is whether the original owner has already been compensated for the loss. Different countries have established different schemes permitting persons whose property was taken during the Holocaust to file claims for compensation. Issues that might arise include whether the original owner filed a claim for compensation, whether the claim included the artwork in question, whether there was a final adjudication of the question, and whether there was any legal effect of the proceeding on title to the artwork. There is also the possibility that an exclusive repatriation system was established by treaty, thus, barring the claimant.<sup>162</sup> Current possessors will argue that failure of the original owner to file a claim is evidence that the original owner did not believe that the property was stolen. In short, both the legal and factual issues in the typical Holocaust art recovery case are complicated and contested. Resolving them is not quick, certain, or inexpensive.

### **III. Statutes of Limitations and Adverse Possession**

#### **A. INTERPLAY BETWEEN STATUTES OF LIMITATIONS AND ADVERSE POSSESSION**

Statutes of limitations and adverse possession attack the problem of stale claims. It seems unfair to permit a claimant to prosecute a claim after a long period of time when evidence has disappeared and memories have faded, so that disputing the claim is likely to be difficult.<sup>163</sup> In addition, statutes of limitation, prescription, and adverse possession respond to a psychological phenomenon known as the “endowment effect.” It has been observed that people will demand more to sell property that they own than they will pay to acquire the same property.<sup>164</sup> Attachment to property grows as the period of possession lengthens.

A good illustration of the evidentiary reasons for statutes of limitations is the landmark, but questionable, case of *O’Keeffe v. Snyder*.<sup>165</sup> The artist Georgia O’Keeffe alleged that three of her paintings were in Alfred Stieglitz’s gallery, An American Place, and that they mysteriously disappeared in 1946. The paintings turned up in Snyder’s possession in 1976. Snyder alleged that he purchased the paintings in good faith from a man who inherited them from a Dr. Frank, in whose New Hampshire apartment the paintings hung during World War II. There were two witnesses who could have testified about whether the paintings moved from An American Place to Dr. Frank’s New Hampshire apartment as a result of

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162. This argument did not succeed in *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1100-1101 (D.C.Cir. 2017).

163. 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, 302-06 (2013).

164. See Daniel Kahneman, *Thinking Fast and Slow* 282-298 (Farrar, Strauss, & Giroux, eds., 2011).

165. *O’Keeffe v. Snyder*, 83 N.J. 478, 416 A.2d 862 (1980).



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sale, gift, or theft, but Alfred Stieglitz died in 1946 and Dr. Frank died in 1968.<sup>166</sup> No paperwork survived them. The case settled, but had it gone to trial, there would have been no way to prove whether the paintings were stolen, sold, or gifted. The person with the burden of proof probably would have lost, but in any case, both parties would have lost considerable money in lawyers' fees.<sup>167</sup>

Most important today, the statute of limitations may permit a case to be disposed of without incurring significant legal expenses. That is because the fact determinations required for disposing of a case on statute of limitations grounds are relatively simple and can be determined from the pleadings and affidavits. Extensive and expensive discovery is not required.

Statutes of limitations are legislatively created. Though they are not constitutionally required, it is common for the legislature to create a limitations period when it creates a right. It is also common for the legislature to create a limitations period when the judiciary has discovered a right.

By contrast, adverse possession only applies when rights to property are in question. The courts reasoned that if a possessor's rights could not be challenged by someone claiming to be the owner because the statutory period had expired, it must be that the possessor is the title holder and has been the title holder since he went into possession.<sup>168</sup> This legal fiction immunized the possessor from actions for damages during his possession and

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166. The settlement was confidential. It was rumored that each party took one painting and the third was sold to pay the legal bills. See PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 456–57 (Caroline Academic Press ed., 3d ed. 2012).

167. It is hard to generalize about lawyers' fees from case to case, and the general public would not know about their size unless there were a case that resulted in the award of lawyer's fees, usually to a successful plaintiff. The fees awarded in *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 815 (9th Cir 2003) amounted to almost \$2 million for defendant, and presumably a similar sum was expended by plaintiff. This was a trademark and copyright case. It is difficult to know whether the fees in *O'Keeffe* would have been similar. *O'Keeffe v. Snyder*, 83 N.J. 478 (N.J. 1980).

168. See *Chapin v. Freeland*, 8 N.E. 128 (Mass. 1886) (where dissent's argument that the remedy was barred but title remained with the original owner was rejected). Adverse possession's origin is found in Norman times in England. After Domesday Book, there was no method of recording changes in the ownership of land. Land was transferred by going on the property and enacting a ceremony of transfer involving the physical transfer of a twig or a clod of dirt accompanied by promises. Sometimes a charter of feoffment, the ancestor of the deed, was signed to commemorate the ceremony, but it was the ceremony that effected the transfer. Even when there was a charter of feoffment, they were easily lost, and fires were a constant medieval hazard. Witnesses to the ceremony died. Soon there was no economical way to prove who owned the land, except that possession seemed to be the best evidence available. From the thirteenth through the sixteenth century, your rights to land could not be challenged if you could prove that you were seized—that is, in possession as an owner—since the occurrence of some event, usually the ascension to the throne of a king. See, e.g., Stat. of Westminster I, 3 Edw. I Ch. 39 (1275). Each of these designated events quickly became dated. The prototype for modern statutes of twenty-one years for real property was set by 21 Jac. I, Ch. 16 (1623).

enabled him to convey a good title.<sup>169</sup> The judicial gloss on statutes of limitations for realty was extended by analogy to personal property.<sup>170</sup>

There are, however, two significant differences between realty and personal property. For the recovery of realty, the statute of limitations is relatively long, most being around twenty years, and few being shorter than ten years.<sup>171</sup> Statutes of limitation to recover personal property are much shorter. They vary from two to six years, and a majority of jurisdictions have two to four year periods.<sup>172</sup> The shorter period is probably justified by the fact that realty is usually of significantly greater value than personalty. Its consequence is that it is much easier to lose personalty by adverse possession than it is to lose realty. The second difference is that realty is immovable, while personalty is not.

Adverse possession requires that the possessor be in possession of the property as a true owner would. This is normally expressed as possession that is open, notorious, continuous, and hostile, but open and notorious simply repeat each other. Possession of land is always open for anyone who comes to the land to see. The same is true of vehicles that are normally used in public places. It is not true for items of personalty that are normally used in private, such as art and antiques. For such property, there is significant dispute about whether adverse possession should apply,<sup>173</sup> but none dispute that a statute of limitations should apply to actions to recover the items. A comparable doctrine, called acquisitive prescription, exists in most European countries that base their legal systems on Roman law.<sup>174</sup>

A statute of limitations cutting off recovery without adverse possession is only half a remedy. If there is a statute of limitations for the recovery of property, it should always coincide with adverse possession. Leaving the possessor in possession but without title impedes commercial transactions in

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169. But, in the case of realty, it is not a marketable title. The “market” requires a paper title that is not subject to challenge. A titleholder by adverse possession who wants to convey a marketable title must win a quiet title action against the person who is the record titleholder. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 11.7 n. 1 (3d ed. 2000).

170. BROWN ON PERSONAL PROPERTY § 4.1 (WALTER B. RAUSCHENBUSH, ED., 3D ED. 1975); BARLOW BURKE, *PERSONAL PROPERTY IN A NUTSHELL* 344-348 (3d ed. 2003); that extension was made by statute in California. CAL. CIV. CODE § 1007 (DEERING 2017).

171. CAL. CIV. PROC. CODE § 325(b) (West 2016).

172. The statement is made at Jodi Patt, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1215 (2002), but note sixty-seven thereof only cites fourteen jurisdictions; Patti Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 121-122 n. 10 (1988) says that thirty percent of jurisdictions require three years, and another thirty percent of jurisdictions require six years.

173. Patti Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 (1988) (adverse possession should be limited to good faith purchasers); Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L. J. 2437 (1994) (placing risk of loss on buyers requires them to internalize costs of searching or not searching title).

174. The American equivalent for personalty is LA. CIV. CODE ANN. arts. 3489-3491, providing a period of three years if the possessor acted in good faith under color of title. If either criterion is missing, ten years.

the property. The possessor cannot sell the property in a domestic sale with the warranty implied by U.C.C. Section 2-312 that he has title; he cannot sell the property in an international sale complying with CISG article 41 as being free from a right or claim of any person.<sup>175</sup> In each case, the seller would need to insert in the contract of sale a clause disclaiming title. Because such a general clause would significantly reduce the sale price, the seller would wish to insert a clause precisely describing the state of the title and the fact that the claimant cannot recover.

#### B. WHEN THE CAUSE OF ACTION ACCRUES

In most cases, the sticking point is not the length of the statute of limitations. The sticking point is when the cause of action accrues because that is the date upon which the statute of limitations begins to run. There are four extant views.

Most important is the demand-and-refusal rule, in effect only in New York. This rule is derived from an old case holding that a good faith purchaser of stolen goods did not commit a wrong until he refused to return the goods to the rightful owner.<sup>176</sup> Because the refusal to return was the last act that established the wrong, the cause of action accrued at that refusal.<sup>177</sup> New York has been unshaken in adhering to that rule.<sup>178</sup> The demand-and-refusal rule places the accruing of the cause of action largely in the hands of the original owner.<sup>179</sup> He will not make his demand until he knows the location of his art and its custodian, and until he is ready to demand it. One would think that the statute of limitations would never expire in New York. That is almost true. There are cases where the claimant does not sue because the claimant is still negotiating with the current possessor, but the court has found a refusal at a much earlier time.<sup>180</sup> An advantage of the demand-and-refusal rule is that it is normally easy to determine the date of the demand and the date of the refusal. It does not appear to satisfy other purposes of the statute like barring stale claims where evidence may be unavailable.

Half-a-dozen jurisdictions apply the discovery rule, where the cause of action accrues when the true owner discovers, or should have discovered,

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175. United Nations Convention on Contracts For the International Sale of Goods art. 4, Apr. 10, 1980, 19 I.L.M. 668, (entered into force 1988).

176. *Gillet v. Roberts*, 57 N.Y. 28 (1874).

177. *Id.*

178. *See, e.g., Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. NY Cty. 1966), *modified on other grounds*, 28 A.D.2d 516, (N.Y. App. Div. 1967); *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y. 2d 311, (1991).

179. If the owner unreasonably delays making a demand, he may find the doctrine of laches applied to bar his suit if that delay has caused detriment to the current possessor. *See* the discussion below.

180. *Grosz v. Museum of Modern Art*, 772 F.Supp.2d 473 (S.D.N.Y. 2010) (refusal occurred during negotiations for return; court did not discuss whether waiver or estoppel applied.).

what he needed to know to bring suit.<sup>181</sup> To invoke the discovery rule, the true owner must first establish that he has been diligent in searching for the property.<sup>182</sup> In discovery rule jurisdictions, two difficult decisions need to be reached at the outset. The first is whether claimant was sufficiently diligent to be entitled to the discovery rule.<sup>183</sup> Second, if claimant is entitled to the discovery rule, when should he reasonably have discovered what he needs to know? Determining both of these questions will probably require discovery, which can be a substantial cost, before the court decides whether it will get to the merits of the suit.<sup>184</sup>

California applies the actual discovery rule for suits to recover works of fine arts from a museum, gallery, auctioneer, or dealer.<sup>185</sup> It also lengthens the statute of limitations from three to six years.<sup>186</sup> The cause of action accrues when the claimant actually discovers both his entitlement and the whereabouts of the artwork.<sup>187</sup> The only question to be determined is the date of actual discovery. Facts to make that determination are peculiarly within the possession of the claimant, though it may be assumed that respondent will wish to examine the claimant's e-mail or reports from the claimant's detective in a close case.

The remainder of the jurisdictions presumably apply the traditional rule that the cause of action accrues when the work is stolen. Many jurisdictions have not ruled on this question recently, so one cannot be confident which rule they would select.<sup>188</sup>

#### **IV. Analysis of HEAR**

##### **A. CONSTITUTIONAL PROBLEMS**

###### **1. *Foreign Relations Power***

The longest portion of the act consists of findings and purposes.<sup>189</sup> The eight findings and two purposes make it clear that the constitutional underpinning of the act is the foreign relations power.<sup>190</sup> The argument is that the United States has entered into agreements with a number of foreign

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181. O'Keeffe v. Snyder, 416 A.2d 862 (1980).

182. *Id.*

183. *Id.*

184. A case where plaintiff had the benefit of the discovery rule but lost because he should have discovered what he needed to know at an early time is Orkin v. Taylor, 487 F.3d 734, 737 (9th Cir. 2007) (applying California law).

185. CAL. CODE CIV. PROC. § 338(c)(3) (West 2016).

186. *Id.*

187. *Id.* at (c)(3)(i) – (ii).

188. Recent examples include: Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at \*3 (E.D. Mich. Mar. 31, 2017); Dunbar v. Seger-Thomschitz, 615 F.3d 574, 577 (5th Cir. 2010) (applying Louisiana prescription law); Toledo Museum of Art v. Ullin, 477 F.Supp.2d 802, 806 – 807 (N.D. Ohio 2006).

189. HEAR, *supra* note, 1 at § 4(2).

190. *See id.*

countries at the Washington and Terezin Conferences. Those agreements are designed to assure that their legal systems facilitate just and fair solutions to the problem of art stolen during the Holocaust based on the merits, and to encourage alternative dispute resolution.<sup>191</sup> While the declaration at neither conference is binding on any of the signatories, it still constitutes a statement of international principle. The only case to rule on the matter held not only that statutes of limitation for the recovery of Holocaust Art were within the foreign relations power as the resolution of war-related disputes, but also that federal exercise of that power had pre-empted the field so that states could not change their statutes of limitations.<sup>192</sup> That decision has been criticized,<sup>193</sup> but it is both the controlling and the only decision on the point. Whatever its merits, in the absence of federal action on the point in controversy or where the United States has not given a binding commitment on the point, the constitutionality of specific statutes implementing treaty obligations such as HEAR is beyond doubt as part of the foreign relations power<sup>194</sup> as long as they do not violate overriding provisions of the constitution.

## 2. *Commerce Clause*

There is no mention in the legislation that HEAR might be grounded on the commerce clause, which gives Congress power over interstate and foreign commerce.<sup>195</sup> The perception was probably that the foreign relations power would cover all Holocaust art cases whereas the commerce power would not cover cases where the art had never moved in international or interstate commerce, as in *Altmann* or *Chabad*.<sup>196</sup> The number of cases not involving foreign or interstate commerce has thus far been quite small and have involved government defendants. As most European museums are either run by the government or an instrumentality of the government and the scope of United States jurisdiction to adjudicate under the Foreign Sovereign Immunities Act is expansive;<sup>197</sup> the potential for such cases is large.<sup>198</sup>

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191. S. REP. NO. 114-394, at 6 (2016).

192. *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009).

193. Rajika L. Shah, *The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)*, 20 CHAP. L. REV. 77, 92-95, 111-12 (2017); Michael J. Bazylar & Rajika L. Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, 23 SW. J. INT'L L. 223, 250-53 (2017); S. REP. NO. 114-394, 114th Cong. 2d Sess. 5 (2016).

194. *Missouri v. Holland*, 252 U.S. 416 (1920).

195. U.S. CONST. art. 1, § 8, cl. 3.

196. *See Altmann v. Republic of Austria*, 317 F.3d 954, 959 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004); *see also* *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F.Supp.2d 6, 12 (D.D.C. 2006).

197. *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004) (Defendant was engaged in a commercial activity in the United States by advertising its tourism and publishing a book here.).

198. For example, after World War II, France identified roughly 2,000 paintings as deserving of return because they were stolen during the war. France was unable to find the rightful owners.

### 3. *Equal Protection*

The proponents might have feared that HEAR would be subject to challenge under the equal protection clause. As indicated below, the act does not apply to all stolen art. It applies to art stolen during the Holocaust, by a limited group of people and institutions, and in pursuit of a particular ideology. By detailing the history of the Holocaust, the statute and committee report try to make the case that those occurrences are sufficiently unique to merit being placed in a category of their own.

### 4. *Takings Clause*

Normally, a jurisdiction can either lengthen or shorten its statute of limitation as it wishes without constitutional challenge.<sup>199</sup>

There are two exceptions. The legislature may not destroy a cause of action before the holder has the opportunity to bring suit.<sup>200</sup> That limit does not apply to HEAR. The second exception is more germane to HEAR. The Fifth Amendment prohibits the taking of property without due process of law.<sup>201</sup> Property can be acquired by deed, bequest, intestate succession, abandonment, or adverse possession. One acquires property by adverse possession on the date that the statute of limitations expires. No document or court action is necessary for the acquisition of title by adverse possession.<sup>202</sup> If, on the date of enactment of HEAR, the possessor's rights in the artwork have ripened into title by the doctrine of adverse possession or the analogous doctrine of prescription, the legislature cannot take that property by lengthening the statute of limitations so as to permit the former owner to recover it.<sup>203</sup> Impairing a title acquired by adverse possession is no different from impairing a title acquired by deed, gift, or bequest.<sup>204</sup> The

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The paintings were loaned to museums throughout the country and designated as part of the *musée non récupérée* (museum of non-restituted art). Later, their accession numbers were changed, obscuring their history.

199. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1190 (1950).

200. *Id.* at 1190-1191.

201. U.S. CONST. amend. V.

202. As a practical matter, it is a good idea to secure a judgment in a quiet title action in order to have evidence of title by adverse possession, but it is not necessary to give the adverse possessor title.

203. See *Campbell v. Holt*, 115 U.S. 620, 623 (1885) (dictum because the case involved a contract obligation to pay a minor the proceeds from the sale of her land and rental of her slaves); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315 (1945) (dictum because case permitted the extension of the statute of limitations to recover damages from a seller of securities); *Stewart v. Keys*, 295 U.S. 403, 417 (1935) (alternate holding); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F.Supp.3d 1148, 1167-1168 (C.D.Cal. 2015), *rev'd and remanded on other grounds*, No. 15-55550, 862 F.3d 951 (9th Cir. 2017); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 619-620 (9th Cir. 2013) (dictum because defendant had not proven that he had acquired title); *Developments in the Law—Statutes of Limitations*, *supra* note 143.

204. It is fair to divide takings cases into three categories. One is where the property is actually taken from the owner, usually (though not necessarily) for government use. This is what

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only cases to use HEAR did not consider the constitutional question because that argument was not raised.<sup>205</sup>

**B. SUMMARY OF WHAT HEAR DOES**

For covered cases, HEAR provides an operative statute of limitations that is six years after claimant actually discovers certain facts for the recovery of certain cultural property stolen 1933-1945 as a result of Nazi persecution. It does not repeal or pre-empt existing statutes of limitations.<sup>206</sup> A claimant can either take advantage of the existing state or federal statute of limitations, or the limitations period provided by HEAR, whichever is longer.<sup>207</sup>

**C. SCOPE**

HEAR applies only to a limited class of actions. It applies to actions to recover property, but it does not apply to actions to recover damages for being deprived of that property. In certain respects, it tracks California law;<sup>208</sup> often where it attempts to provide further definition, it provides less clarity, not more. The California law is narrower in scope, as it applies only to recovery of art from art professionals—museums, galleries, auctioneers, or dealers.<sup>209</sup> HEAR applies to all defendants, whether they be art

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HEAR does if the current possessor has already acquired title. In the second category, the property is not taken from the owner, but government regulation deprives the owner of its economic utility. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The third category is where the government regulates a business, but not a specific property. While some judges prefer to analyze this as a substantive due process problem, others regard it as a takings. The takings analysis asks whether the loss is substantial, whether reasonable investment expectations are defeated (which is often the case where legislation is retroactive), and whether a small number of people are singled out to bear the burdens of conduct long in the past. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 525-528, 532-537 (1998). If analyzed under these criteria, the loss to the current possessor is total, that defeats his reasonable investment expectations, and he is singled out to bear the cost of actions performed by others more than seventy years ago.

205. Indeed, the briefs in one case had already been filed when HEAR was enacted. The parties notified the court of it by letter. The court recognized the issue that the extension of the California statute of limitation might violate the takings clause of the constitution, but did not discuss whether HEAR did. The court did not discuss whether CAL. CODE CIV. PROC. § 338(c)(3) (West 2016) violated the takings clause because it thought that HEAR controlled the case. *See Cassirer v. Thyssen-Bornemisza Museum*, 862 F.3d 951, 959-60 (9th Cir. 2017). In *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1109-1110 (D.C.Cir. 2017), the Herzog family asked that they be permitted to amend their complaint because “justice so requires.” *See id.*; Fed. R. Civ. Proc. 15(a)(2). They cited HEAR as evidence of what justice required. The court, in its two-paragraph discussion, did not interpret HEAR or discuss its constitutionality as applied to this case.

206. HEAR, *supra* note 1, at § 4(2).

207. S. REP. NO. 114-394, at 10 (2016).

208. CAL. CIV. PROC. CODE § 338(c)(3) (West 2016).

209. *Id.* at (3)(A).

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professionals, major collectors, individuals owning but a single work of art, or governments.<sup>210</sup>

1. “*Artwork or Other Property*”

The action must be to recover certain cultural property. The technical term developed to define that property is “artwork or other property.” That term means pictures, paintings, drawings, statuary art, sculpture, engravings, prints, lithographs, works of graphic art, applied art, original artistic assemblages and montages, books, archives, musical objects and manuscripts (including musical manuscripts and sheets), sound, photographic, and cinematographic archives and mediums, sacred and ceremonial objects, and Judaica.<sup>211</sup> None of these terms is further defined either in the law or in the legislative history.

The closest comparable term in federal law is the term “work of visual art” that delimits the items protected by the Visual Artists Rights Act (VARA).<sup>212</sup> That term is less extensive in many ways. It does not include musical objects or manuscripts, archives, applied art, sacred and ceremonial objects, or Judaica unless they can be categorized as sculpture, paintings, or prints.<sup>213</sup> On prints and sculpture, VARA is limited to editions of 200 or fewer exemplars, signed and numbered by the author,<sup>214</sup> while HEAR applies regardless of the number of works produced or whether they are signed or numbered.

On the other hand, VARA seems more extensive in its clear application to photographs.<sup>215</sup> HEAR does not specifically mention photographs at all. Photographs might be included as “pictures,” though the use of that phrase in connection with paintings and drawings would argue to the contrary. Alternatively, it could be argued that photographs are included as “sound, photographic, and cinematographic archives and mediums.”<sup>216</sup> It seems incongruous to include a photographic archive, but to exclude individual photographs or negatives that are not part of an archive. It may be that photographs are intended to be included as “photographic . . . mediums,” though that would be a strange way to express it; by contrast, VARA clearly includes certain photographs (signed, numbered, and produced for exhibition purposes), but includes no moving pictures.<sup>217</sup>

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210. The California law would probably also apply to governments because in most cases the reason the government has the art is because it is operating a museum.

211. HEAR, *supra* note 1, at § 4(2).

212. 17 U.S.C. § 101 (2016).

213. *Id.*

214. *Id.*

215. California law specifically includes photographs. See CAL. CIV. CODE § 982(d)(1) (West 2016).

216. HEAR, *supra* note 1, at § 4(2).

217. 17 U.S.C. § 101 (2016), *supra* note 212.



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“Artwork or other property” clearly includes collage as “original artistic assemblages and montages,” and probably includes environments, though the number of those that were prepared before 1946 is probably small.<sup>218</sup>

The committee report discussion of the term “artwork or other property” is short, not illuminating, and does not even consist of an entire paragraph. It says: “The definition extends to include not only fine art, but applied art, written texts, musical art, and Judaica.”<sup>219</sup>

It is not at all clear what is meant by “applied art.” Almost anything could be applied art, as almost anything can be the subject of good (or bad) design. One could suspect that by applied art, the statute means crafts, which is specifically covered by California law.<sup>220</sup> One could suspect that all “musical objects,” “sacred and ceremonial objects” and “Judaica” except manuscripts and books would also be covered as “applied art.” Even illuminated manuscripts could be considered “applied art.”

As a matter of practicality, the Act is only likely to be applied to work of considerable value because of the cost of amassing the facts needed and the cost of the lawyering required to bring suit. Because they often lack significant value, many of the items listed above, though technically qualifying under the act, are unlikely to be the subject of litigation by themselves. They may be included with other items that the heirs of the former owner seek from the person in possession if they have ended up in the same hands as something truly valuable.

## *2. Covered Period*

The period during which property must have been lost to get the benefit of the act is January 1, 1933, to December 31, 1946.<sup>221</sup> This period is slightly longer than Nazi power, which began January 30, 1933, and ended with V-E Day, May 8, 1945.<sup>222</sup> The legislative history provides no clue as to why the lengthier dates were chosen. While it can be argued that there was considerable violence before the Nazi rise to power and much chaos after the official end of the war, some of the other requirements of the act may be difficult to establish, especially after May 8.

One might ask what needs to be proven to take advantage of the act with respect to dates. To prove that one has lost property, one must first prove that one had property. At this point, one need not prove how the property departed.<sup>223</sup> Likewise, one need not prove ownership on December 31, 1932. It is probably sufficient to prove ownership of the contested property some reasonable time before that date, at which point the burden of proof

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218. HEAR, *supra* note 1, at § 4(2).

219. S. REP. NO. 114-394, at 9 (2016).

220. CAL. CIV. CODE § 982(d)(1) (2016).

221. HEAR, *supra* note 1, at § 4(2).

222. *See VE Day*, BBC, [http://www.bbc.co.uk/history/events/ve\\_day](http://www.bbc.co.uk/history/events/ve_day) (last accessed Jan. 21, 2018).

223. In many cases, the substantive question will be whether the work was stolen, or whether the work was abandoned, gifted, willed, or sold.

might shift to the current possessor to prove that the purported owner sold, gifted, bequeathed, or abandoned the property before 1933. An owner may have acquired the property after 1932, but before 1946, in which case the claiming owner must prove the acquisition of the property. As to proving that he lost the property before 1946, it is probable that a claiming owner meets his burden of proof by alleging and proving that he lost the property before January 1, 1946, thereby shifting the burden to the current possessor to prove that the owner still had the work on that date or at a later time.

### 3. *Nazi Persecution*

The act only applies to property lost as a result of Nazi persecution.<sup>224</sup> “Nazi persecution” is defined as “any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates . . . .”<sup>225</sup>

It does not apply to art initially lost to troops of the Soviet Union in their reconquest of territory held by Germany during the war. It would, however, apply to art first lost to Germany by the owner, but then taken by the Soviet Union. The key determinants here are the person taking the work and the reason for which it was taken. The identity of subsequent possessors of the work is irrelevant.

The Act only applies to some art taken during the Nazi period. It requires a persecution of a specific group of individuals. Courts can probably take judicial notice that there were laws, doctrines, and customs of the German government and its allies, the Nazi party, and related parties throughout Europe, discriminating against certain groups. Those groups included Jews, Gypsies, homosexuals, Slavs, and the disabled. The persecutions imposed on each group were not identical, nor were they uniformly applied.

Other people lost art during the war who were not part of those groups. Opponents of the Nazi regime were not treated kindly, yet it is hard to see them as a “group” in the sense of the statute, or as being persecuted as a result of an ideology. Artists who were out of favor might lose their works.<sup>226</sup>

HEAR requires that the work be lost as a result of Nazi persecution of a group.<sup>227</sup> In many cases that will be easy because patterns of persecution emerged, such as the aryanization of businesses. However, in some cases, proving that the work was lost because of persecution may be more difficult.

Laws applying throughout a geographic area taking art without regard to the identity of the person who suffers from them would not seem to result

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224. HEAR, *supra* note 1, at § 4(5).

225. HEAR, *supra* note 1, at § 4(4).

226. *Grosz v. Museum of Modern Art*, 772 F.Supp.2d 473, 484-85 (S.D.N.Y. 2010) contends that though Grosz did not belong to any of the groups mentioned, he fled Germany for his safety, necessarily leaving his art with someone else, and was declared stateless.

227. HEAR, *supra* note 1, at § 4(5).

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from a persecution of a specific group of individuals. Thus, the act would not apply *prima facie* to the taking of so-called “degenerate art,” which was taken from all Germans, even German state museums.<sup>228</sup> Artists who produced degenerate art were subject to special persecution such as being dismissed from university positions.<sup>229</sup> Some were prohibited from creating art. It is not clear that this was persecution of a group in the sense of the statute, or persecution of individuals. Even if they do constitute a group, works were not taken from them because they were a specific group of individuals, but because all degenerate art was confiscated by the law.

A person could, however, argue that although the law was nondiscriminatory, its application was discriminatory. What evidence needs to be introduced to establish the discriminatory application of that law is unclear. Probably the fact that none of Joseph Goebbels’<sup>230</sup> collection of degenerate art was confiscated is not enough. On the other hand, German bureaucrats are prodigious record-keepers. There may be sufficient evidence of the identities of the persons from whom degenerate art was confiscated to clearly establish discriminatory enforcement of the law against persons with certain characteristics.

The law also requires persecution by certain individuals or entities. Entities are the government of Germany, the government of its allies, or the agents of either.<sup>231</sup> This includes the Vichy government in France and the Mussolini government in Italy. Both were formal German allies. Whether HEAR would apply to work stolen by the Soviet Union 1939-1941 is doubtful, as the German-Russian agreement was one of non-aggression.<sup>232</sup> Likewise, though the Spanish government had clear affinities for the Nazis, its position during the war was one of formal neutrality.

Individuals include members of the Nazi party, their agents, or their associates. Thus, if the allegation were that the owner was coerced to sell his art gallery by a member of the Nazi party for a ridiculously low price to a person who was not a member of the Nazi party but who was designated by the Nazi party member, the “buyer” would be an associate, and the Act

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228. GESETZ ÜBER DIE EINZIEHUNG VON ERZEUGNISSEN ENTARTETER KUNST [LAW ON CONFISCATION OF WORKS OF DEGENERATE ART], May 31, 1938 (Ger.), available at <http://litgloss.buffalo.edu/gesetz/test.shtml>. The 1937 exhibition of degenerate art included 650 works confiscated from thirty-two German museums, [http://germanhistorydocs.ghi-dc.org/sub\\_document.cfm?document\\_id=1578](http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1578), last accessed 25 April 2017. See Michael Rebholz, *Recovery of Nazi-Related Art: Legal Aspects Under German and U.S. Law Exemplified by the Gurlitt Case*, 37 COMM/ENT 305, 311 (2015).

229. WILLIAM S. BRADLEY, EMIL NOLDE AND GERMAN EXPRESSIONISM: A PROPHET IN HIS OWN LAND, 115 (1986).

230. Paul Joseph Goebbels (1897-1945) was Reich Minister of Propaganda 1933-1945.

231. HEAR, *supra* note 1, at § 4(5).

232. It probably looked to the Poles as though the two countries were allies. Germany invaded Poland from the west September 1, while the Soviet Union invaded Poland from the east sixteen days later. The agreement is variously known as the Molotov-Ribbentrop Pact or the Nazi-Soviet Pact. Its official name is the Treaty of Non-aggression between Germany and the Union of Soviet Socialist Republics.

would apply.<sup>233</sup> On the other hand, if an owner claimed that he sold his art at a bargain price to his neighbor, who was not a Nazi party member or a government official, because the neighbor threatened to report him to the Gestapo, the Act does not apply because the neighbor was not an agent of either the government or of a member of the Nazi party. Thus, HEAR has no application to work stolen by American servicemen at the end of the war.<sup>234</sup>

#### D. WHAT HAPPENS WHEN HEAR APPLIES

##### 1. *Recovery of Property Only*

Provided that the facts meet the criteria set forth above, HEAR provides that the statute of limitations for the recovery of property will be either the statute of limitations otherwise prescribed, or six years from the time of actual knowledge of specified facts, whichever is longer.<sup>235</sup> The extension of the statute of limitations only applies to actions that would at common law have been deemed actions of replevin. HEAR makes no change in the statute of limitations for the recovery of damages.

This is a little strange. In most cases, one cannot recover damages if one has obtained title by adverse possession.<sup>236</sup> The theory is that the adverse possessor always was the owner. It would be inconsistent with that theory to award the property to the adverse possessor but to give damages to the original owner. This is the opposite case. There would seem to be no reason why a person who can recover property should not also be able to recover damages for being deprived of that property, except that HEAR clearly does not extend the statute of limitations to recover damages.<sup>237</sup>

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233. However, the beneficiaries of those agreements were normally Nazi party members. *See, e.g., United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002).

234. *See, e.g., Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982).

235. S. REP. NO. 114-394, at 10 (2016).

236. RESTATEMENT (FIRST) OF PROP. § 224 cmt. (c) (AM. LAW. INST. 1936); *ibid.*, § 465; *Nagel v. Emmons Cty. Water Res. Dist.*, 474 N.W.2d 46, 50 (N.D. 1991).

237. Take a hypothetical case in New York. The statute of limitations for the recovery of property, or for the recovery of damages for property taken, is three years. N.Y. C. P. L. R. § 214 ¶ 3 (McKinney). Owner demands the return of his property December 31, 2011, and the possessor immediately refuses to return the property. The owner does not sue until 2015. The suit is barred for both recovery of the property and for damages. HEAR revives the statute of limitations for recovery of the property, but not for damages. Note that since New York is a demand-and-refusal state because of *Gillet v. Roberts*, 57 N.Y. 28 (1874), the statute of limitations does not begin to run until the owner makes a demand, and that demand is refused. In the above case, if the possessor did not refuse to return the property, but a long negotiation ensued about the return so that the refusal does not take place until December 31, 2015, the original owner should, in my opinion, be able to file suit through the end of 2018. HEAR does not extend the statute; the period allowed by the New York statute because of the demand-and-refusal rule would be longer than the period provided by HEAR, six years of actual knowledge. A related argument failed in *Grosz v. Museum of Modern Art*, 772 F.Supp.2d 473 (2010), *aff'd* 2010 U.S. App Lexis 25659, the court suggesting that lengthy continued negotiations with

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In most cases, this will not be significant. Damages will be trivial compared to the value of the property recovered. However, every bit of damages makes a difference. An owner might be able to prove that he could have rented the artwork during the period and gained substantial income.

In addition, the value of property is not stable. A person might recover property that had great value three years before, but for which the market has collapsed. One might argue for damages equal to the difference in fair market value between the high point and the date of judgment.

HEAR makes no change in the statute of limitations for civil forfeiture. One method by which the original owner's heirs can get their property is to induce the federal government to seek civil forfeiture. While technically the property is forfeited to the United States, the custom of the United States government is to grant the property to its rightful owner. Civil forfeiture has been sought under the National Stolen Property Act (NSPA)<sup>238</sup> when stolen property has been brought into the United States,<sup>239</sup> or under customs laws when an importer has made a material misstatement on importing an item. The reason HEAR does not apply to civil forfeiture lies in the wording of HEAR: "a civil claim or cause of action . . . to *recover* any artwork or other property . . ." (emphasis added).<sup>240</sup> With civil forfeiture, the government is not recovering property because it never owned the property in the first place. It is forfeiting the property.

The fact that HEAR does not extend the NSPA five-year statute of limitations is not very significant because NSPA only applies when the person transmits stolen property "knowing the same to have been stolen."<sup>241</sup> Most possessors of art stolen during the Holocaust have no idea that they possess stolen property. Likewise, typical customs violations require knowing misrepresentations that are material to importation before a work can be forfeited.<sup>242</sup> The technical term is "without reasonable cause to believe the truth of such statement . . ."<sup>243</sup>

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proposals for joint ownership and to hire an independent investigator amounted to a refusal because they did not acknowledge plaintiff's ownership.

238. 18 U.S.C. § 2314 (2016); 18 U.S.C. § 545 (2016); 19 U.S.C. § 1595(a)(c)(1) (2016) provide for forfeiture. It has also been argued that 22 U.S.C. § 401 (2016) might be construed to provide for forfeiture of artwork. *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 at \*2 (S.D.N.Y. 2002).

239. *See United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002) (United States sued to forfeit a Schiele painting loaned by the Austrian Leopold gallery for display at the Museum of Modern Art because it had been stolen from Leah Bondi Jaray during the Holocaust and the gallery director knew it.). For discussion of whether Bondi surname in Prague is of Ashkenazic or Sephardi origin, *see* Alexander Beider, *Exceptional Ashkenazic Surnames of Sephardic Origin*, 33 AVOTAYNU 3,5 (#4, Winter 2017).

240. HEAR, *supra* note 1, at § 5(a).

241. 18 U.S.C. § 2314 (2016).

242. 18 U.S.C. § 545 (2016).

243. 18 U.S.C. § 542 (2016). *See also United States v. An Antique Platter of Gold*, 184 F.3d 131, 133 (2d Cir. 1999) for an art forfeiture as a result of intentionally mis-stating the country of origin and certifying a worth at only twenty-five percent of fair market value.

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HEAR does not make every suit to recover Holocaust art into a suit that can be heard in federal court under federal question jurisdiction.<sup>244</sup> It specifically states that it is not creating “a civil claim or cause of action.”<sup>245</sup> While sometimes federal question jurisdiction can be based on a state cause of action,<sup>246</sup> it must be a case where the federal question is necessarily raised, actually disputed, substantial, and can be resolved in federal court without disrupting federal-state balance. “Substantial” seems to mean important to the federal system as a whole.<sup>247</sup> It is doubtful that any interpretation of HEAR would rise to that status. Still, most cases will be in federal court because of diversity of citizenship.

2. *Laches Preserved*

As originally drafted, HEAR would have abolished the defense of laches. Congress thought better of this. The law states, “Notwithstanding . . . any defense at law relating to the passage of time . . .” making it clear that laches is not affected by the law because it was a defense at equity, not at law.<sup>248</sup> The legislative history confirms this interpretation.<sup>249</sup>

3. *Extend the Statute of Limitations How Far?*

It further provides that the six-year period begins on the date of enactment of HEAR even if the claimant had knowledge of the requisite facts before the date of enactment, whether or not the claim would be barred by another statute of limitations.<sup>250</sup> Reading this provision, one might think that no claim would be barred before the end of 2022, six years after enactment. That is mostly, but not entirely, true.

Subsection (e) provides that HEAR will not apply if the claimant had actual knowledge on or after January 1, 1999 and not less than six years had passed from the date of such knowledge during which the claim was not barred by a statute of limitations.<sup>251</sup> To illustrate, in case 1, claimant discovers the facts he needs January 1, 2014. Claimant is not barred because six years have not passed. In case 2, claimant discovers the facts needed

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244. 28 U.S.C. § 1331 (2016).

245. HEAR, *supra* note 1, at § 5(a). Most Holocaust recovery cases are brought in federal courts under diversity jurisdiction because the claimants are often not citizens of the United States and the current possessors are citizens or corporations of the United States.

246. *Grable & Sons Metal Products v. Darue Eng'g*, 545 U.S. 308, 312 (2005) (federal jurisdiction proper in a state law quiet title action where the crucial question was the interpretation of a federal Internal Revenue Service notice provision.).

247. *Gunn v. Minton*, 568 U.S. 251, 260 (2013) (Plaintiff's contention in a state malpractice case that his lawyer should have raised a federal patent issue was important to his case, but not to the federal patent system as a whole.).

248. HEAR, *supra* note 1, at § 5(a).

249. “The amendment removes the reference precluding the availability of equitable defenses and the doctrine of laches.” *See* S. REP. NO. 114-394, at 7 (2016).

250. *Id.* at 10.

251. HEAR, *supra* note 1, at § 5(e).

January 1, 2011. Claimant's action may or may not be barred; it depends on the otherwise applicable statute of limitations. If the statute of limitations is six years or longer and there is a jurisdiction in which defendant was amenable to suit that is a traditional jurisdiction, a discovery rule jurisdiction, or an actual discovery jurisdiction, claimant is barred on January 1, 2017 because six years have passed during which he could have brought suit. If the statute of limitations is three years, claimant is not barred until January 1, 2020. His action was not barred from 2011 to 2014, three years, but it was barred from 2014 to 2017 because of the three-year statute. HEAR revives the potential to sue in 2017, and the additional three years until 2020 assures that claimant has had six years in which to sue. There is no indication that the six years must be consecutive, though one could certainly argue that it should be because the apparent expiration of the statute of limitations might have diverted the claimant's attention from his claim. The better rule, and the one that more conforms to the statutory language, is that six years of knowledge is sufficient to bring action, whether consecutive or not.

What about a situation where the owner's claim has been litigated to final judgment and the period for appeal has expired? The wording of the statute makes it appear that such a claim might not be barred by the statute of limitations and could be re-raised, but the Senate report makes it clear that HEAR does not benefit those claims.<sup>252</sup> But, a claim where a case has been dismissed on statute of limitations grounds but the period for appeal has yet to expire can benefit from the extra time allowed by HEAR.<sup>253</sup>

#### 4. *Knowledge of What?*

The two things of which claimant must have knowledge in order to start the HEAR six-year period are (1) the identity and location of the work; and (2) the claimed possessory interest of the claimant.

Before discussion of either, one must know who the claimant might be under HEAR. The factual answer is that both the representative of the original owner and the current possessor are claimants. The original owner's representative is claiming the property based on ancestral ownership. The current possessor is claiming the property based on ownership of his grantor or his own ownership, either as the grantee of the true owner, as a good faith purchaser or as an adverse possessor. It is clear from the context of the statute that the claimant is meant to be the original

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252. The textual support for this statement lies in § 5(d), which provides that HEAR applies to pending causes, and to cases filed between the effective date of HEAR and December 31, 2026. This is a negative pregnant that implies that HEAR does not apply to cases that have been finally decided. S. REP. 114-394, 114th Cong. 2d Sess. 10 (2016) states: "Claims that were dismissed pursuant to, or litigated to, a final judgment from which no appeal lies on the date of enactment are unaffected by this provision."

253. Both propositions are true in California. See CAL. CIV. PROC. CODE § 338(c)(3)(B) (2016).

owner's representative because he is the one claiming to move the art from its current possessor.

Knowing the claimed possessory interest of the claimant requires two important items: (1) the claimant must know that the original owner was in fact the owner of the work when it was lost 1933-1945; and (2) the claimant must also know that she is the heir entitled to sue on behalf of that original owner.

Under the circumstances, these are not trivial matters. It is not at all clear that everyone who is the heir of someone who owned work lost in the Holocaust will know that he is the heir. Because the end of the covered period was more than seventy years ago, someone who was adult enough to own the work then would now be north of ninety years old.<sup>254</sup> The number of owners who currently survive must surely be small.<sup>255</sup> It will, therefore, be an heir who is entitled to sue. A goodly number of people who owned significant art collections had no children.<sup>256</sup> Their heirs are likely to be collateral relatives. But which one? In the chaos and dislocation following World War II, families were often separated and did not know what relatives survived. Charitable organizations attempted to reunite families with some success,<sup>257</sup> but even seventy years after the war ended, people were re-connected with cousins they thought had perished during the war.<sup>258</sup> So, it is entirely possible that a distant relative of a person might know that she was a distant relative, but might not know that she was the heir.

Likewise, the current living heir may not know what covered works her ancestor owned. Many persecuted individuals were lucky to escape with their lives. If they had ownership records, most were lost or destroyed during the war. The same is true of photographs of works. If the heir is a great nephew or a great-greatgrandchild born after the war, or even born in the late 1930s, he may have no knowledge of the art owned by his ancestor 1933-1945. For the reasons indicated above, situations where records were most likely to have survived are art owned by dealers or by major, meticulous collectors.

The claimant must also have actual knowledge of the identity and location of the artwork.<sup>259</sup> But there is a special rule for misidentification in the case of multiples. If the work is "one of a group of substantially similar multiple artworks or other property," actual discovery occurs on the date on which

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254. This would not be true if the work was owned by a minor. No such situation has surfaced in litigation, but it is certainly possible. Even so, the minor would now be at least in his 70s.

255. In the actual litigated cases, none of the claimants were the person from whom the art was taken except Mrs. Menzel, whose case was litigated in the early 1960s.

256. Maria Altmann was the niece of Ferdinand Bloch-Bauer, who had no children. See Elana Shapira, *Adele Bloch-Bauer*, JEWISH WOMEN'S ARCHIVE, <https://jwa.org/encyclopedia/article/bloch-bauer-adele> (last accessed Apr. 27, 2017).

257. The principal one, which also had government support, was the International Tracing Service in Bad Arolsen Germany, <https://www.its-arolsen.org/en/>, last accessed Apr. 27, 2017.

258. See, e.g., David Price, *Reunion After 70 Years*, 32 AVOTAYNU 68 (#4, Winter 2016).

259. HEAR, *supra* note 1, at § 4.



there are facts sufficient to form a substantial basis to believe that this one is the one that was lost.<sup>260</sup> Whether the work was the one lost or not.

In the art world, a “multiple” is a print or sculpture of which there are numerous more-or-less identical copies.<sup>261</sup> Even though painters often do similar paintings of the same subject (*see* my discussion above of Bernardo Strozzi’s St. Catherine of Alexandria), these works are not considered multiples. Whether they were intended to be included in the statute is anyone’s guess, but the use of the term “multiples” argues against it. That is to the relief of the original owner’s heirs, because the statute shortens the statute of limitations for such multiples to the discovery of the location of the first of these similar multiples that seem to have belonged to his ancestor.<sup>262</sup> It is unlikely that the heir will know the number of the print his ancestor had, so the fact that it is a print of the same image should be enough to “form a substantial basis to believe” that it is the lost work.<sup>263</sup> The result is that if the claimant discovers a Rembrandt etching that is the same image as one his ancestor lost in the possession of X Museum, but it later turns out that X Museum has a clear title, the statute of limitations has begun to run on a suit to recover the copy actually taken. No reason for this is provided in the legislative history—just a description of the provision, and it is hard to see why the owner’s heir’s statute of limitations should begin to run when he cannot institute suit for the real thing. This provision contradicts the spirit of “actual discovery.”

What is “actual discovery?” It is first defined as “knowledge,” but when “knowledge” is defined, we are not so sure. The definition states that it means “having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.”<sup>264</sup> It is clear that something less than actual knowledge is meant; it is unclear what having sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge might be. It does not appear that the statute means to include constructive notice that one gets from the fact that a document is recorded in a certain place.<sup>265</sup> If it means inquiry notice,<sup>266</sup> this is certainly an obscure way of

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260. *Id.* at § 5(b).

261. More or less identical because each copy made from the original will have slight variations, if only because the plate or the mold from which it is made is more worn. With prints, the ink distribution or the wiping may not be exactly replicated.

262. HEAR, *supra* note 1, at § 5(b).

263. *See id.*

264. HEAR, *supra* note 1, at §§ 4(1), (4).

265. One is said to have constructive notice of the contents of deeds recorded in one’s chain of title. *See* WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 882, 886–889 (3d ed. 2000). The California statute’s expansion on actual knowledge simply excludes “constructive knowledge imputed by law.” *See* CAL. CODE CIV. PROC. § 338(c)(3)(C)(1) (2016). But, in California, constructive notice includes both what would be discovered from an examination of the records, and what is usually called inquiry notice: the duty to make further inquiry about the legal status of things that do not comport with the record, such as possession

stating it. Yet, the addition of this phrase to the statute must mean something, but its enactment only confuses the definition.<sup>267</sup>

Actual knowledge is extremely difficult to prove. We cannot know what is in the mind of another person. We can only deduce actual knowledge based on another person's acts and statements. Clearly, making a demand for the return of the work would be an act from which one could deduce that the demander knew the identity and location of the work, as well as the person claiming a possessory interest. In copyright law, we deduce that a person knew that the work was copyrighted if we find a copy of the work with a copyright notice in his possession, or if the person hands a picture of the work that contained a copyright notice to another person, having admitted that he tore off the copyright notice.<sup>268</sup> Along the same lines, access to a copyrighted work can be proven by establishing that the work has been widely disseminated, so that it is readily accessible.<sup>269</sup> One wonders whether the continuous exhibition of the work in a museum for a long period of time would be enough to establish a *prima facie* case of actual knowledge.<sup>270</sup>

#### 5. *Changing the Time Required for Acquisitive Prescription*

HEAR does not lengthen the time or change any other requirements for acquisitive prescription in civil law jurisdictions.<sup>271</sup> While the decision has been criticized,<sup>272</sup> it is correct. Almost since the beginning of the republic, the "Charming Betsy" principle of statutory construction has been to construe statutes whenever possible so that they do not contravene international law.<sup>273</sup> While the international law principle was stronger in 1800 than it is today, it is still a principle that one country's law should not prescribe conduct in another's territory unless certain conditions are met which do not seem to apply here.<sup>274</sup>

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of the property by a person not the title holder, mention in a deed of an unrecorded interest, or construction according to a uniform scheme.

266. One has inquiry notice of the rights of some possessors, a quitclaim deed in one's chain of title, or the apparent uniformity of buildings within a subdivision. *STOEBUCK & WHITMAN*, *supra* note 265, at 882-886.

267. The comparable California provision is clear: constructive notice is not actual discovery. See CAL. CODE CIV. PROC. § 338(c)(3)(C)(1) (2016).

268. See *Rogers v. Koons*, 960 F.2d 301, 305, 307 (2d Cir. 1992).

269. 3 PAUL GOLDSTEIN, COPYRIGHT § 9.2.1.1 (3d ed. 2014).

270. In a somewhat analogous case, it was held that deposit of a copy in the Library of Congress was insufficient to prove wide dissemination. *Higgins v. Woroner Prods., Inc.*, 1969 U.S. Dist. LEXIS 9801, at \*1-\*2 (S.D. Fla. Feb. 27, 1969).

271. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (9th Cir. 2017).

272. Symeon Symeonides, Choice of Law in the American Courts in 2017, to be published in 66 Am. J. Comp. L. (2018), <https://ssrn.com/abstract=3093709>, at pp. 60-62.

273. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

274. The topic is discussed at length at Restatement (Fourth) The Foreign Relations Law of the United States Jurisdiction § 203 (Am. Law Inst.) (T.D. No. 3, 2017). While the black letter does not make this distinction, comment a limits the presumption to substantive provisions. Comments b and c state that the presumption against extraterritoriality can be rebutted either by express language or by the focus of the provision. The Reporters' Notes cite many cases

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A second principle of statutory interpretation is that where there are two possible interpretations, one of which would raise serious constitutional questions and the other of which would not, the interpretation that does not raise constitutional questions is to be preferred.<sup>275</sup> In this case, if HEAR were interpreted to alter the requirements for acquisitive prescription that was otherwise achieved in 1999, this would raise the question of HEAR's constitutionality as applied to this case under the takings clause of the Fifth Amendment discussed above.<sup>276</sup>

Moving to the substantive question, HEAR applies "[n]otwithstanding. . . any defense *at law* relating to the passage of time." Defenses at law were defenses developed in the law courts; they are contrasted with defenses at equity, such as laches, clean hands, and balancing of the hardships, that were developed in the equity courts of England.<sup>277</sup> Acquisitive prescription is not a common law doctrine at all. It was developed in civil law countries whose law follows the model of Roman law. History would not tell us whether it is a doctrine of law or equity. We would need to operate by analogy.

Is it a defense "relating to the passage of time?" Certainly. The passage of time is one of the requirements for acquisitive prescription, in this case six years. Unlike typical statutes of limitation, more is required for acquisitive prescription than simply the passage of time.<sup>278</sup> In the case of the Spanish acquisitive prescription in *Cassirer*, the possession must be public and the possessor may not be the thief, his accomplice, or an accessory. Accessory has been variously defined as either someone who acted to aid the person who committed the crime in avoiding penalties, or simply as someone who knew about the crime.<sup>279</sup> Whichever definition is used, those requirements are different in kind from the requirements attached to the expiration of the statute of limitations, and their evocation of good faith is certainly more analogous to English concepts of equity than of law.

A similar result should be expected where the law of a foreign country provides that a good faith purchaser of art in the ordinary course of the seller's business acquires good title after possessing the art for a specified number of years.<sup>280</sup>

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both applying the principle and failing to apply it, as well as some in which Congress later overruled the application of the presumption.

275. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis concurrence).

276. See *supra* note 199.

277. See *supra* note 199.

278. Note that this is also true in a sense of the statute of limitations if you collapse the rules about tolling into the statute. What is required is passage of time while defendant is present in the jurisdiction and is not fraudulently concealing the work being sought.

279. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951, 965-973 (9th Cir. 2017).

280. See *supra* note 161.

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6. *Examples*

The following sections illustrate the likely effect of HEAR in selected jurisdiction types.

a. New York's Demand-and-Refusal, Three-Year Statute

New York is the most important jurisdiction for the return of Holocaust art. It has a large number of museums and private collectors. It is also the state in the United States in which the most important art auctions are held. If a valuable piece is sent to auction in the United States either from within or from outside the United States, it will likely be sent to New York.<sup>281</sup>

HEAR is likely to have least effect in New York. That is because New York uses the demand-and-refusal rule for the accrual of a cause of action. This means that the statute of limitations does not begin to run until comparatively late. The fact that a person has made a demand for the return of his property is excellent evidence that the person had actual knowledge that he was entitled to claim the property and that he knew the location of the property. For that reason, in New York, the only likely result of HEAR is to extend the statute of limitations from three years after demand is refused to six years after actual discovery if that is a longer period. As suit is likely to follow soon after a refusal to deliver, the extension is unlikely to be used frequently.

Because suit is unlikely to be delayed much beyond refusal of a demand, it is unlikely that anyone would have gained title by adverse possession before December 16, 2016, (the effective date of HEAR) under New York's demand-and-refusal rule. For that reason, the vice that HEAR might unconstitutionally take a property interest will not normally be a concern in New York.

b. New Jersey Discovery Rule, Six-Year Statute<sup>282</sup>

Assessing the impact of HEAR in New Jersey is complicated by the fact that it is uncertain whether adverse possession of personalty is still possible there. While the court in *O'Keefe v. Snyder*<sup>283</sup> talks about abolishing adverse possession for chattels,<sup>284</sup> it concludes that a possessor who prevails under the discovery rule obtains good title.<sup>285</sup> Thus, one must consider two alternatives. One is that New Jersey actually permits adverse possession or something close enough to it to be considered functional adverse possession. The second is that adverse possession of personal property does not exist in New Jersey.

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281. A count of litigated cases confirms this. Nine cases of Holocaust art were litigated in New York; four in California; no other state had more than one. If all cases litigated to judgment seeking the return of stolen art (not limited to Holocaust art) were counted, the results would be more lopsided in favor of New York as a litigating location.

282. N.J. STAT. ANN. § 2A:14-1 (West 1963).

283. *O'Keefe v. Snyder*, 416 A.2d 862, 885 (1980).

284. *See id.* at 872.

285. *See id.* at 874.

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If there is no adverse possession of chattels in New Jersey, there can be no concern that HEAR would unconstitutionally take property when it lengthens the statute of limitations.

That would leave two possibilities. If claimant does not establish that he was sufficiently diligent to benefit from the discovery rule, the cause of action would accrue when the work was stolen and brought into New Jersey.<sup>286</sup> HEAR would postpone that accrual until the claimant actually knew what he needed to know to sue.<sup>287</sup> The six years provided by New Jersey law and the six years provided by HEAR would be the same, but the later accrual would be significant in many cases.

If claimant establishes that he was sufficiently diligent to use the discovery rule, HEAR is still likely to extend the statute of limitations unless the time when claimant actually discovers what he needs to know is the same moment that he should have discovered it. In that limited case, the time provided by HEAR and New Jersey law would be the same. If the facts are actually discovered later than they should have been discovered, HEAR will provide the same amount of extra time to bring suit.

If, on the other hand, New Jersey has something like adverse possession for chattels, any possession that ripened into title before December 16, 2016, will be protected from HEAR by the takings clause of the constitution. But, such a result has its own set of problems. It is unlikely that it can be determined whether adverse possession has occurred without significant discovery and a trial on that issue. This is because those questions call for judgments about reasonability of diligence and what one should have learned, which usually cannot be resolved without a trial.

For current possessors whose possession did not ripen into title by adverse possession, the result will be as set forth above if New Jersey has abolished adverse possession for personalty.

c. California Actual Discovery Rule & Six-Year Statute for Art Professionals, Discovery Rule, and Three-Year Statute for Other Current Possessors

The effect of HEAR in California is a bit complicated because California has a number of different statutes of limitations for the recovery of personal property, two of which apply to the property protected by HEAR.<sup>288</sup> An action to recover property of historical, interpretive, scientific, or artistic significance taken by theft invokes the discovery rule, requiring suit within three years of the time the diligent owner discovered or should have discovered what he needs to know.<sup>289</sup> But, a suit brought before December

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286. The universal rule is that the statute of limitations does not run when the work is outside the jurisdiction or when the work is being fraudulently concealed.

287. HEAR, *supra* note 1, at § 4.

288. The general rule is three years from the time the cause of action accrues, presumably the time of the taking. See CAL. CODE CIV. PROC. § 338(c)(1) (2016).

289. See CAL. CODE CIV. PROC. § 338(c)(2) (2016). This provision was enacted by Stats. 1982, c. 340, p. 1642 § 3.

31, 2017, to recover from an art world professional a work taken within one hundred years of the enactment provides that the three year period begins from actual discovery.<sup>290</sup>

If the applicable statute of limitations had already expired before HEAR was enacted, so that the current possessor became the owner by adverse possession, HEAR could not constitutionally be applied because that would be an unconstitutional taking. The comments about the extra cost of discovery and proof with the New Jersey discovery law apply here. If the applicable statute of limitations has not yet given the current possessor title, then HEAR would extend the statute to six years after actual discovery.

d. Traditional Jurisdictions

Traditional jurisdictions, where the cause of action accrues as soon as the property is stolen (as long as the property is located within the jurisdiction and is not fraudulently concealed<sup>291</sup>) are jurisdictions where the current possessor is most likely to have gained title by adverse possession. In that case, the current possessor would be constitutionally protected from HEAR by the takings clause.

But, where the current possessor has not gained title, those jurisdictions will have the statute of limitations extended to the full six years after actual knowledge by HEAR.

**V. Implications for Practice**

HEAR clearly tilts the scales toward the original owner's heirs having a chance at discovery and the opportunity to go to trial to try to recover the property.

A. LITIGATE ABROAD

The initial response of the current possessor may be to litigate the question of ownership outside the United States.<sup>292</sup> Such a move has the advantage of making it less likely that HEAR will be applied as the choice of law for the statute of limitations. If the substance of the controversy is ever reached, it is more likely that the substantive choice of law will point to the law of some European civil law country that will protect a good faith

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290. *Id.* at § 338(c)(3). This part of the statute was enacted in 2010, so it includes works illegally taken in the Armenian genocide or the Russian revolution, as well as works stolen domestically.

291. There is a presumption that possession by the thief or by someone who knows about the theft is fraudulent concealment. BROWN & RAUSHENBUSH, *THE LAW OF PERSONAL PROPERTY* § 4.2 (3d ed. 1975).

292. Some cases where the current possessor instituted the lawsuit are reviewed at 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, 308-323 (2013) and NICHOLAS M. O'DONNELL, A TRAGIC FATE 102-121, 146-186, 203-215 (2017).

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purchaser. One way to do this would be to bring a declaratory judgment action<sup>293</sup> to determine title outside the United States. It would probably help to move the work to the country in which the litigation is to take place, if it is not already located there. A fringe benefit is that the heirs of the original owner will need to pay their lawyer, as contingent fees are not common (and may not be permitted) in civil law countries.

Such an approach may not be feasible for several reasons. It may not be possible to get jurisdiction over the person claiming to be the heir of the original owner in the foreign court. Jurisdiction based on the temporary presence of the artwork may not be authorized.<sup>294</sup> Second, one must consider that moving valuable artwork is expensive. Even more expensive, in many civil law countries, the filing fees are determined as a percentage of what is claimed, so the filing fee may be prohibitive.<sup>295</sup> In addition, the foreign court may require that a bond be posted to cover court costs and attorneys fees, because in most countries the loser pays his own attorneys fees and those of the winner.<sup>296</sup> Discovery is usually much more limited in foreign forums than in the United States. One must consider that the owner's heir may file suit in the United States, resulting in all the costs and complications of trying to pursue two parallel litigations. Even if you win, one must assess whether the foreign judgment is likely to be recognized and enforced in the United States. A final risk is that many civil law countries prohibit the export of a work that the country considers to be a national treasure, even though it has only been brought into the country temporarily.<sup>297</sup> The art in that case could not be returned to the United

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293. In *Bakalar v. Vavra*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008), *vacated*, 619 F.3d 136 (2d Cir. 2010), *argued*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012) (per curiam), the current possessor was first to the courthouse, but filed suit in New York. In *Vineberg v. Bissonnette*, 548 F.3d 50, 54 (1st Cir. 2008), the art was moved abroad and suit instituted there. The author is unaware of the final outcome in that case, but has been told that the foreign suit was not seriously pursued.

294. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L. 351), regulates where a person domiciled in a member state may be sued. Article 7(4) provides that a person domiciled in a Member State may be sued in another Member State "as regards a civil claim for the recovery, based on ownership, of a cultural object . . . initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised;" *Id.* art. 7(4). This is the reverse of the case posited in the text, *Bakalar*, 550 F. Supp. 2d 549, where it is the current possessor, rather than the claimant, who wishes to sue. If the defendant is not domiciled in a member state, the regulation article 6(1) leaves the question of jurisdiction to the law of the state where the suit is filed. 2012 O.J. (L. 351), art. 6(1).

295. See *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 2009-10 (C.D. Cal. 2001), *aff'd* 317 F.3d 954 (9th Cir. 2002), *aff'd* 541 U.S. 677 (2004), where the Austrian filing fee was at least \$130,000.

296. See *id.* at 1210.

297. See, e.g., Timothy P. Ramier, *Agent Judiciaire du Trésor v. Walter: Fait du Prince and a King's Ransom*, 6 INT'L J. CULT. PROP. 337 (1997); Alan Riding, *A Van Gogh Becomes a Cause Célèbre*, N.Y. TIMES, April 18, 1994, <http://www.nytimes.com/1994/04/18/arts/a-van-gogh-becomes-a-cause-celebre.html?pagewanted=all> (discussing *Agent Judiciaire du Trésor c. Walter*, Cass. Civ.

States, regardless of whether the foreign court favors the original owner's heir or the current possessor.<sup>298</sup>

Not all current possessors will choose to litigate abroad, even if they can. Because a major share of the revenue of most American museums comes from fundraising, museums must always be conscious of their public images. Moving art out of the country and litigating abroad are not likely to be public relations successes for museums. As a result, it can be predicted that current possessors who try to litigate abroad will be either individual collectors or dealers, foreign governments, or foreign museums. They are unlikely to be American museums.

#### B. EQUITABLE DEFENSES, PRINCIPALLY LACHES

Removing the availability of the statute of limitations defense puts enormous pressure on equitable defenses, primarily the doctrine of laches. Laches will bar the institution of suit if the claimant or his ancestor unreasonably delayed filing suit, with the result that the current possessor suffered a significant detriment. A significant difference between the statute of limitations defense and laches is that a statute of limitations defense will normally succeed at the pleadings stage if it has merit, thereby sparing the parties considerable legal expense. Because laches considers all the facts and circumstances, discovery and a mini-trial are required before a decision can be made about whether laches will bar the suit.<sup>299</sup>

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Ire, 20 fev. 1996, Bull. de la Cour, where Jacques Walter, a French citizen, bought a Van Gogh in New York in 1955, brought it to France in 1957, and was denied permission to take it to his Geneva home in 1989, as France in that year classified it as a national treasure). He recovered a substantial judgment, in part because of procedural irregularities, because confining the painting to France reduced its value by roughly eighty-five percent. *See id.* Such action is authorized by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 4(a), Nov. 14, 1970, 823 U.N.T.S. 231, as property created within French territory by a French resident. Article 4(b) seems to justify such classification even when the only reason is that the artwork was once in the country. *See id.* art. 4(b). Italy claimed a Matisse painted in France as its national treasure because it was owned by an Italian in Milan in *Jeanneret v. Vichey*, 693 F.2d 259, 263 (2d Cir. 1982).

298. *See id.*

299. Summary judgment on laches denied: *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 47 (1990); *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009). Summary judgment on laches granted: *In re Peters*, 34 A.D.3d 29, 30 (N.Y. App. Div. 2006); *Wertheimer v. Cirker's Hayes Stor. Warehouse*, 300 A.D.2d 117, 118, (N.Y. App. Div. 2002). Judge Rakoff comments in *Schoeps*: "[T]he fact-intensive question of whether laches bars Claimants' action will be the subject of an evidentiary hearing conducted by the Court simultaneously with the jury's trial of the merits of the case. Summary judgment is inappropriate at this stage because genuine questions of fact exist as to, *inter alia*, whether Elsa knew she had a potential claim to the Paintings during her lifetime and whether the Museums, as Claimants argue, had reasons to know that the Paintings were misappropriated and so are barred from invoking laches by the doctrine of 'unclean hands.'" *Schoeps*, 594 F. Supp. 2d at 468. A confidential settlement was reached on the morning set for trial, with the art remaining in the museums and plaintiffs to receive "a sum certain." *See Memorandum Order of March 23, 2009*, at 2, 594 F. Supp. 2d 461 (2009) (No. 07-11974). The museums were willing to waive the



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Laches has two requirements: unreasonable delay and resulting detriment. Unreasonable delay is not measured simply by time, though a matter of years is usually required before delay is unreasonable, while a matter of months is seldom sufficient. Unreasonable delay depends on the facts of the case, one court suggesting that a twenty-year delay might be reasonable in reporting a loss if it was thought that public knowledge of the loss would send the missing artwork underground and make it more difficult to find.<sup>300</sup> It seems also to depend very much on the second requirement, that the defendant has changed his position to his detriment as a result of the delay.<sup>301</sup>

Unreasonable delay can be attributed to claimants, or to their predecessors in interest, and this is true even though claimants or their ancestors were unaware of their rights if they should have known them.<sup>302</sup> Because a court is likely to attribute to claimants knowledge that they would have discovered had they been duly diligent, current possessors will try to prove that claimants were not duly diligent in seeking their artworks. Claimants will allege their reasonable diligence. Alternatively, they will argue that they would not have discovered what they need to know if they had been more diligent. In short, some of the material that HEAR makes irrelevant for statute of limitations purposes by making HEAR an actual discovery statute creeps back into consideration in laches.

There are two kinds of detriment that might result from delay in bringing suit. One is that witnesses or other evidence might no longer be available. Courts have not required that the witnesses would have testified for the current possessor; it is enough that a witness who could explain whether the property was stolen or not or other circumstances can no longer testify.<sup>303</sup>

The other detriment is that the current possessor or his predecessor may have changed his position to his detriment in reliance on his ownership. One example might be if he invested in conservation of the work. One court has opined that this requirement might be satisfied if the work greatly

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confidentiality, but the claimants were not. *See id.* Judge Rakoff approved the confidentiality of the settlement with great reluctance. *See id.* at 6. More detail on the case is provided at O'DONNELL, *supra* note 292, at 203–215. For an illustration of some of the difficulties of proving and defending against a laches allegation, *see* Solomon R. Guggenheim Found. v. Lubell, 153 A.D.2d 143, 151–52 (N.Y. App. Div. 1990).

300. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991) (dictum).

301. *See Ricciardi v. Johnstown Leather*, 1 A.D.3d 661, 663 (N.Y. App. Div. 2003) (4 months not enough); *Weiss v. Mayflower Doughnut Corp.*, 135 N.E.2d 208, 212 (N.Y. 1956) (dictum that 3 months is not enough).

302. *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303–306 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012) (per curiam); *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 467 (S.D.N.Y. 2009); *In re Estate of Barabash*, 286 N.E.2d 268, 271 (N.Y. 1972) (laches denied when party had no reason to know of his rights).

303. *See Bakalar*, 819 F. Supp. 2d at 306 (witness dead); *Wertheimer*, 300 A.D.2d at 118 (witnesses dead).

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increased in value.<sup>304</sup> The installation of special security measures would probably be another example. No court has considered whether the payment of insurance premiums on the work was a substantial detriment, or whether that might be offset by the pleasure of enjoying the work during the period covered by the insurance premiums. Another potential detriment is that the delay in suing the current possessor's predecessor in title might have caused the current possessor to pay fair market value for the work.

But, laches is not available when defendant knew that plaintiff intended to assert his rights, even if he had yet to file suit.<sup>305</sup>

In New York, laches applies to actions for replevin, which before the merger of law and equity would have been legal, not equitable, in nature. Laches also applies whether the action is subject to a specific statute of limitations or not.<sup>306</sup>

Other equitable defenses that are not barred by HEAR include clean hands and balancing the hardships. Often, the clean hands defense is asserted to prevent a laches defense from succeeding and is often rejected (without considering whether the hands are sufficiently besmirched) on grounds that the alleged dirty hands did not affect the opposing party.<sup>307</sup>

### C. ALTERNATIVE DISPUTE RESOLUTION

The Senate Report states that it wishes to encourage alternative dispute resolution of these cases.<sup>308</sup> As is usual, the Act appropriates no money for this purpose, nor does it mandate any particular form of ADR. What it seems to suggest is mediation, assisted by a panel of experts.<sup>309</sup>

#### 1. *Mediation and Negotiation*

Mediation and negotiation are both processes where the parties reach agreement. The significant difference between them is that in mediation, the parties hire someone to help them reach agreement. Parties do not always reach agreement when they negotiate or when they engage in mediation, but they sometimes do.

One question is whether HEAR makes it more or less likely that parties will reach agreement. The author believes that HEAR makes it more likely.

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304. *Zakaessian v. Zakaessian*, 161 P.2d 677 (Cal. Dist. Ct. App. 1945) (dictum; suit to cancel a deed, but the property had not significantly increased in value).

305. *Cohen v. Krantz*, 227 A.D.2d 581, 582 (N.Y. App. Div. 1996) (neighbor told contractor who told defendant that neighbor objected to fence); *Weiss*, 135 N.E.2d at 212 (defendant tenant knew that plaintiff was litigating with defendant's landlord over lease provision that would have prohibited tenant's use).

306. *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

307. See, e.g., *In re Peters*, 34 A.D.3d 29, 38 (N.Y. App. Div. 2006); *Wertheimer*, 300 A.D.2d at 118–119; *Schoeps*, 594 F. Supp. 2d at 468 (S.D.N.Y. 2009).

308. S. REP. NO. 114-394, at 10-11 (2016).

309. See *id.*

Parties are more likely to reach agreement when the outcome of litigation is uncertain. The negotiation literature suggests that parties calculate their Best Alternative To a Negotiated Agreement (BATNA), their Worst Alternative To a Negotiated Agreement (WATNA), and their Most Likely Alternative To a Negotiated Agreement (MLATNA).<sup>310</sup> In the case of a suit to recover Holocaust art, the best alternative is to win (including the other side giving up). The worst alternative is to lose (including giving up yourself). Win or lose, there are costs attached to the result. If you win, you get or keep the artwork, but you must pay your lawyer. If you are the claimant, your lawyer probably has the case on a contingent fee of between one-third and one-half the value recovered. If you are the possessor, you are probably paying your lawyer on an hourly basis. A majority of the cases that have not been resolved based on the statute of limitations have required two trips to the court of appeals, and one unusual case has been decided by the court of appeals three times, the last time remanding for trial.<sup>311</sup> In terms of lawyering cost, that is expensive.

Notice that in this type of case, there is no MLATNA. In the minds of each party, it may be more likely that his side will win, and under the facts of a particular case, that may be justified. In most Holocaust art recovery cases, predicting the results of a trial and subsequent appeal is hazardous.

By removing the certainty of victory on the statute of limitations point in many cases and remitting the parties to trial on the merits, HEAR has increased the uncertainty of result and thereby increased the likelihood of a negotiated or mediated settlement.

A second factor that encourages settlement is a look at the BATNA and WATNA. Both BATNA and WATNA have substantial costs in lawyer's fees attached to them.<sup>312</sup> For the current possessor, those future costs reduce their BATNA and increase their WATNA. For the claimant with a contingent fee contract, the potential legal costs reduce their BATNA. For the claimant's lawyer, investing significant billable hours in a case whose outcome is highly uncertain is a factor to consider.

One should consider other costs of litigating. Developing a case takes time. Responding to discovery may require many hours. Then there are the emotional costs of being involved in litigation. In addition to the

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310. ROGER FISHER & WILLIAM URY, GETTING TO YES 100–106 (2d ed. 1991); RUSSELL KOROBKIN, NEGOTIATION THEORY, AND STRATEGY 149–182 (2002); Jessica Notini, *Effective Alternatives Analysis In Mediation: "BATNA/WATNA" Analysis Demystified*, <http://www.mediate.com/articles/notini1.cfm> (last accessed Jan. 18, 2017); John Lande, *BATNA, MLATNA—No Big Difference, Right?*, [www.mediate.com/articles/LandeJbI20151123.cfm](http://www.mediate.com/articles/LandeJbI20151123.cfm) (last accessed Jan. 18, 2017).

311. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *rev'd sum nom*, *Thyssen-Bornemisza Museum*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part & rev'd in part*, 616 F.3d 1019 (9th Cir. 2010) (*en banc*), 2012 U.S. Dist. LEXIS 196047 (C.D. Cal. 2012), 737 F.3d 613 (9th Cir. 2013) *aff'd in part, rev'd in part & remanded*, 153 F. Supp. 3d 1154 (C.D. Cal. 2015), *rev'd & remanded*, 2017 U.S. App. LEXIS 12265 (9th Cir. 2017).

312. CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 60–62 (7th ed. 2012).

uncertainty, being the subject of cross-examination is not pleasant. The necessity to further invest physical or emotional resources in the cost of the litigation also induces the parties to consider settlement.

A third factor that should induce settlement is the fact that the parties may value different things. Museums want to be able to continue displaying the art. Private collectors do not want to see their investment in their collections disappear. Claimants want recognition that their ancestor was wronged. Lawyers for the claimants want their fees.

A fourth factor that should make settlement easier is the realization that neither the claimant nor the current possessor are wrongdoers. Both are caught in the eternal triangle of the law. The hypotenuse that is the wrongdoer has long since departed, leaving them to pick up the pieces of the loss. The claimant's ancestor was robbed of the art; the current possessor bought the art from someone who appeared to have title to it, but did not, and is no longer answerable to the current possessor because of expiration of the statute of limitations.

## *2. Potential Solutions*

There are two potential destinations for high-value art. Either it ends up in a museum, or it is sent to auction where it is purchased by a private individual or company with enormous wealth. In the latter case, it is likely to disappear from public view into a private collection. Even worse, it may repose in a storage container in a free port awaiting a time when it can be sold at a profit, unviewed by anyone, with taxes on the gain not paid.<sup>313</sup> The claimant may wish to retain the art for sentimental or appreciative reasons, but it is only in the rare case that he has the assets to do so.

The fact is that a middle-class person,<sup>314</sup> or even an upper middle-class person, cannot afford to maintain high-value art. The insurance premiums (if insurance is available)<sup>315</sup> and the required security for the art are beyond

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313. Scott Reyburn, *What the Panama Papers Reveal About the Art Market*, N.Y. TIMES: ART & DESIGN (Apr. 11, 2016), <https://www.nytimes.com/2016/04/12/arts/design/what-the-panama-papers-reveal-about-the-art-market.html> (Apr. 11, 2016); Graham Bowley, *One of the World's Greatest Art Collections Hides Behind This Fence*, N.Y. TIMES: ART & DESIGN (May 28, 2016), <https://www.nytimes.com/2016/05/29/arts/design/one-of-the-worlds-greatest-art-collections-hides-behind-this-fence.html>.

314. The median household income in the United States for 2016 was \$59,039, up 3.2% from 2015's \$57,230. See U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/2017/demo/p60-259.html> (last accessed Feb. 28, 2017).

315. Even if hung in your home, high-end art is not effectively covered by your homeowner's insurance policy because there are value limits on that coverage. It would need a separate rider. Even that may not be possible because most ordinary insurance companies limit the amount of those riders, for example, to no more than fifty percent of the insured value of the structure. If the insured value of your home is \$500,000 and you recover a painting worth \$500,000, you might obtain a rider to insure \$250,000 of it. A rate that was mentioned was five cents per thousand dollars of coverage. In the case above, one would probably do better to seek specialized coverage for the entire value of the work. That would require an appraisal, which is also not free.

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the budget of any but the wealthy, to say nothing of the fact that high-value art often requires expensive conservation to maintain its value. In addition, where the art is recovered by a person represented by a lawyer who has a contingent fee contract, most claimants have little in the way of other idle resources with which to pay the contingent fee without selling the art. The final straw may be that the claimant may not be a single claimant, but plural claimants. While we speak about a single claimant, at a remove of several generations from the owner, there is often more than one claimant who are heirs.<sup>316</sup> In that case, the only way to equitably divide the art that is secured is to sell it and divide the proceeds.

The art may end up in a museum in one of several ways. The settlement may leave the art in the museum.<sup>317</sup> The art may be sold to a museum, though few museums have the resources to purchase high-value art.<sup>318</sup> Alternatively, the art may be purchased by a private person who later donates it to a museum. This alternative is less certain. The major incentive for museum donations is the charitable deduction from either the income or estate tax.<sup>319</sup> That deduction only benefits United States taxpayers. Many buyers in today's art market are nonresident aliens, for whom United States tax inducements are irrelevant.<sup>320</sup> Even with United States taxpayers, the value of a charitable deduction is reduced when tax rates are reduced, when the number of people who take the standard income tax deduction increases, and when the exemption from the estate tax increases, all of which occurred for taxable years beginning January 1, 2018.

From a public policy viewpoint, having a work disappear into a private collection is not desirable. One of the reasons for special treatment of art is to make it accessible to the general public. Given a choice between putting art in a museum where it will be on public view or at least accessible to

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316. There were nine heirs in *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, n. 1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 805 (N.D. Ohio 2006).

317. See, e.g., *Schoeps v. Museum of Modern Art*, 594 F.Supp.2d 461, 463 (S.D.N.Y. 2009).

318. Two exceptions seem to be the Getty Museum in Los Angeles and the Neue Galerie in New York. Jori Finkel, *Getty Museum Buys Art by Michelangelo, Parmigianino and More*, N.Y. TIMES: ART & DESIGN (Jul. 20, 2017), <https://www.nytimes.com/2017/07/20/arts/design/getty-museum-buys-art-by-michelangelo-parmigianino-and-more.html> (estimated at \$100,000,000); Graham Bowley, *Neue Galerie Returns Painting Seized by Nazis and Then Rebuys It in Settlement*, N.Y. TIMES: ART & DESIGN (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/arts/design/neue-galerie-returns-painting-seized-by-nazis-and-then-rebuys-it-in-settlement.html> (estimated at \$1,000,000). While the purchase of Gustave Klimt's *Portrait of Adele Bloch-Bauer I*, "The Golden Portrait" was by Ronald Lauder, the Neue Galerie is the beneficiary. Carol Vogel, *Lauder Pays \$135 Million, A Record, for a Klimt Portrait*, N.Y. TIMES: ART & DESIGN (June 19, 2016), <http://www.nytimes.com/2006/06/19/arts/design/19klim.html>.

319. 26 I.R.C. § 170, 2055 (2015).

320. In some cases, tax benefits are irrelevant. See, e.g., <http://www.cbsnews.com/news/doing-the-right-thing-with-stolen-art/>, last accessed 20 July 2017.

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scholars, and having it subject to the whim of a private individual, one should always prefer the museum solution.<sup>321</sup>

a. Claimant and Private Collector

In the typical case between the claimant and a private collector, the whereabouts of the work is usually discovered when the work is sent to an auction house for sale.<sup>322</sup> The most likely settlement in that case, because the current possessor wants to sell the work and the claimant cannot afford to keep it, is to sell the work and divide the proceeds.<sup>323</sup> Each party, if a United States citizen or resident, will pay tax on his gain, though the amount of the gain will differ depending on the time and method of acquisition of the interest.<sup>324</sup>

A more desirable settlement, if the parties can afford it, would be to offer the work to a museum in a private sale at a bargain price, with the parties agreeing to how they will divide the sales price and the charitable deduction.<sup>325</sup>

b. Claimant and Museum

In the more common case where the dispute is between the claimant and a museum, there is an opportunity for creative negotiation. The museum

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321. Alyssa R. Bickford, *Nazi-Looted Art: Preserving a Legacy*, 49 CASE W. RES. J. INT'L L. 115, 130-132 (2017); Herbert Lazerow, *Mastering Art Law* 13 (2015).

322. See e.g., *Bakalar v. Vavra*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1380 (S.D. Ind. 1989); *Greek Orthodox Patriarchate v. Christie's, Inc.*, No. 98CV7664(KMW), 1999 U.S. Dist. LEXIS 13257, at \*8 (S.D.N.Y. Aug. 18, 1999).

323. A split was negotiated between the heirs of Heinrich and Anna Maria Graf and a trust set up in the will of the current possessor over Marieschi's "La Punta Della Dogana e San Giorgio Maggiore." The work was to have been sold at auction and the proceeds shared, though news articles do not reveal the percentage that each will receive. Dalya Alberge, *Case of Venetian masterpiece looted by Nazis closed 80 years on*, THE GUARDIAN (May 27, 2017), <https://www.theguardian.com/artanddesign/2017/may/27/painting-looted-nazis-anschluss-auction-venetian-michele-marieschi>.

324. Artwork is taxed at a maximum capital gains rate of twenty-eight percent on collectibles. INT. REV. CODE OF 1986 § 1(h)(3), (4). The basis will be the purchase price if bought, under § 1012; if received by bequest, the fair market value on the date of death or the alternate valuation date, under § 1014; and different computations apply under § 1015 if received as a gift, depending on whether the property is sold at a gain or at a loss. A person who is not a United States citizen or resident is unlikely to be taxed by the United States even if the property is sold in the United States, unless the seller is in the business of selling art.

325. A slight variation of this settlement occurred for Edgar Degas' *Landscape with Smokestacks*, claimed by the Gutmann heirs from Daniel Searle, who bought it in 1987. The parties agreed that each owned half the work, that Searle would donate his half to the Art Institute of Chicago, which would buy the half-interest of the Gutmann heirs. O'DONNELL, *supra* note 292, at 98-101. The museum's purchase benefited Searle indirectly. It is always difficult to value the donation of a unique object. It is even more difficult to value a fractional interest in a unique object. The museum's purchase of the half interest from the Gutmann heirs established the fair market value of the interest that Searle donated for purposes of his charitable deduction.

would like to keep the work on display, but few museums have giant acquisition budgets. Buying the work outright at its current fair market value is usually not an option. The claimant would like public recognition of the wrong done to his ancestor and would like that recognition symbolized with some cash.

One potential solution would be for the museum to acknowledge the wrong done to the claimant's ancestor in a permanent way, by putting the history of the artwork on the museum sign that identifies it and on the museum website. The history of the family's persecution is sometimes detailed. The museum might make a modest payment to the claimant, and the claimant might donate the artwork to the museum, thereby securing a charitable deduction for the difference between the fair market value of the work and the amount the claimant received.<sup>326</sup> The charitable contribution might be larger than the claimant could use in the year it is given, but any unused amount can be carried forward to the five succeeding years.<sup>327</sup> In such a case, claimants should consider whether it is better to receive a lump sum, or periodic payments, perhaps in the form of a life annuity.

Such resolutions can be expressed in a variety of ways.<sup>328</sup> In one settlement, the current possessor University museum formally returned Pissarro's "La Bergère" to the French resident heir of the original owner.<sup>329</sup> The University had received the painting as a bequest.<sup>330</sup> The settlement provided for the painting to rotate between display at the University museum and display at a museum in France.<sup>331</sup> The claimant promised to

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326. 26 I.R.C. § 170. This would be a transaction that combined a sale of part of the interest and a charitable gift of the rest. *Diedrich v. C.I.R.*, 457 U.S. 191 (1982) (part sale, part gift when donee agreed to pay donor's gift tax).

327. 26 I.R.C. § 170(d).

328. A list of thirty-two known restorations or settlements by museums is found at, Frankel & Forrest, *supra* note 292, at 279, 329–335.

329. Randy Ellis & Silas Allen, *University of Oklahoma Settlement Agreement Revealed in Nazi-looted Art Case*, THE OKLAHOMAN (Feb. 23, 2016, 11:30 AM), <http://newsok.com/article/5480678>.

330. *See id.*

331. *See id.* One wonders whether the University considered the possibility that during one of the painting's sojourns in France, the French government might classify it as a national treasure and prohibit its export, thereby terminating the benefit that the University was promised in the settlement. For an analogous situation, *see* Ramier, *supra* note 297, at 337, where a French citizen, bought a Van Gogh in New York in 1955, brought it to France in 1957, and was denied permission to take it to his Geneva home in 1989, as France in that year classified it as a national treasure. He recovered a substantial judgment, in part because of procedural irregularities, because confining the painting to France reduced its value by roughly eighty-five percent. *See id.* Such classification is authorized by, Convention on the Means of Prohibiting and Preventing the Illicit Import, *supra* note 292, art. 4(a), as property created within French territory by a French resident; General Agreement on Tariffs and Trade art. XX(f), Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 188; and the Treaty Establishing the European Community (Consolidated), art. 30, Oct. 11, 1997, O.J.C.E. 97/C 340/03.

give or bequeath the painting to a French museum.<sup>332</sup>

In another, the North Carolina Museum of Art restored Lucas Cranach the Elder's "Madonna and Child with Landscape" to the grandnieces of Philip von Gumpfretz, who sold it to the museum for half its fair market value, \$600,000.<sup>333</sup> An exhibition was planned to explain the history of the painting and honor Mr. Von Gumpfretz and his heirs.<sup>334</sup> The Museum had received the painting as a gift.<sup>335</sup>

The Neue Galerie acknowledged the ownership of Schmidt-Rottluff's "Nude," then purchased it from the heirs for its fair market value.<sup>336</sup>

The Bavarian State Paintings Collection restored "The Raising of Lazarus" that had been in Herman Goering's collection, then purchased it, with the understanding that a plaque will detail the restitution and the fate of the family.<sup>337</sup>

It needs to be emphasized that the likelihood of reaching an eventual settlement may depend on the stances of the parties, beginning when the claimant approaches the current possessor. If the claimant approaches the current possessor as a thief, and the current possessor communicates that he thinks the claimant is engaging in extortion, settlement will be difficult. If the claimant treats the current possessor as someone who has rendered a valuable service by protecting and conserving the artwork for years, and the current possessor treats the claimant's approach as something that needs to be verified and promptly devotes assets to that verification, agreement is much more likely.

## **VI. Net Effect of HEAR**

It is always hazardous to predict the effect of legislation before courts have had the opportunity to construe it. Nevertheless, the above analysis leads one to conclude that it will have little effect in New York, the most popular state for litigating Holocaust recovery cases. The statute of limitations there is seldom a bar to pursuing those cases because of the demand-and-refusal rule. Its practical result in an "actual discovery" jurisdiction is also likely to be minimal, because most people will claim property once they actually

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332. Ellis & Allen, *supra* note 329. For more detail on the litigation that preceded the settlement, see O'DONNELL, *supra* note 292, at 216–223.

333. Ellis & Allen, *supra* note 329.

334. CBS, *supra* note 320.

335. *See id.*

336. Bowley, *supra* note 318. A bargain for both sides. The Galerie did not pay the twenty percent buyer's commission that most auction houses charge, and the seller did not pay a similar seller's commission. *See id.* Neither was subject to the potential vicissitudes of an auction where the price can vary significantly from fair market value.

337. Catherine Hickley, *Painting From Goering's Collection Is Returned to Banker's Heirs*, N.Y. TIMES: ART & DESIGN (July, 21, 2017), <https://nyti.ms/2txjrYQ>; *Bavarian State Painting Collections restitutes 'The Rising of Lazarus'*, ART DAILY, <http://artdaily.com/news/97660/Bavarian-State-Painting-Collections-restitutes%E2%80%94The-Raising-of-Lazarus-#.WXaQqaKQxjU> (last accessed Jan. 20, 2017).



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discover who has it and that they are entitled to it. Its effect in states following the traditional rule, that a cause of action accrues when the item is taken and brought into the jurisdiction, should likewise be minimal, because in most of those jurisdictions the current possessor would have long ago acquired title by adverse possession. Any attempt to apply HEAR to lengthen the statute of limitations for those properties would be an unconstitutional taking of the property barred by the Fifth Amendment.

HEAR is likely to have a significant effect in those states following the discovery rule. The change from discovery with all its requirements of diligence and determination of when one should have discovered the appropriate facts to actual discovery is likely to require the litigation or settlement of many more cases.

HEAR's effects are further reduced by its strict limitation to takings from persecuted groups by specified institutions or people pursuant to Nazi ideology.

HEAR is also likely to make litigation more expensive by shifting from the simple question of whether the statute of limitations has expired to the question of whether the claimant is barred by the doctrine of laches, with its requirement of discovery and a separate trial on that issue.

The law is likely to have the effect of encouraging more settlements by mediation and negotiation. It creates more uncertainty of result and it increases the cost of litigating, which should encourage settlements.