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The Choice between Civil and Criminal Remedies in Stolen Art Litigation

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The Choice between Civil and Criminal Remedies in Stolen Art Litigation

Jennifer Anglim Kreder*

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I. INTRODUCTION

The subject of stolen art has recently received substantial attention from the media¹ and has been the subject of a number of closely-followed cases,² many involving Nazi-looted art. Such cases

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1. *E.g.*, Lawrence M. Kaye & Howard N. Spiegler, *Looted Art Carries Its Own Set of Problems*, 4 N.Y.L.J. 1 (2004) (“There has been much publicity in recent years about the theft of cultural property, ranging from the smuggling of antiquities from foreign countries (including the artifacts recently looted from the Baghdad Museum) to the plunder of art by the Nazis during the Holocaust.”).

2. Stephen W. Clark, *Selected World War II Restitution Cases*, SK061 A.L.I.-A.B.A. 217 (2005). *See, e.g.*, U.S. v. *Femme en Blanc*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Bennigson v. Alsdorf*, No. B168200, 2004 WL 803616 (Cal. Ct. App. 2004); *Alsdorf v. Bennigson*, No. 04C5953, 2004 WL 2806301 (N.D. Ill. 2004); *Warin v.*

were filed in U.S. courts as recently as 2004 and 2005,³ and in 2004, the U.S. Supreme Court heard one such case, *Republic of Austria v. Altmann*, on a narrow issue.⁴ Some heirs of deceased Holocaust survivors are learning, as they look through family documents, for example, that they have claims to art.⁵

Because approximately 20% of all European art was looted by the Nazis,⁶ there is a tremendous amount of artwork with a tainted past that has traded hands many times.⁷ Current possessors of such art may be completely unaware that it ever was stolen.⁸ Even if they are generally aware of the Nazi-looted art problem, many are leery of initiating a provenance search: possessors may be apprehensive, not only because the search itself is expensive, but also because they may

Wildenstein & Co., Inc., 297 A.D.2d 214 (N.Y. App. 2002); *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 WL 1657237 (2001); *In Re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 N.Y.2d 729 (N.Y. 1999) (involving seizure of *Portrait of Wally* by Egon Schiele); *U.S. v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

3. *Femme en Blanc*, 362 F. Supp. 2d at 1175; Martha Lufkin, *Elizabeth Taylor Contests New Suit to Claim Her Van Gogh*, THE ARTNEWSPAPER.COM, Dec. 27, 2004, available at <http://www.theartnewspaper.com/news/article.asp?idart=11671>. The case has since been dismissed. Associated Press, *Suit Against Elizabeth Taylor Dismissed*, USA TODAY, February 8, 2005, available at http://www.usatoday.com/life/people/2005-02-08-taylor-suit_x.htm?POE=LIFISVA.

4. 541 U.S. 677 (2004). The parties in *Altmann* agreed to binding arbitration in Austria, with a ruling expected by November 1, 2005. Howard Reich, *Austrian Panel, Not U.S. Courts, Will Decide Who Owns Looted Art*, CHICAGO TRIBUNE, May 18, 2005, available at <http://www.adele.at>. It should be noted that an Austrian art restitution board in November 2003 recommended the return to the plaintiff, Mrs. Altmann, of another Klimt, *Portrait of a Woman*, from the Austrian Gallery. Der Standard, *Ein Weiterer Klimt Wird Restituiert* [Klimt Painting Restituted To Heirs of Bernhard Altmann], Nov. 21, 2003, available at <http://www.bslaw.net/news/031121.html> in German and English.

5. *E.g.*, Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295, 304 n.80 (2003); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 23 (1998).

6. Stevenson Swanson, *Fifty-three Years after WWII, Ghosts Spawned by Nazi Looting Return to Haunt Art World*, BUFFALO NEWS, Feb. 8, 1998, at A18 ("By some estimates, wartime looting affected as much as 20 percent of Europe's treasury of art.").

7. *E.g.*, Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 660 (2000):

According to Ronald Lauder, former U.S. ambassador to Austria and now chairman of the Museum of Modern Art in New York, "more than 100,000 pieces of art, worth at least \$10 billion in total, are still missing from the Nazi era." Mr. Lauder believes that "because of these large numbers, every institution, art museum and private collection has some of these missing works." (internal citations omitted).

Id.

8. This was claimed by Elizabeth Taylor, for example. See Lufkin, *supra* note 3.

fear that initiating a search will ultimately result in dispossession without compensation.⁹ As potential buyers research the provenance of the artwork, information about the artwork's whereabouts and its current possessors will reach claimants, who will seek to negotiate a settlement, file a lawsuit, or both.¹⁰

The fight to return Nazi-looted art was invigorated by the publication of Lynn Nicholas' *The Rape of Europa* (1994) and Hector Feliciano's *The Lost Museum* (1997).¹¹ News of lawsuits filed in the late 1990s seeking compensation for World War II-era slave labor,¹²

9. Glenn D. Lowry, Director of the Museum of Modern Art, testified before the House Committee & Financial Services Committee about the nature of provenance research:

In order to illustrate the complexity of the issues involved in this kind of work, let me offer an example of the time and effort that must go into provenance research. The Museum of Modern Art recently acquired a truly great painting, *The Window/The Yellow Curtain*, by Henri Matisse. At first glance the painting had an impeccable provenance having been in the great French collector Alphonse Kann's collection before the war. During our research on the painting, however, we learned that it had been confiscated by the Nazis and even appears in a war-time photograph of the Jeu de Paume, the Parisian building used as a repository for looted art by the Nazis. Crestfallen, we ceased to pursue the painting and alerted the dealer to the problem. But this is not the end of the story. For subsequent research revealed that despite being looted, the painting had been restored to Mr. Kann prior to his death, and that he in turn had sold it to a European collector in the 1940s. In order to be sure that this had happened, the Museum contacted the heirs through an intermediary and obtained a letter from them assuring us that all was in order. This process took over a year and a half despite the renown of both the painting and the Kann collection. While this kind of intensive research is standard for all works of art we acquire, I believe that it is the exception rather than the rule to be able to so clearly document the history of such a work of art.

Elaine L. Johnston, *Cultural Property and World War II: Implications for American Museums, Practical Considerations for the Museum Administrator*, SC40 A.L.I.-A.B.A. 29, 60-1 (1998) (reprinted testimony).

10. For example, in the *Alsдорff/Bennigson* litigation, an heir of a woman whose Picasso painting was looted by the Nazis learned of the current possessor's attempts to sell the painting only after a potential buyer researched the painting's provenance through the Art Loss Register. See *Bennigson*, 2004 WL 803616.

11. See LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Alfred A. Knopf ed., 1994); HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (Tim Bent & Hector Feliciano trans., Basic Books 2d ed. 1997).

12. See, e.g., *In re Austrian German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001) (approving dismissal of slave labor claimants' class action lawsuits after the U.S. and German governments agreed to create foundation for their benefits).

unpaid insurance policies,¹³ bank accounts,¹⁴ and stolen gold¹⁵ led to generally increased awareness about the remaining legal issues pertaining to the Holocaust. Since these events and the adoption of the Washington Principles in 1998,¹⁶ many major museums around the world have dedicated significant resources to researching the provenance of artworks with gaps seemingly related to World War II.¹⁷ These museums are publishing their findings on the web, which is searchable by claimants. Organizations dedicated to locating looted art, such as the Art Loss Register, are taking similar steps.¹⁸ Some museums have reached creative settlements with claimants.¹⁹ Others, however, notably the Austrian Gallery and the Belvedere in Vienna, have fought claims in U.S. courts.²⁰

In the United States, litigation of art theft issues has taken various forms and is governed by varying standards of proof and statutes of limitation. Of course, traditional civil litigation is one option. On the whole, traditional civil litigation of art theft cases has been quite positive for plaintiffs: most of those cases reach out-of-court settlements.²¹ Notably, some have an unfavorable view of U.S. courts' openness to such claims. For example, some critics maintain

13. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (enjoining enforcement of California statute authorizing law suits against foreign insurers that had issued policies prior to World War II as preempted by federal executive foreign affairs powers).

14. *In re Holocaust Victim Assets Litigation*, No. LV-96-4849-ERK-MDG, 2000 WL 33241660 (E.D.N.Y. Nov. 22, 2000), *aff'd*, 413 F.3d 183 (2d Cir. 2005).

15. *Id.*

16. On December 3, 1998, forty-four governments participating in the Washington Conference on Holocaust-Era Assets adopted principles for "dealing with Nazi-looted art." The principles are available on the web site run by the Commission for Looted Art in Europe: http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm.

17. For the first time in a very public way, major American institutions are attempting to correct possible improper acquisitions relating to [the WWII] era and to quell once and for all old claims, by posting on web sites lists of objects that have gaps in provenance. As these sites proliferate, some museums are entering negotiated settlements with litigants or potential litigants in response to ownership claims that otherwise might be defeated by traditional defenses like the statute of limitations.

JESSICA L. DARRABY, *ART, ARTIFACT & ARCHITECTURAL LAW* § 6:116 (West 2002).

18. *Id.*; Elizabeth Olson, *Web Site Goes Online to Find Nazi-Looted Art*, N.Y. TIMES, Sept. 8, 2003, at E4; Art Loss Register available at <http://www.artloss.com/Default.asp> ("The Art Loss Register (ALR) is the world's largest private international database of lost and stolen art, antiquities and collectibles that provides recovery and search services to collectors, the art trade insurers and law enforcement through technology and a professionally trained staff of art historians.")

19. E.g., David D'Arcy, *Viennese Family Sell Nazi Loot Cranach Back to North Carolina Museum for Half Price*, THE ARTNEWSPAPER.COM, available at <http://www.theartnewspaper.com/news/article.asp?idart=2116>.

20. *Altmann*, 541 U.S. 677; *Portrait of Wally*, 105 F. Supp. 2d 288.

21. Kaye & Spiegler, *supra* note 1, at 3.

that the New York courts—arguably the most liberal in the United States because they employ the “demand and refusal” rule for triggering the statute of limitations—have become a magnet for ancient, unjustified claims.²²

The most contested issues in such cases tend to be the factual accuracy of the claim of looting, statutes of limitation, and choice of law.²³ As witnesses die and documents are lost, a plaintiff has greater difficulty establishing ownership, while a defendant has an increased ability to show prejudice from the delay under U.S. laches doctrine.²⁴ As time passes and art trades hands, it likely will become more difficult for plaintiffs to win such cases.²⁵ Additionally, the applicable statutes of limitation and repose available under the civil law of European nations continue to run.²⁶ Choice of law is often contested because U.S. law is more favorable to plaintiffs than European laws on statute of limitations issues.²⁷

Plaintiffs continue to file traditional civil actions seeking the return of Nazi-looted artwork. In October 2004, a case was filed against Elizabeth Taylor. That case was dismissed fairly quickly, primarily because there was no evidence that the art was looted or

22. Ashton Hawkins, et al., *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, 51 (1995):

Although the court in *Guggenheim* expressed a fear that a less “owner-friendly” rule would turn New York into a haven for stolen art, its decision instead threatens to turn New York into a haven for questionable litigation of ancient claims, and thereby may have a chilling effect on legitimate art transactions and art exhibitions in the state.” (internal footnotes omitted).

See also Charles D. Webb, Jr., *Whose Art is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 *KY. L.J.* 883, 893–94 (1990–91) (claiming due diligence rule will encourage filing of stale claims); Richard Perez-Peña, *The Art-Law Center of the Universe*, *N.Y. TIMES*, Oct. 22, 1993, at B7 (describing New York as an attractive venue for filing ancient stolen art claims).

23. See Emily A. Maples, Note, *Holocaust Art: It Isn't Always “Finders Keepers, Losers Weepers”*: A Look at Art Stolen During the Third Reich, 9 *TULSA J. COMP. INT'L L.* 355 (2001) (describing issues that arise during lost art cases); Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 *CASE W. RES. L. REV.* 87, 117 (1999) (“The publicity of such high profile cases, such as the Seattle [Art Museum] case, will encourage plaintiffs with tangential and weak cases to sue museums, realizing that public sentiment is likely to push the museum toward settlement.”).

24. See Maples, *supra* note 23 (providing a thorough general overview of the hurdles plaintiffs typically face); see also Constance Lowenthal, *Edited Presentation*, 31 *N.Y.U. J. INT'L L. & POL.* 133, 137 (1998) (“[O]ne of the most important obstacles to recovery for Holocaust victims has been proof. Holocaust victims who fled their apartments usually had only their own recollections of their possessions . . .”).

25. Lowenthal, *supra* note 24, at 137.

26. Maples, *supra* note 23, at 367–68.

27. *E.g.*, *id.*

subjected to a forced sale.²⁸ Additionally, Ed Fagan—famous for his role in the Holocaust slave labor class actions in New York—reportedly filed an \$18 billion suit against Germany and a \$1.8 billion suit against Sotheby's, publicly stating that he planned to file similar suits against the United States, Austria, and France.²⁹ Regardless of the viability of those particular suits, traditional civil litigation is a viable option in many Nazi-looted art cases. Indeed, the *Altmann* case, prior to entering arbitration, was litigated all the way to the Supreme Court in 2004, albeit on narrow grounds.³⁰

Criminal prosecution is another possible option. At the federal level, art theft is prosecuted criminally under the National Stolen Property Act (NSPA).³¹ The NSPA was initially passed to address the problem of stolen cars that were moved in interstate commerce: prior to its enactment, prosecutors in the state where cars were stolen were powerless to prosecute the thieves after they drove the stolen cars across state lines.³² Of course, criminal prosecutions are governed by the "beyond a reasonable doubt" standard, whereas most traditional civil litigation is governed by the "preponderance of the evidence" standard.

In addition to civil actions and criminal prosecutions, civil forfeiture is another mechanism that may be used to recover stolen art.³³ The civil forfeiture mechanism operates as a hybrid of criminal and civil proceedings.³⁴ In the types of civil forfeiture proceedings most applicable to stolen art, the government seizes the art and must then show, by a preponderance of the evidence,³⁵ that the art is subject to forfeiture because it was imported, transported, or received in violation of some law (probably the NSPA or a customs regulation).³⁶ Those who claim ownership of the art—regardless of

28. *Adler v. Taylor*, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005).

29. See *Germany Sued over Holocaust Art*, WORLD JEWISH CONGRESS ONLINE, June 24, 2004, <http://web.archive.org/web/20040624024319/http://www.wjc.org.il/dwb/archive.cfm?y=2004&m=6>; *Sotheby's Looted Art Lawsuit*, WORLD JEWISH CONGRESS ONLINE, June 7, 2004, <http://web.archive.org/web/20040624024319/http://www.wjc.org.il/dwb/archive.cfm?y=2004&m=6>.

30. *Altmann*, 541 U.S. 677.

31. 18 U.S.C. §§ 2314, 2315 (2005). Trafficking in looted antiquities also commonly is prosecuted via customs statutes. *E.g.*, *U.S. v. An Antique Platter of Gold, Known as a Gold Phiale Mesamphalos*, C.400 B.C., 991 F. Supp. 222, 229–33 (S.D.N.Y. 1997).

32. George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT'L L. & COM. 77, 89–91 (1978).

33. See Barbara J. Van Arsdale, *Validity, Construction, and Application of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 145 A.L.R. FED. 349 (2004).

34. *Id.*

35. *Id.*

36. For example, in *Portrait of Wally*, the U.S. government seeks forfeiture pursuant to 19 U.S.C. 1595(a) and 22 U.S.C. § 401(a). 105 F. Supp. 2d 288.

whether they possessed the art immediately prior to the seizure—may then assert that the art should not be forfeited to the government, but rather should be awarded to them.³⁷

“[T]he complexities of ownership issues sometimes result in more than one party having colorable and good faith claims to title.”³⁸ Additionally, because a violation of the NSPA occurs only when the defendant acted “knowingly,”³⁹ there is a scienter component, which means that the government must prove that the violation was intentional.⁴⁰ Further, as with most U.S. penal statutes, conspiracy to violate the NSPA is also a crime.⁴¹

This Article analyzes the patchwork of legal remedies available to persons claiming ownership of Nazi-looted art. This Article demonstrates that the use of the NSPA via criminal prosecutions or civil forfeiture proceedings provides a claimant with great advantages over the present-day possessors of the art. Part II analyzes the criminal remedies used to punish thieves and restore the art to its original owners or their heirs. Part III analyzes the use of the civil forfeiture mechanism—a hybrid of criminal and civil remedies—in pursuit of restoring art to claimants.

Part IV concludes that criminal prosecutions or civil forfeiture proceedings premised on violations of the NSPA should be brought—most often, but not exclusively—in the limited circumstance of a clear, usually recent, theft. The NSPA is a criminal statute and should only be applied—even indirectly through civil forfeiture proceedings—to truly criminal conduct. For many claims to purportedly stolen art, traditional civil litigation is a viable option that is preferable to government-backed forfeiture proceedings, which preempt statute of limitations principles upon which the viability of the art market greatly depends. Although since the adoption in 2000 of the Civil Asset Forfeiture Reform Act (CAFRA) the advantages to the government in a civil forfeiture proceeding are no longer quite as extreme as they once were,⁴² they still are weighty. Moreover, the risk of erroneous deprivation is extremely high when ownership turns on complex legal and factual issues that span many years. The government should initiate criminal or civil forfeiture proceedings only when there is probable cause to believe that notice of criminal conduct at the time of acquisition is attributable to the current possessor of the art, and when the current claimant is unable to locate the art shortly after the theft. Otherwise, the government

37. See *infra* Section III.

38. Am. Ass'n of Museums Br., at 3.

39. Nowell, *supra* note 32, at 99–101.

40. *Id.*

41. *E.g.*, Am. Ass'n of Museums Br., at 5.

42. See Van Arsdale, *supra* note 33.

should limit its involvement to assisting in negotiating a settlement, or it should leave the claimants to pursue traditional civil remedies.

II. STOLEN ART CRIMINAL PROSECUTIONS

Only a few criminal cases have been filed on the grounds of art theft. The NSPA—passed in 1934⁴³ as an extension of the National Motor Vehicle Act of 1919⁴⁴—has been the basis for almost all reported criminal prosecutions of art theft in the United States. The NSPA is subdivided into two sections: 2314 and 2315. Section 2314 provides in relevant part:

Whoever transports, transmits or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years or both.⁴⁵

Section 2315 provides in relevant part:

Whoever receives, possesses, conceals, stores, barter, sells, or disposes of any goods . . . of the value of \$5,000 or more . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken. . . [s]hall be fined under this title or imprisoned not more than ten years or both.

In sum, the two sections aim to prevent the knowing transport or receipt of stolen goods. Because a defendant must have acted “knowingly” to be convicted under the NSPA, there is a scienter component,⁴⁶ which means that the government must prove that the violation was intentional;⁴⁷ this will be discussed in further detail

43. See Nowell, *supra* note 32, at 89–91 (providing a full description of the legislative history of the NSPA).

44. 18 U.S.C. § 2312 (1992).

45. 18 U.S.C. § 2314 (1994). The statute also provides in part potentially relevant to international art theft:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5,000 or more . . . [s]hall be fined under this title or imprisoned not more than ten years or both.

Id.

46. *E.g.*, Nowell, *supra* note 32, at 99–101.

47. *E.g.*, *id.*

below. Additionally, as with most U.S. penal statutes, conspiracy to violate either section of the NSPA is a criminal violation.⁴⁸

“Until the early 1970s, because of the difficulty in proving the scienter element, the prosecution of possessors of stolen art was only a theoretical deterrent to art theft.”⁴⁹

Proving scienter in stolen art cases is normally more difficult than for other commercial goods. This difficulty is a function of the nature of the art transaction itself. Often, the exchange of art objects is made through art dealers and auction houses who take very few measures to verify the provenance of the artwork. This lack of procedural safeguards makes it difficult to show a legitimate chain of title. Thus, more often than not, stolen artwork resurfaces on the legitimate market with the purchaser unaware of its illicit background.⁵⁰

The first criminal conviction under the NSPA that related to art was *United States v. Hollinshead* in 1974.⁵¹ Hollinshead, a dealer in pre-Columbian artifacts, and Fell, the owner of a Guatemalan company used as a fence, smuggled artifacts out of Guatemala into the United States.⁵² They were convicted under the NSPA of, among other things, conspiracy to transport property in interstate commerce.⁵³ The prosecution focused in particular on the smuggling of one spectacular Mayan stele⁵⁴ worth thousands of dollars, which was cut into pieces, brought to Fell’s packing plant in Belize, and then “packed in boxes and marked ‘personal effects’ and addressed to Hollinshead at Santa Fe Springs, California.”⁵⁵ Evidence introduced at trial proved that Hollinshead and Fell were present while the events occurred and were also present while Guatemalan officers were bribed to allow the stele’s smuggling.⁵⁶ Ultimately, Hollinshead himself attempted to sell the stele in the United States.⁵⁷ After they were found guilty,⁵⁸ Hollinshead and Fell appealed the jury’s

48. *E.g.*, *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) [hereinafter *McClain I*], conviction on retrial upheld by *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979) [hereinafter *McClain II*].

49. Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT’L L. & POL’Y 225, 233 (1993) (citing PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 68–69 (1981) (noting that difficulties in proving that an object was stolen hindered the prosecution of art thieves)).

50. *Id.*

51. 495 F.2d 1154 (9th Cir. 1974).

52. *Id.* at 1155.

53. *Id.*

54. “An upright slab bearing sculptured designs or inscriptions. Sometimes loosely applied to any prepared surface on the face of a building, a rock, etc., covered with an inscription.” OXFORD ENGLISH DICTIONARY (2d ed. 1989).

55. *Hollinshead*, 495 F.2d at 1155.

56. *Id.*

57. *Id.*

58. *Id.*

verdict.⁵⁹ Notably, *Hollinshead* began as a civil suit brought by the Guatemalan government, but Guatemala dropped the civil suit when the U.S. Attorney initiated criminal proceedings under the NSPA.⁶⁰

An important issue on appeal was whether the jury instruction that "there is a presumption that every person knows what the law forbids" was overbroad when foreign law was at issue.⁶¹ In instructing the jury, the trial judge defined the term "stolen" as used in the NSPA as follows: "'Stolen' means acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership."⁶² The judge further instructed the jury, as one would expect in a criminal case under the NSPA, that "it must find beyond a reasonable doubt that the . . . [criminal defendants] knew that the stele had been stolen."⁶³ Guatemalan law provides that all artifacts like the stele "are the property of the Republic, and may not be removed without the permission of the government."⁶⁴

The Ninth Circuit Court of Appeals found that there was "overwhelming evidence that the defendants knew that it was contrary to Guatemalan law to remove the stele, and that the stele was stolen."⁶⁵ In fact, the court concluded that it would have been "astonishing if the jury had found that they did not know that the stele was stolen," regardless of any confusion the jury may have had as to whether the controlling law was that of Guatemala or whether Guatemalan law was enforceable in the United States.⁶⁶ Further, the court found that the criminal defendants' knowledge of foreign law was "relevant only to the extent that it bears upon the issue of their knowledge that the stele was stolen."⁶⁷ In sum, the defendants' conduct—bribing officials and using false marks on the stele's packaging to smuggle it into the United States—evidenced beyond any reasonable doubt that they knew they were smuggling "stolen" property into the United States, which is a clear violation of the NSPA.

59. *Id.*

60. Richard Upton, *Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts*, 10 INT'L L. & POLITICS 569, n.102 (1978) (citing LEONARD D. DUBOFF, ART LAW: DOMESTIC AND INTERNATIONAL 332 (Leonard D. Duboff ed., Fred B. Rothman & Co. 1975)).

61. *Hollinshead*, 495 F.2d at 1155.

62. *Id.* at 1156.

63. *Id.*

64. *Id.*

65. *Id.* at 1155.

66. *Id.*

67. *Id.* at 1156.

The second criminal conviction under NSPA was *United States v. McClain* in 1977. Notably the defendants in *McClain* had connections to Hollinshead.⁶⁸ In *McClain*, five defendants were found guilty of violating the NSPA for stealing pre-Columbian artifacts from Mexico and selling them in the United States.⁶⁹ A Mexican law passed in 1972 nationalized ownership of pre-Columbian artifacts still in the ground.⁷⁰ Thus, a “distinctive characteristic of these objects is that not only may they never have been in governmental possession, but their very existence or discovery may have been unknown to the Mexican government.”⁷¹ Arguably, however, artifacts unearthed prior to the passage of the Mexican law in 1972 are beyond its scope.⁷² Thus, provenience⁷³ records relating to pre-Columbian art became very important to those looking to buy and sell such art.⁷⁴

The actions of the defendants in *McClain* indicated beyond a reasonable doubt that they knew that they were smuggling “stolen” property. Although the government “presented no evidence as to how and when the artifacts were acquired in Mexico, nor as to when the

68. *McClain I*, 545 F.2d 988. See generally Upton, *supra* note 60, at 569–78 (discussing *McClain I*). For the connection with Hollinshead, see 593 F.2d at 663.

69. *McClain I*, 545 F.2d at 992. This opinion is cited solely for factual matters in the case. This opinion actually reverses the conviction below and remanded the case for a new trial. The conspiracy count conviction in the retrial was affirmed on subsequent appeal in *McClain II*, 593 F.2d at 658.

70. *McClain I*, 545 F.2d at 992.

71. Upton, *supra* note 60, at 571 (footnotes and citations omitted):

The potential chilling effect of the *McClain* decision on the acquisition and circulation of pre-Columbian materials within the United States is enormous. Since most American collections of pre-Columbian art contain items lacking any reliable provenance, the *McClain* convictions set a precedent which would expose museum trustees to the risk of federal criminal prosecution if the museum arranges an interstate loan of pre-Columbian objects. Furthermore, it is questionable whether this decision will have any offsetting beneficial effect in deterring the burgeoning black market in pre-Columbian artifacts.

72. See *McClain I*, 545 F.2d at 992 (Ownership of pre-Columbian art unearthed in Mexico was vested in the Republic of Mexico unless it issued “a license or permit to private persons to possess, transfer, or export the artifacts.” In effect, enforcing this standard in the United States “casts a cloud on the title of almost every pre-Columbian object in the United States.”).

73. The term “provenience” is used to indicate the history of an archaeological object back to its archaeological find spot. The presence of a documented provenience will indicate the original archaeological context and associated materials and strata. “Provenience” has been used to indicate the modern history of the ownership of an object.

Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 446 n.156 (2003).

74. See *McClain I*, 545 F.2d at 1003 (discussing confusion of ownership with possession of pre-Columbian artifacts).

pieces were exported,”⁷⁵ the artifacts “had not been registered with the Public Register of Archeological and Historical Zones and Monuments of the Republic of Mexico, or with any government register, and were exported without license into the United States.”⁷⁶ The defendants attempted to sell the artifacts to members of the art and museum community—some viewing the artifacts in motel rooms—⁷⁷as well as to an undercover FBI agent.⁷⁸ “[S]ome of the defendants made statements showing that they were aware that Mexican law forbade the exportation of artifacts without permits from the Mexican government.”⁷⁹

For example, when one potential buyer viewing artifacts caked in mud and straw asked one of the defendants, Rodriguez, how he obtained the ancient artifacts, Rodriguez responded that “he had five squads working in various archeological zones and that the objects were passed, a few at a time ‘by contraband’ to his Calxico store, which served as a front for his operation.”⁸⁰ Rodriguez further explained that “the prices had gone up as a result of the February 1972 presidential agreement between the United States and Mexico”⁸¹ by which the United States agreed to assist Mexico in stemming the black market demand for pre-Columbian artifacts.⁸² Further, the defendants told a potential buyer “that the items had been ‘stolen’ or ‘smuggled’ out of Mexico . . . [and that Rodriguez] was ‘chief of the Mexican Secret Service’ and had gotten the artifacts from ‘a vault’ in Mexico.”⁸³ The defendants also described a plan to generate false bills of sale in Europe so as to improve the marketability of the pieces.⁸⁴

Further, after an informant contacted the defendants by phone claiming to represent “an international combine with Mafia or other underworld connections” looking to purchase stolen property to sell outside the United States, one member of the conspiracy responded favorably that the defendants were “waiting for a shipment of pre-Columbian artifacts to cross the border.”⁸⁵ Telephone conversations with other defendants leading up to the sting sale were similar.⁸⁶ One defendant, William Clark Simpson, “described a ‘conduit’ by which the items were taken from the diggings to the archeological institute

75. *Id.* at 992.

76. *Id.*

77. *McClain II*, 593 F.2d at 660.

78. *McClain I*, 545 F.2d at 992–93.

79. *Id.* at 993.

80. *McClain II*, 593 F.2d at 660.

81. *Id.*

82. 19 U.S.C. §§ 2091–95 (2005) (enacted in 1972).

83. *McClain II*, 593 F.2d at 660.

84. *Id.*

85. *Id.* at 661.

86. *Id.*

in Mexico, where documents or permits were forged or backdated.”⁸⁷ He also described how the items were then “trucked in disguise” across the border.⁸⁸

Another example of the conspirators’ knowledge that they were smuggling “stolen” materials is that defendant Simpson stated to an informant “that what they were doing ‘is illegal, but really not illegal, because if the Mexican authorities knew basically what [they] were doing, they would take [the items] away from [them], because the Mexicans really claim all of the items belong to them.”⁸⁹ Simpson also explained how backdating was being used to contravene the 1972 Mexican law.⁹⁰ In arranging the final sale, which was the sting, Simpson reminded the potential purchasers of the need for discretion and of the Mexican government’s claim of ownership of the items, stating that “they would get into a lot of problems if the United States government caught them since what they were doing was against the law.”⁹¹ Simpson’s wife also cautioned an undercover potential buyer not to show any sample artifacts from the operation to any art dealers or museums because a “recent similar showing had caused the FBI to investigate.”⁹² She also requested that the buyer not bring in an appraiser from Mexico City because “she was afraid he might return and report their doings to the authorities because ‘what [they] are basically doing is against the law.”⁹³ The Fifth Circuit concluded that these and other similar comments demonstrated beyond a reasonable doubt that the conspirators knew that the art in question was “stolen” as that term is used in the NSPA.

Nonetheless, both the *Hollinshead* and *McClain* decisions were criticized by many who claimed that, in both cases, U.S. courts improperly enforced the penal laws or the export regulations of other nations, or both.⁹⁴ Many also claimed that a consequence of the decision would be to encourage growth of the black market rather than a responsible, regulated market, in antiquities.⁹⁵ In other words,

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 662.

93. *Id.*

94. *E.g.*, John H. Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT’L L. & POL. 1, 10 (1998).

95. *See, e.g.*, Upton, *supra* note 60, at 602–03 (discussing the weakness of the *McClain* opinion due to the failure to address whether this is an unwarranted enforcement of Mexican law). For discussion of the applicability of foreign law in regards to the importation of art, see generally Kavita Shrama, Note, *From the Mayan Machaquila Stele to Egyptian Pharaoh Amenhotep’s Head: United States Courts’ Enforcement of Foreign National Patrimony Laws after United States v. Schultz*, 56 HASTINGS L.J. 749 (2005); Paul M. Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in DUBOFF, ART LAW, DOMESTIC AND

critics maintained that enforcing foreign law criminalizing the export of any and all artifacts, rather than limiting the export prohibition to a narrower class of objects, would generate a black market in “art hungry”⁹⁶ nations.⁹⁷ Further, the legislative history of the NSPA indicates that Congress did not contemplate that the Act would be applied to the theft of archeological materials in foreign nations.⁹⁸ “Congress intended the NSPA to reach organized criminals who steal property in one state of the United States and sell it to persons in different states.”⁹⁹ Nonetheless, the *Hollinshead* and *McClain* courts found that the plain language of the NSPA applies broadly to stolen goods, regardless of whether the goods are automobiles, cash, or archeological materials stolen in another country.¹⁰⁰ As stated by the Fifth Circuit in *McClain*: “It would have been impossible for the statutes to have explicitly described every type of theft that might fall within their purview.”¹⁰¹ The court concluded: “[I]t is not ‘unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.’”¹⁰²

At least one scholar cautioned, in reference to *McClain*, that the case would have “potentially staggering ramifications for any art collector and for owners of any other type of foreign-origin property.”¹⁰³ Although that fear may have been correct, no possessors

INTERNATIONAL 295, 300 (1975); John Merryman, *The Protection of Artistic National Patrimony against Pillaging and Theft*, in DUBOFF, ART LAW, DOMESTIC AND INTERNATIONAL 233,244–45 (1975); Rogers & Cohen, *Art Pillage—International Solutions*, in DUBOFF ART LAW 315, 317–18 (1975); James A.R. Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW OF THE AM, 68, 71 (1975); Rogers, Note, *The Legal Response to the Illicit Movement of Cultural Property*, 5 LAW & POLY IN INT'L BUS. 932, 958–63 (1973). *But see* Patty Gerstblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197 (2000) (approving expansive use of the NSPA); Barbara B. Rosencrance, Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311 (1986) (same); Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466 (1988) (same).

96. *E.g.*, Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 G.W. INT'L L. REV. 131, 150–51 (2000).

97. *See* William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POLY INT'L BUS. 123, 128–29 (1996).

98. Nowell, *supra* note 32, at 89 (“Despite the apparent ease with which the statute may seem to apply to foreign archaeological materials, the NSPA was drafted to deal with a very different problem, namely, theft of standard, modern commercial goods clearly ‘owned’ and ‘possessed’ by some person or corporation before their theft.”).

99. *Id.* at 89.

100. *See also* United States v. Shultz, 333 F.3d 393 (2d. Cir. 2003) (holding that the NSPA applies to stolen property from a foreign government).

101. *McClain I*, 545 F.2d at 1002.

102. *Id.* at 1002 n.30 (quoting *Boyce Motor Lines v. U.S.*, 342 U.S. 337, 340 (1952)).

103. Upton, *supra* note 60, at 571.

of Nazi-looted art have been convicted for their purchases.¹⁰⁴ Moreover, there has been only one other criminal prosecution under the NSPA in the context of stolen archeological materials: *United States v. Schultz*.

The eleven-day *Schultz* trial in June 2002 was widely followed in the art community¹⁰⁵ and was the subject of Indiana Jones-like stories in the print and television media.¹⁰⁶ Frederick Schultz was a Manhattan art dealer who sold exquisite antiquities worth many millions of dollars—many of which, it has come to be revealed, he smuggled out of Egypt.¹⁰⁷ Aided by British national, Tokely Parry, and Egyptian black marketer, Ali Ibrahim Alia Farag, Schultz smuggled newly unearthed antiquities out of Egypt in violation of Egypt's patrimony law, Law 117.¹⁰⁸ Law 117 was passed in 1983 and provides that all antiquities still in the ground belong to the nation of Egypt and may not be exported from the country.¹⁰⁹ The law, however, applies only to those antiquities unearthed after 1983.¹¹⁰

To get around Law 117, the conspirators would buy newly unearthed antiquities at black market prices from tomb-raiders, building contractors, and corrupt Egyptian officials.¹¹¹ It was important for the smuggling scheme that the antiquities be newly discovered because tombs previously discovered would have been described and published in academic journals.¹¹² "Claiming that an antiquity came out of Egypt [decades before 1983] clearly would have been problematic if there was a publication that recorded the antiquity as having been discovered in a tomb in Egypt [after then]."¹¹³ To explain further, Parry and Schultz "needed the [objects] to be from an unpublished tomb, so that the Egyptian Government could not identify them as having been removed from Egypt in the recent past."¹¹⁴

104. As discussed below, the Department of Justice initiated a prosecution of the family of serviceman Joe T. Meador, but the case was dismissed. Meador stole the Quedlinburg treasures after the war and shipped them to his home in rural Texas. See *infra* text accompanying notes 153–61.

105. See, e.g., *Last Shot for Schultz*, *ARCHAEOLOGY*, May 29, 2003, available at <http://www.archaeology.org/online/features/schultz/briefs.html> (discussing *Schultz*).

106. See, e.g., Barry Meier & Martin Gottlieb, *An Egyptian artifact takes a crooked path* *Stolen Treasures*, *INT'L HERALD TRIB.*, Feb. 24, 2004, at NewsA, 2004 WLNR 5188944.

107. Brief for the United States of America, *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003) (No. 02-1357), available at 2002 WL 32395393.

108. *Id.*

109. *Id.* at *3.

110. *Id.*

111. *Id.* at *2.

112. *Id.* at *9-*12.

113. *Id.*

114. *Id.* at *10 (trial transcript citation omitted).

To further their scheme, Parry “created false provenances of [the objects]’ origin, to make it appear as if they had been removed from Egypt long before the enactment of Law 117.”¹¹⁵ The court summarized the scheme as follows:

Tokely Parry, a skilled restorer of antiquities, restored several of the pieces using techniques from the 1920’s. Schultz then offered the stolen antiquities for sale at his art gallery located on Madison Avenue, which specialized in Classical, Egyptian, Near Eastern, Early European and Eskimo antiquities. Schultz falsely told prospective buyers that the antiquities came from old private collections predating Law 117—including the fictitious “Thomas Alcock¹¹⁶ Collection,” named after a long-deceased great uncle of Tokely Parry—and succeeded in selling one piece, a 3,000-year old stone head of an Egyptian pharaoh [Amenhotep III],¹¹⁷ for \$1.2 million.¹¹⁸

For example, one of the smuggling techniques involved disguising an object “by plastering it with a conservation plastic and painting it to look like a tourist souvenir,”¹¹⁹ which then could easily be carried out of Egypt in a suitcase.¹²⁰ Then, after restoring the object, Parry would adhere to the object a Victorian pharmaceutical label stained with tea bags to make it look old and marked with the name of an old collection, like the Thomas Alcock Collection.¹²¹

In addition to creating old collection labels, Tokely Parry restored the [Amenhotep III head] imitating a restoration style that was popular in the 1920’s. He painted the entire head with a coat of brown shellac (a varnish used at the time), and used plastic modeling material to fill in a false nose, beard and uraeus (a sacred cobra appearing on the forehead). He then photographed the head in this condition and provided these photographs to Schultz, along with a phony restoration report describing what he purportedly did, as a modern restorer, to remove the old restoration.¹²²

The scheme did not come crashing down until more than two years after Parry was arrested by New Scotland Yard in 1994 for smuggling Egyptian antiquities seemingly unrelated to Schultz’s scheme.¹²³ In fact, the pair continued smuggling for two years after the arrest, although they took additional steps to try to hide their

115. *Id.* at *3.

116. Thomas Alcock was an engineer who worked in India and often traveled down the Suez Canal. *Id.* at *6.

117. “Amenhotep III was the king of Egypt from approximately 1390 to 1352 B.C., which was during the 18th dynasty of the period known as the New Kingdom. This was one of Egypt’s most wealthy and powerful times.” *Id.* at *5 (citation to trial transcript omitted).

118. *Id.* at *4.

119. *Id.* at *5.

120. *Id.*

121. *Id.* at *6.

122. *Id.* at *6–*7 (internal citations omitted).

123. *Id.* at *14. Additionally, Schultz was fully aware that Ali Farag and members of his family were charged in Egypt with dealing in stolen antiquities. *Id.*

activities.¹²⁴ At trial, evidence of the above-described events was presented. Other evidence demonstrating that Schultz knew that he was violating Law 117—such as a letter he received from Parry about other pieces of lesser value that were used in their efforts to make the existence of an old collection seem believable—was presented; it is likely that no collection would consist solely of prime pieces of extremely high value.¹²⁵ In the letter, Parry wrote

I spoke with Ali about the pair of reliefs and he assured me that the tomb is completely unknown to the government. So although you would probably prefer anyway to go through with your search, I'm certain that there will be no problems about these pieces. I'm sufficiently content about this to send over some Thorn Alcock labels for them.¹²⁶

Other similar letters and faxes demonstrated Schultz's knowledge that Law 117, at a minimum, made it illegal to export recently discovered antiquities out of Egypt without governmental approval.¹²⁷ For example, in a letter requesting money to continue funding the operation, Parry informed Schultz that

the boys have just returned from the hills above Minea [a large city in central Egypt known for its volume of archeological materials], which is bandit country . . . and we are offered a large hoard. It should be possible to flip some items over, and take the ones you would prefer, but we shall need more money to put down.¹²⁸

Another letter stated that a particular piece was

lost to us because, simply, we didn't have any money there to put down a deposit and secure it (that is, physically take it away from the farmer.) I'm immensely depressed about this, as the piece would have solved all our problems . . . We managed, however, with considerable skill, to keep our customer who, it seems, is sitting on a temple. We have told him that we need another important piece, and he has agreed to actively dig for one.¹²⁹

In another letter specifically informing Schultz of legal developments concerning the Egyptian stolen antiquities market, Parry wrote:

Market here has changed dramatically after Simone's¹³⁰ incarceration and Tariq's retirement for one year . . . Also, new legislation is inclining all the farmers to sell their collections: anyone found with objects—and

124. *Id.* at *11. Further, "Tokely Parry was convicted after a trial in England of violations of the 1968 Theft Act for the secondary handling of stolen antiquities. He served approximately three years in prison, from 1997 to 2000. Tokely Parry testified without any cooperation agreement or other agreement with U.S. or British authorities." *Id.* at *10 (internal citation to trial transcript omitted).

125. *Id.* at *12.

126. *Id.* at *9.

127. *Id.* at *16.

128. *Id.* at *17.

129. *Id.* at *18.

130. *Id.* Simone was an antiquities dealer arrested in Egypt.

classifiable as a 'dealer' thereby—will have his entire assets (house, funds, bank accounts etc. seized).¹³¹

In other letters, Parry wrote that he feared going to prison.¹³² Near the end, their communications were written in Italian—in code—so that hotel workers would not understand them.¹³³ Finally, one fax instructed Schultz to eat the fax after he read it.¹³⁴

Schultz challenged his conviction on many grounds, including many that were advanced in *McClain* and by scholars who criticized *McClain*.¹³⁵ Schultz's first argument was that the NSPA did not extend to the taking of antiquities in violation of foreign nations' laws, regardless of whether the law was an anti-export law or a national patrimony law declaring ownership of all newly discovered antiquities in the state.¹³⁶ This argument was squarely rejected by the Fifth Circuit in *McClain* in the opinion written by Judge Wisdom¹³⁷ and by the Second Circuit in *Schultz*. The Second Circuit stated that the

McClain court's conclusion is firmly anchored in the text and purpose of the NSPA, which, by its terms, applies to any goods that enter the United States after having been stolen abroad, and which has consistently been given a broad interpretation by the Supreme Court and this Court. Since *McClain* was decided, every court to have reached the issue has agreed with the Fifth Circuit's analysis; the relevant agencies of the Executive Branch have endorsed its conclusion as consistent with the best interests of the United States; and Congress has repeatedly rebuffed efforts to amend the NSPA to create the very exception that Schultz asks be read into the statute [for art dealers].¹³⁸

131. *Id.*

132. *Id.* at *18.

133. *Id.* at *19.

134. *Id.* at *19.

135. See Cynthia Ericson, *United States of America v. Frederick Schultz: The National Stolen Property Act Revives the Curse of the Pharaohs*, 12 TUL. J. INT'L & COMP. L. 509, 511 (2004) (discussing the *McClain/Schultz* line of cases).

136. *Schultz*, 2002 WL 32395393 at *23.

137. *McClain I*, 545 F.2d at 988.

138. *Schultz*, 2002 WL 32395393 at *23; see also Upton, *supra* note 60, at 570 (criticizing *McClain*'s application of the NSPA to prosecution for objects taken in violation of foreign national patrimony regimes); Paul M. Bator testified in May 1985 on Bill 86-S521-56 that the NSPA should return to "its intended framework—that is, cases of real theft, where it is shown and proved that somebody took something from somebody else's ownership, and it is a real ownership not simply one of these abstract vesting statutes saying that everything belongs to the State." *Last Shot for Schultz?: Battle of the Briefs*, ARCHAEOLOGY, May 29, 2003, <http://www.archaeology.org/online/features/schultz/briefs.html>; see also Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982); *Schultz*, 2002 WL 32395593 at *28 (discussing Congressional hearings on proposed bills advocating amendment of the NSPA in light of *McClain*, which bills never were sent out of committee to the full Congress for voting). The Departments of State, Justice, and Treasury all sent representatives to testify at hearings in opposition to the bills. *Id.*

Schultz further argued that applying the NSPA to his conduct—taking objects in contravention of the national patrimony laws of a foreign nation—violated the principle of strict construction and the rule of lenity in criminal cases.¹³⁹ Both the Fifth Circuit in *McClain* and the Second Circuit in *Schultz* rejected similar arguments on very similar facts.¹⁴⁰ The principles of strict construction and lenity generally provide that criminal statutes shall be strictly construed “to ensure a defendant has fair warning that his conduct is criminal.”¹⁴¹ The *Schultz* court rejected this line of argument, finding that the statute was clear and that “Schultz cannot credibly complain that he lacked fair warning that his conduct was criminal”¹⁴² in light of the “obvious criminality of his conduct.”¹⁴³ According to the court, the NSPA “plainly prohibits the knowing receipt of stolen goods, and the jury’s verdict confirmed that Schultz received goods that he knew had been stolen from Egypt.”¹⁴⁴

Thus, *Schultz* solidified application of the NSPA to theft committed abroad when the stolen goods are brought into the United States. The thefts in *Hollinshead*, *McClain*, and *Schultz* stood in violation of foreign national patrimony statutes that clearly set forth governmental ownership of newly discovered antiquities. The defendants in all three cases clearly knew that their activities were illegal—even if, as the defendants and some scholars have argued, the defendants did not know necessarily that U.S. criminal law, or the NSPA in particular, would categorize their conduct as “theft.”

The *Schultz* court also concluded that, in these circumstances, it was not unfair to satisfy the scienter component of the NSPA via violations of foreign ownership laws.¹⁴⁵ “As the *McClain* court noted, the NSPA’s scienter requirement protects against ‘the possibility that a defendant is convicted for an offense he could not have understood

139. *Schultz*, 2002 WL 32395593 at *31–*35. See also *Dowling v. U.S.*, 473 U.S. 207, 213 (1985) (holding that the meaning of “stolen, converted or taken by fraud” in § 2314 requires a “narrow interpretation”).

140. *McClain I*, 545 F.2d at 1002 n.30 (rejecting a similar argument based on the “void for vagueness” doctrine).

141. *Schultz*, 2002 WL 32395593 at *31.

142. *Id.* at *32.

143. *Id.*

144. *Id.* The *Schultz* court also rejected the argument that because *McClain* was criticized by many scholars that Schultz should thereby be exculpated for his conduct because he did not know 100% whether other courts would follow *McClain* and find that the NSPA applied to his conduct.

145. *Id.* See also *U.S. v. Tanuzzo*, 174 F.2d 177, 180 (2d Cir. 1949), cert denied, 338 U.S. 815 (1949); Nowell, *supra* note 33, at 100 (analyzing the potential confusion created by the scienter requirement in the context of theft abroad as to whether knowledge is required about illegal export as opposed to taking from an actual owner); Upton, *supra* note 60, at 569.

to exist.”¹⁴⁶ The *Schultz* court further noted that the *McClain* court “addressed any due process concerns by requiring that foreign national ownership laws declare ownership with ‘sufficient clarity to survive translation into terms understandable by and binding upon American citizens.’”¹⁴⁷ Enforcing the NSPA in this manner prevents the United States from becoming a black market “for the fruits of foreign grave robbery.”¹⁴⁸ All of the defendants in *Hollinshead*, *McClain*, and *Schultz* clearly knew that the goods in which they were trafficking were “stolen, unlawfully converted, or taken.”¹⁴⁹ More particularized knowledge about the specific laws that could apply to their wrongful acts is not required under the NSPA.¹⁵⁰

Nonetheless, as cautioned by *McClain*, “[t]hrough the National Stolen Property Act is not void for vagueness because the general class of offenses to which it is directed is plainly within its terms, it cannot properly be applied to items deemed stolen only on the basis of unclear pronouncements by a foreign legislature.”¹⁵¹ Thus, the NSPA

146. *Schultz*, 2002 WL 32395593 at *26 (citing *McClain I*, 545 F.2d at 1001 n.30).

147. *Id.* (citing *McClain II*, 593 F.2d at 670).

148. *Id.* at *48 (citing the 1985 hearing testimony of a Justice Department representative).

149. 18 U.S.C. § 2315.

150. See *Schultz*, 2002 WL 32395393 at *71 (citing *U.S. v. Rosa*, 17 F.3d 1531, 1546 (2d Cir. 1994) (identifying “*mens rea*” element of § 2315 as simply “knowing the same to have been stolen”) (quoting § 2315); *Goodwin v. U.S.*, 687 F.2d 585, 588 (2d Cir. 1982) (“A violation of 18 U.S.C. § 2315 normally requires simply the act of receiving or disposing of stolen goods of the requisite value moving in interstate commerce, coupled with knowledge that the goods are stolen.”). “The statute is thus a classic example of the type of statute that ‘merely requires proof of knowledge of the facts that constitute the offense,’ and not knowledge that the defendant’s conduct constitutes a crime.” *Id.* (quoting *Bryan v. U.S.*, 524 U.S. 184, 193 (1998), citing *Liparota v. U.S.*, 471 U.S. 419, 426 n.9 (1985) (explaining that for crime of receipt of stolen goods, it is not a defense that one did not know that the goods were stolen)); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.1(d) (1986) (although crime of larceny is not committed if defendant mistakenly believed that the property belonged to him, it is committed if defendant mistakenly believed that it was lawful to take property e knew belonged to others because it was the custom of the community to do so). It should be noted that *McClain II* was initially reversed on appeal and remanded for a new trial because the Fifth Circuit found that “the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.” 593 F.2d at 670. The lower court improperly instructed the jury that Mexican law since 1897 vested ownership of Mexican cultural patrimony in the state, when the law was not clear in this regard until 1972. *Id.* at 666. The court insisted that the patrimony law must clearly vest ownership in the state and noted that it was “loath to reverse a conviction such as this where the evidence of guilt and of intent to violate both foreign and domestic law is near overwhelming.” *Id.* at 670.

151. *McClain II*, 593 F.2d at 671; see also Ann Brickley, Note, *McClain Untarnished: The NSPA Shines through the Phiale Controversy*, 10 DEPAUL-LCA J. OF ART & ENT. L. 315, 351 (2000) (“The United States acknowledged the patrimony laws of Mexico and Guatemala because they are clear, were in effect prior to the theft in

applies to archeological artifacts stolen in nations with statutes clearly vesting ownership of the objects in the state. Consequently, it is unlikely that the NSPA could be presently applied in a criminal prosecution to Nazi-looted art stolen sixty years ago that has since been purchased by a bona fide purchaser—because a bona fide purchaser, by definition, would not have had the requisite knowledge that the object was stolen. A bona fide purchaser is “one who purchased property from seller, honestly believing seller had right to sell property, and absent any dubious circumstances that would put buyer on notice to contrary.”¹⁵² Where one’s status as a bona fide purchaser is less than clear, however, the NSPA potentially could apply, assuming that there is no statute of limitations bar.

For example, the Department of Justice initiated a criminal prosecution against some family members of serviceman Joe T. Meador, a former art teacher and U.S. soldier in World War II.¹⁵³ Meador stole the Quedlinburg treasures after the war and shipped them wrapped in brown paper to his home in rural Texas.¹⁵⁴ The Quedlinburg treasures were a “trove of gold, silver and bejeweled medieval manuscripts [hidden in a cave during the war] near the Quedlenburg Cathedral, their home for the previous 1,000 years.”¹⁵⁵ One such treasure covered with precious stones is believed to have belonged to Henry I.¹⁵⁶ The treasures have been described as “one of the most important collections of religious art of the Middle Ages.”¹⁵⁷

After Meador died in 1980, his family sold some of the treasures, which eventually attracted the attention of the German government.¹⁵⁸ The German government reached a controversial \$2.75 million settlement with the family to secure the return of the

question, and because the objects were obviously taken from the present day countries.” (citations omitted).

152. LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE VOL. 3: MOVEMENT 396–416 (1989).

153. See, e.g., Peter Gillman, *The Gospel Story*, INDEPENDENT, Mar. 30, 1991, at 20–28 (describing Meador’s theft). For detailed analyses of the case, see Constance Lowenthal, *Case Study: The Quedlinburg Church Treasures*, in THE SPOILS OF WAR 148–58 (Elizabeth Simpson, ed. 1997).

154. See Glenn Collins, *New Hopes of Finding Lost and Looted Art*, N.Y. TIMES, June 20, 1990, at C11. The Quedlinburg treasures were taken from a church of the same name; they consisted of at least fourteen items, including a comb and a reliquary.

155. Marcia Chambers, *One Theft That Brought Big Rewards*, THE NAT’L L.J. 13, Mar. 25, 1991, at 13.

156. Claudia Fox, Note, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT’L L. & POL’Y 225, 227 n. 11 (1993) (citing Stifskirche-Domgemeinde of Quedlinburg v. Meador, No. CA3-90-1440-D (N.D. Texas filed June 18, 1990)).

157. William H. Honan, *It’s Finally Agreed: Germany to Regain a Stolen Trove*, N.Y. TIMES, Feb. 26, 1992, at C15 (quoting Klaus Maurice, the chief German negotiator who arranged for their return to Quedlinburg).

158. Chambers, *supra* note 155, at 13.

treasures.¹⁵⁹ As part of the settlement, the German government informed the Department of Justice that it did not wish for the family members to be prosecuted.¹⁶⁰ Although a prosecution was initiated, it eventually was dropped, and the family members were never prosecuted in any court.¹⁶¹

Many treasures seem to have been returned to claimants after World War II, in part, because of fear of prosecution by those who stole the objects and attempted to sell them.¹⁶² According to Ely Maurer, an assistant legal adviser for cultural property at the State Department at the time of the Meador controversy, "in 300 cases the State Department was able to identify looted objects that had been brought to the United States 'and bring about their restitution'"¹⁶³ Additionally, "[a]fter the war, the Army prosecuted 'dozens of soldiers for taking stolen property and trying to sell it,'" putting the soldiers in prison or giving them dishonorable discharges.¹⁶⁴ Interestingly, "Meador had been court-martialed in 1945 after the Army found he had stolen some valuable china from a French chateau."¹⁶⁵

These criminal cases indicate that the continued prosecution of people who loot archeological sites in nations that have enacted national patrimony laws is likely, so long as the foreign law clearly states that the nation is vested with ownership of the unearthed objects.¹⁶⁶ A U.S. Attorney's Office, most likely one in New York or California,¹⁶⁷ might also bring a NSPA prosecution against someone who currently possesses Nazi-looted art if that person obtained the art during, or shortly after, World War II and clearly knew it had

159. Associated Press, *Stolen Treasures Returning to German Church*, L.A. TIMES, Jan. 8, 1991.

160. Honan, *supra* note 157, at C15 ("A lot of things can affect the decision to prosecute," the Justice Department official said. "These are elderly people, hometown people. It's not as if they were a couple of yuppies who would get much less sympathy, especially down here.").

161. *Id.*

162. See Collins, *supra* note 154, at C11.

163. *Id.*

164. *Id.* (quoting Ely Maurer, *The Role of the State Department Regarding National and Private Claims for the Restitution of Stolen Cultural Property*, in THE SPOILS OF WAR 142 (Elizabeth Simpson ed., 1997)).

165. Chambers, *supra* note 155, at 13.

166. See *McClain I*, 545 F.2d at 1002 n.30 ("It poses the possibility, of course, that similar exportations from different countries might lead to different results in the United States.").

167. U.S. Attorneys in these two states have initiated civil forfeiture proceedings against Nazi-looted art. See *infra* Part III.

been stolen by a serviceman, “aryanized,”¹⁶⁸ or sold at an infamous “Jew auction.”¹⁶⁹

Where theft is unclear, however, prosecution does not seem likely.¹⁷⁰ Theoretically, a modern prosecution would seem most likely if the same person who looted the object transports it. The same may be true, in very limited circumstances, if the descendants of someone who knowingly purchased Nazi-looted art—or stole it during the war—knew it was stolen but tried to sell it now. Most Nazi-looted art, however, was sold long ago by those who stole it or purchased it from Nazi collaborators. Much of it seems to have been bought by museums, dealers, or individuals many, but certainly not all, of whom have strong claims that they were bona fide purchasers without knowledge that the artwork was looted.

As previously discussed, the NSPA criminal cases indicate that “ownership” of an object will be determined according to the laws of the nation where the object was acquired. As a general rule, civil-law nations’ laws as to bona fide purchasers’ abilities to “get title from a thief” are much more liberal than those in the United States.¹⁷¹ For example, the affidavit of French law experts in the *Alsdorf v. Bennigson* declaratory judgment proceeding indicates that even though France enacted a law nullifying Nazi forced sales of Jewish property by 1945, the law also provided for a thirty-year statute of repose to all claims applicable to moveable property, regardless of whether the current possessor was a bona fide purchaser or not.¹⁷² One can argue today that such a law is unfair, but U.S. standards of due process would seem to preclude criminally prosecuting someone for purchasing property in France, for example, more than thirty years after it was stolen there. In the U.S. legal system, a key problem with the “scienter” requirement would exist.

It seems that who qualifies as a “bona fide purchaser” would be more liberally applied to those who purchased art, not during or shortly after the war from dealers known to be Nazi collaborators, but rather to those who purchased the art from the mid-1970s until 1994, when Nicholas’ *The Rape of Europa* brought the issue to the fore. In contrast, if someone were to purchase art today when the relevant

168. The term “aryanized property” refers to property that was owned by Jews but which the Nazi regime forced Jewish owners to sell to an Aryan (as defined under Nazi law), or where the property was confiscated from the Jewish owner and given to an Aryan.

169. NICHOLAS, *supra* note 11, at 23–25, 39–40 (describing the auctions known as “Jew auctions” where the Nazis sold property expropriated from persecuted Jews).

170. This Article does not attempt to analyze the criminal liability faced by an employee of a museum—such as the director of the Leopold—claiming ownership of allegedly aryanized art. See *infra* Part III.

171. E.g., Thomas Kline, *The Recovery of Stolen Art Sold in the United States from a “Neutral” Country*, 14 AM. U. INT’L L. REV. 243, 245 (1998).

172. Compl. For Declaratory Judgment, *Bennigson*, 2004 WL 2806801.

provenance information reveals that it had been sold shortly after the war by a dealer known to have collaborated with the Nazis, it is unlikely that such a person would qualify as a bona fide purchaser, at least under U.S. laws. Nonetheless, it is doubtful that the legal standards applicable to many such purchases would be sufficiently "clear" to purchasers to satisfy the standard set out in the criminal NSPA cases—that the foreign law clearly vests ownership in someone other than the purchaser.

In conclusion, because of the scienter requirement, although the intent of the NSPA is to assist theft victims,¹⁷³ the Act's "application [likely will continue to be] limited to cases involving easily proved thefts,"¹⁷⁴ at least in regard to criminal prosecution.¹⁷⁵ If the looter or possessor of the object moves it across a state line, the NSPA would be triggered. The same may be true in very limited circumstances if the descendants of someone who knowingly purchased Nazi-looted art, or stole it outright during the war, knew it was stolen but tried to sell it presently. In any event, it is doubtful that the legal standards applicable to many such purchases would be sufficiently "clear" to satisfy the standard set out in the criminal NSPA cases.¹⁷⁶ Because sixty years now have passed since World War II, it seems unlikely, but not impossible, that one in possession of Nazi-looted art today would be prosecuted criminally under the NSPA.

III. CIVIL FORFEITURE CASES—A HYBRID

A civil forfeiture proceeding is initiated by the government filing a complaint that names specific property as the defendant, as opposed

173. See *McClain I*, 545 F.2d at 996. Notably, "[a]lthough the *McClain* court asserted that legislators intended the NSPA to protect owners of property worldwide, the court did not support its assertion. No legislative materials dealing with the NSPA mention foreign situs thefts," Nowell, *supra* note 32, at 92 n.72, except for "an amendment to extend the NSPA to any [American-owned commercial] property seized in violation of law or confiscated by a foreign government." *Id.* at 90 n.59 (citing William J. Hughes, *United States v. Hollinshead: A New Leap in Extraterritorial Application of Criminal Laws*, 1 HASTINGS INT'L & COMP. L. REV. 149, 170 (1977); *Extending the National Stolen Property Act to Confiscated Property: Hearings on H.R. 9669 Before Subcomm. No. 3 of the Comm. on the Judiciary of the House of Representatives*, 77 Cong., 3d Sess. (1940); 86 Cong. Rec. 12971-98 (1940)).

174. Nowell, *supra* note 32, at 86-87.

175. Cf. *McClain I*, 545 F.2d at 1001 n.30; Schultz, 2002 WL 32395593 at *26 (scienter discussion).

176. The procedure for the government to return stolen objects to their rightful owners is somewhat ambiguous. Upton, *supra* note 60, at 609 ("In addition, because NSPA only addresses prosecution of the thief, the art objects which are the center of the controversy are not returned automatically to the victim-owner. The owner must bring a civil action against the artifacts themselves to recover them.") (internal citations omitted); Jodi Patt, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1211-12 (2002).

to a person who may have committed a crime to obtain the property.¹⁷⁷ Typically the property is seized in an administrative proceeding by the appropriate federal agency, such as the Department of Treasury or FBI, prior to a U.S. Attorney's initiation of civil proceedings.¹⁷⁸ The complaint filed by the U.S. Attorney's Office states, with legal and factual support, the government's reasons for seeking forfeiture of the property.¹⁷⁹ The proceeding then moves along much like ordinary civil litigation, except that "[a]ny person with a legal interest in the property who wishes to contest its forfeiture has the right to do so and is entitled to a jury trial."¹⁸⁰ The civil forfeiture proceeding has significant advantages over criminal proceedings for prosecutors:

The burden of proof is lower—'preponderance of the evidence' versus 'beyond a reasonable doubt.' But more importantly, civil forfeiture cases do not require a criminal conviction and proceed independent of a criminal trial. The government still must prove that a crime occurred and that the property subject to forfeiture was involved in that crime, but it does not have to put the wrongdoer himself on trial. That means that the government . . . can use forfeiture to impose a civil penalty on a person in a case that is serious, but not serious enough to justify a criminal conviction.¹⁸¹

"[T]he NSPA is not a forfeiture statute and has no forfeiture provisions."¹⁸² A violation of the NSPA nonetheless "may give rise to forfeiture under, *inter alia*, 19 U.S.C. § 1595a(c) (permitting forfeiture of merchandise imported into the United States 'contrary to law')."¹⁸³ Additionally, as discussed in more detail below, before the passage of CAFRA in 2000, the government had a probable cause burden that required a search warrant in criminal cases.¹⁸⁴ This practice was widely criticized, which is a major reason for the enactment of CAFRA.¹⁸⁵

177. See, e.g., Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archeological Resources*, 41 IDAHO L. REV. 129, 132 (2004).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Schultz*, 333 F.3d at 409 (rejecting claim that CPIA forfeiture provisions, which were not at issue in the case because the government was not seeking forfeiture in the criminal action, superseded the NSPA in criminal cases based on illegal importation of antiquities); see also *U.S. v. Schultz*, 178 F. Supp. 2d 445, 449 (S.D.N.Y. 2002) (citing *U.S. v. Stephenson*, 895 F.2d 867, 872 (2d Cir. 1990); Bator, *supra* note 138, at 353) (extensive discussion of the issue).

183. *Schultz*, 333 F.3d at 1109.

184. Van Arsdale, *supra* note 33.

185. E.g., H.R. 1658, 106th Cong. (1999) [hereinafter H.R. 1658] (quoting *U.S. v. \$12,390, 956 F.2d 801, 811* (8th Cir. 1992) (Beam, J., dissenting)).

Allowing property to be forfeited upon a mere showing of probable cause can be criticized on many levels: "The government need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay

This Section will analyze the two civil forfeiture proceedings filed against Nazi-looted art and the changes brought about by CAFRA.

A. Austrian Post-War Efforts and Portrait of Wally

In one case in which the U.S. Attorneys' Office utilized the civil forfeiture mechanism against the current possessor of Nazi-looted art, the then-current possessor was an Austrian museum.¹⁸⁶ The Austrian government established programs after the war in an effort to return aryanized property to its rightful owners pursuant to the Austrian State Treaty of 1955.¹⁸⁷ Under Article 26 of the Treaty:

Austria was obligated to restore the legal rights and interests of the true owners of such property where possible . . . [and] if property remains unclaimed or heirless six months after the Treaty comes into force, Austria "agrees to take under its control all [such] property" and "transfer such property . . . to the appropriate agencies or organizations to be used for relief and rehabilitation of victims of persecution."¹⁸⁸

The statutory framework contemplated that survivors or their heirs would file claims with statutorily created Restitution Commissions.¹⁸⁹ "Restitution Commissions acted in panels, with a professional judge presiding" to adjudicate claims.¹⁹⁰ "They were established at each of the provincial courts in charge of the administration of justice in civil matters."¹⁹¹

The Bundesdenkmalamt (BDA) was an Austrian agency created and authorized to collect property after the war for future processing by the Restitution Commissions.¹⁹² Under the Austrian Ban on Export of Cultural Assets Code, the BDA had the shocking power to "impede the return of artwork to successful claimants residing abroad when it found that the 'public interest' required the preservation of such cultural assets in Austria."¹⁹³ In determining whether to grant the required export permits, the BDA often would consult with Austrian museums about the quality of the works at issue.¹⁹⁴ "Often the BDA would grant export approval for certain works of art on the

and the flimsiest of evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of erroneous deprivation intolerable."

Id.

186. *United States v. Portrait of Wally, A Painting by Egon Schiele*, No 99-CV-9940, 2002 WL 553532, at *2 (S.D.N.Y. Apr. 12, 2002).

187. *Id.* at *7.

188. *Id.*

189. *Id.*

190. *Id.* at *1 n.1 (citing Friedrich Decl. ¶ 24).

191. *Id.*

192. *Id.*

193. *Id.* at *2 n.2 (citing Friedrich Decl. ¶ 5n).

194. *Id.*

condition that the owner would sell at a low price or make a gift of other works of art to Austrian museums.”¹⁹⁵ This extortion seems to have been widespread, although, as discussed below, it does not seem to have been commonly known to the international community until the late-1990s.

In response to continued criticism that Austria had failed to adequately retribute Nazi-looted art and compensate Holocaust victims after the war,¹⁹⁶ the Austrian government enacted legislation in 1995, giving the Austrian Jewish community ownership of “heirless” art looted by Nazis, which had been simply sitting in storage since the war.¹⁹⁷ The art was auctioned to benefit Holocaust survivors and their heirs.¹⁹⁸ Then, “[i]n January and February 1998, a series of articles by Hubertus Czernin appeared in the Viennese newspaper, *Der Standard*, reviewing the methods by which Austrian National Museum personnel virtually extorted art from Jews who, having survived, chose to leave Austria after the war.”¹⁹⁹ On December 4, 1998, in response to continued exposure of Austria’s post-war exploitation of gifts from survivors in exchange for export permits, the Austrian Parliament enacted legislation to provide for “restitution notwithstanding such legal obstacles as the statute of limitations.”²⁰⁰

195. *Id.*

196. See generally Eric Rosand, *Confronting the Nazi Past at End of Twentieth Century: The Austrian Model*, 20 BERKELEY J. INT’L L. 202 (2002) (discussing the resolution of issues which arose during negotiations between the U.S. government and Austria to establish humanitarian foundations that would make payments to certain of those who suffered under the Nazi regime).

197. Kelly Ann Falconer, Note, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT’L ECON. L. 383, 416 (2000) (citing *CNN Newsroom: A Sale of Art Confiscated from Jews During World War II Closes a Chapter in the History of the Holocaust* (CNN television broadcast Nov. 26, 1996) (transcript available in CNN file of LEXIS News Library) (“[T]he Austrian people in general, either forgot about them or didn’t know what to do with them. They’re basically heirless pieces of art.”)).

198. *Id.* This auction is referred to as the Mauerbach auction.

199. Lowenthal, *supra* note 24, at 135.

200. Normal Palmer, *Federal State Act on the Return of Cultural Objects*, in MUSEUMS AND THE HOLOCAUST 178–79 (2000), available at <http://www.lootedart.com/InformationByCountry/Austria/Laws%20policies%20and%20guidelines/laws.asp> (follow “Federal State Act on the Return of Cultural Objects, 4 December 1998”). See also <http://www.lootedart.com/InformationByCountry/Austria/Laws,%20policies%20and%20guidelines/laws.asp> (follow “Styrian Provincial Law of 14 March 2000”); <http://www.lootedart.com/Informationbycountry/Austria/Laws,StyrianProvincialLawof14March2000ontheReturnorTakingtoAccountofWorksofArtorCulturalAssetsConfiscatedfromTheirOwnersDuringtheNaziRegime;ResolutionoftheViennaCityCouncilof29April1999>, available at www.lootedart.com/InformationByCountry/Austria/Laws,%20policies%20and%20guidelines/laws.asp (follow “Resolution of the Vienna City Council of 29 April 1999”).

“Elisabeth Gehrler, Austria’s Minister of Culture, . . . set up a museum panel to identify works that [should] be returned.”²⁰¹ One consequence was that the Rothschild family retrieved 200 pieces of art that were auctioned at Christie’s for \$90 million.²⁰² Many, however, did not believe Austria went far enough in its recent attempts to rectify its Nazi past. In fact, the 2000 U.S. Presidential Commission on Holocaust Looted Art and Assets reported that Austria’s “restrictive restitution process [immediately after the war] impeded the return of assets to victims.”²⁰³

These shortcomings in Austria’s post-war practices were highlighted again after litigation was filed concerning Schiele’s *Portrait of Wally*. During or before 1938, *Portrait of Wally* came to be housed in the apartment of a Viennese gallery owner, Lea Bondi Jaray, an Austrian Jew.²⁰⁴ After Germany annexed Austria in the Anschluss,²⁰⁵ Friedrich Welz aryanized²⁰⁶ Bondi’s gallery and coerced Bondi to give him *Portrait of Wally*, as well.²⁰⁷ Bondi gave up the painting and fled to London with her husband.²⁰⁸ After World War II, when Welz was interned on suspicion of war crimes, the U.S. military seized his possessions.²⁰⁹ In accordance with post-war military decrees and policies, the United States returned the property to the government of the country from which it was taken, Austria, not the individual from whom it was taken.²¹⁰ Thus, *Portrait of Wally* was returned to the post-war Austrian governmental body authorized to take custody of such property, the BDA.²¹¹

After the war, *Portrait of Wally* was erroneously believed to have belonged to the estate of Dr. Heinrich Rieger, who, along with his

201. Lowenthal, *supra* note 24, at 135.

202. Hugh Eakin, *Unfinished Business*, ARTNEWS, Sept. 1, 1999, available at 1999 WL 9955745.

203. U.S. PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), available at http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home_contents.html (last accessed Oct. 27, 2005).

204. *Portrait of Wally*, 2002 WL 553532, at *1. All facts are taken as stated in the Third Amended Complaint, No. 99-9940, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

205. “Anschluss” can be defined generally as “the historical euphemism describing Nazi Germany’s bloodless annexation of the Post-World War I Austrian Republic.” Brian F. Havel, *In Search of a Theory of Public Memory: The States, The Individual, and Marcel Proust*, 80 IND. L. J. 605, 621 n.28 (2005).

206. “Aryanization” can be defined generally as the process “whereby Jews were forced to sell their property to ‘Aryans’ at artificially low prices.” *Portrait of Wally*, 2002 WL 553532, at *1.

207. *Id.*

208. *Id.*

209. *Id.* at *2.

210. *Id.*

211. *Id.*

wife, perished in the Holocaust.²¹² The Rieger heirs were able to recover much of the art stolen from their parents, which they then sold to the Österreichische Galerie Belvedere (the Belvedere).²¹³ Although the Rieger heirs did not claim ownership of *Portrait of Wally*, when the art they sold was shipped from its storage place to the Belvedere, *Portrait of Wally* was mistakenly included in the shipment.²¹⁴

Bondi subsequently learned of the circumstances when she returned to Austria immediately after the war and confronted Welz about her property.²¹⁵ She returned to London after this meeting unconcerned about the painting "because she believed [it] was safe at the Belvedere Gallery."²¹⁶ She recovered her art gallery (and, arguably, title to *Portrait of Wally*) in 1949 and, in a restitution action against Welz in 1953 she allegedly enlisted the aid of Dr. Rudolph Leopold to recover *Portrait of Wally* from the Belvedere.²¹⁷ In 1954, unbeknownst to Bondi, Leopold acquired the painting from the Belvedere for himself.²¹⁸ Bondi discovered Leopold's betrayal when she saw him listed as the owner of *Portrait of Wally* in an exhibition catalogue in 1957.²¹⁹

Bondi then engaged an Austrian lawyer and another colleague to help her regain possession of *Portrait of Wally*, but to no avail.²²⁰ Bondi passed away in 1969, and the efforts to recover *Portrait of Wally* seem to have remained dormant until her heirs had an opportunity to act in late 1997.²²¹ She had never filed any formal proceeding to attempt to recover *Portrait of Wally*. After her death, an unsigned handwritten note was found in her London apartment, which stated:

I myself prevent a court case with the Belvedere (Museum for Modern Art in Vienna) as I was reinstated as the proprietor of the Gallery Würthle, Gallery exclusive for Modern Art, and as this it was not possible for me to quarrel with the Museum of Modern Art and tried to get my picture back by peaceful means.²²²

In 1997, the Leopold Museum-Privatstiftung (the Leopold) lent *Portrait of Wally* to the New York Museum of Modern Art (MOMA)

212. *Id.* at *2.

213. *Id.* The Belvedere also is commonly referred to as the Austrian National Gallery.

214. *Id.*

215. *Id.* at *9.

216. *Id.*

217. *Id.* at *3.

218. *Id.*

219. *Id.*

220. *Id.* at *3.

221. *Id.* at *4.

222. Third Amended Compl. ¶ gg, *Portrait of Wally*, 2001 WL 34727703.

for exhibition.²²³ By this time, the painting was valued at over \$2 million.²²⁴ Three days after the exhibition ended, the Manhattan District Attorney's Office issued a subpoena for the painting, but the subpoena was quashed because a New York anti-seizure statute prohibited its seizure at the state level.²²⁵ Nonetheless, an U.S. magistrate judge issued a warrant to seize the painting a few hours later, and the federal government thus began a civil forfeiture proceeding.²²⁶ The magistrate issued the warrant after finding probable cause that the Leopold had violated the NSPA by transporting the painting in foreign commerce while knowing that it was stolen property.²²⁷

Glenn Lowry, the director of the MOMA, testified before the House Committee on Banking and Financial Services on February 10, 2000, after pre-trial discovery in *Wally* had been underway for some time. Lowry described how MOMA has dedicated significant resources to provenance research of all of its holdings and stated unequivocally: "The Museum of Modern Art does not, and will not, knowingly exhibit stolen works of art."²²⁸ Likewise, other museums have dedicated significant resources, including full time staff, to

223. Dr. Leopold is "a Director and the Museological Director for life" of the Leopold. *Portrait of Wally*, 2002 WL 553532, at *1, *4.

224. *Id.* at *4.

225. *Id.* (citing In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 93 N.Y.2d 729 (App. Div. 1999)). The New York Arts and Cultural Affairs Law prohibited any seizure of any work of fine art on loan to any museum or other non-profit exhibitor of art in the state of New York. N.Y. ARTS & CULT. AFF. LAW § 12.03 (McKinney 1984 & Supp. 2000). At the time, the law provided in full:

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.

Id. After *Portrait of Wally* was decided, the New York legislature eliminated the protection against seizure in criminal forfeiture proceedings, at least temporarily. See Collins, *supra* note 154, at C11. The amendment eliminating the protection against criminal forfeiture proceedings as written was "deemed repealed on June 1, 2002." N.Y. ARTS & CULT. AFF. LAW § 12.03, Historical and Statutory Note L.2000, c. 39. § 2. Research indicates that the amendment expired quietly on that date.

226. *Portrait of Wally*, 2002 WL 553532, at *4.

227. *Id.*

228. *Holocaust Assets Hearings Before the H. Comm. on Banking and Financial Services*, 106th Cong. 95 (2000) (statement of Glenn D. Lowry, Director of Museum of Modern Art, New York).

provenance research.²²⁹ Lowry further stated: "It is gratifying and encouraging to be able to report to you that despite the enormous devotion of resources to this issue, American museums have, to date, discovered very few problems with their collections."²³⁰

Lowry also spoke specifically about *Wally*.²³¹ Lowry described the issues in *Wally* as "knotted in difficult questions of inheritance and post-War restitution."²³² Lowry noted that *Wally* "had been exhibited around the world for decades and . . . had been reproduced frequently in books."²³³ In regard to one of the claimants and purported heirs, Lowry stated:

The man who asserted his family's rights in the painting wrote to us about his vivid recollections about seeing the picture in his aunt's house in Vienna before the War. But, according to the pre-War owner's grandson, the claimant never saw the painting, never set foot in the house in Vienna, and is not, as a matter of fact, an heir, a fact the claimant has recently conceded in a British newspaper interview. Despite all this, the U.S. Justice Department has commenced a forfeiture proceeding to reclaim this alleged heir's painting, politicizing our courts and making it almost impossible to engage in the kind of meticulous and dispassionate research required to ascertain the exact history of this painting immediately before and after the Second World War, and who, today, is its rightful owner.

I mention this example not to discuss the merits of the claim or to delve into the extremely sensitive moral and legal questions of who may rightly assert claims and when they should do so, but to demonstrate that the process of determining what, if any, art in American museums was looted by the Nazis and never returned to the proper owner, and then trying to determine who the proper owner might be, is an extremely complex undertaking, and is made even more so when the works in question are loans to, rather than objects owned by, the relevant institution.

Just as we have learned that American and European museums, working with the AAMD guidelines,²³⁴ can play a vital role in reuniting looted art with its rightful owners, we have also learned most

229. See, e.g., *id.* (statement of Earl A. Powell III, Director of the National Gallery of Art).

230. *Id.* (statement of Glenn D. Lowry, Director of Museum of Modern Art, New York).

231. *Id.* at 95-97.

232. *Id.* at 96.

233. *Id.* Lowry also discussed a claim made as to *Dead City III*, also by Egon Schiele, which was on display along with *Portrait of Wally*. A warrant did not issue for that painting, which has since been returned to Austria. It seems that the claimants had no colorable claim to the painting. *Id.*; Bruce Balestier, *Return of Painting Blocked by U.S. Attorney*, N.Y.L.J., Sept. 23, 1999, at 1. See also Judith H. Dobrzynski, *German Court Revokes Ruling on Ownership of a Schiele Painting*, N.Y. TIMES, Apr. 16, 1998, at E6 ("German court revokes 1963 declaration of heirship that is basis of Rita Reif's and Kathleen E. Reif's claim to Egon Schiele's *Dead City*; painting was confiscated by Nazis from Fritz Grunbaum, who died in Dachau in 1941 . . .").

234. See generally Daniel Range, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655 (2004).

emphatically that use of criminal process is not an appropriate way to address this issue. With the immensely valuable participation of groups like the Commission for Art Recovery of the World Jewish Congress, we have seen that the most effective means to resolve problems involving the return of Nazi looted art requires good faith, discretion, and cooperation between museums and claimants, not the blunt instruments of subpoena power and forfeiture proceedings.

For museums and for the public, involvement of criminal process is counterproductive.²³⁵

Nonetheless, others have different views. For example, Larry Kaye, a well-known Manhattan plaintiff's attorney in the art field whose firm represents the Bondi family in *Wally*—not the claimants who were being discussed by Lowry—wrote in regards to *Wally*:

To say the subpoena created an uproar is to put it mildly. Museums claimed to be “shocked,” expressing concern that such action would slow or stem the international flow of artwork into New York. The Austrian government also expressed outrage. Various organizations made statements supporting one side or the other, and the media weighed in on both sides. But, to the victims of the Holocaust, the subpoena symbolized a willingness to provide a much-needed forum to redress past wrongs. In my view, the District Attorney's actions were a proper and welcome exercise of his powers.²³⁶

Although it would be impossible to ever remedy the Nazi atrocities of the Holocaust, Austria has made an effort to come to terms with its Nazi past. Besides passing the above legislation and holding the Mauerbach auction, in 2000 the Austrians effectively

235. See Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295 (2003) (discussing how the judicial system is ill-equipped to handle Nazi-looted art claims and advocating for resolution via arbitration); Alan G. Artner, *Ethics and Art Museums Struggle For Correct Response to Stolen Art Claims*, CHI. TRIB., Aug. 16, 1998, at 6 (quoting Constance Lowenthal, then director of the World Jewish Congress in New York as stating that “[arbitration] is certainly a possibility, because these cases—which keep arriving with alarming regularity—and the laws that have been made with them, particularly those involving World War II, are not well-known to most judges.”). Interestingly, a German court ordered the seizure of *Bauhaus Staircase*—a 1932 painting by Oskar Schlemmer, considered an “icon” of MOMA's collection, which was on loan to an international exhibition—“for investigation of its provenance based on a claim to ownership by Schlemmer family members.” Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 1034 (citing Judith H. Dobrzynski, *Modern is Focus of a New Dispute Over a Painting*, N.Y. TIMES, Feb. 10, 2000, at E3). The painting was shipped back to MOMA before the seizure warrant was served. *Id.* The German proceeding has been described as the “mirror image” of *Wally*. *Id.*

236. Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART OF ENT. L & POL'Y 11, 13 (1999). The Author would like to note that although she criticizes *Portrait of Wally*, she admires the excellent advocacy skills of Howard Spiegler and Lawrence Kaye of the Herrick Feinstein firm, and she is thankful for their willingness to share information about the case.

settled the slave-labor class actions by creating the Austrian Fund for Reconciliation, Peace and Cooperation and endowing it with six billion Austrian shillings, or approximately \$500 million.²³⁷ Perhaps most importantly, Austria issued a formal apology for its role in World War II, a dramatic step away from the widely-held Austrian view that, as the first country overtaken by Hitler, it was a victim rather than a voluntary ally of Nazi Germany.²³⁸ In light of Austria's efforts to atone for its Nazi past, some have described the seizure of *Portrait of Wally* as "particularly insulting."²³⁹ But many do not believe Austria has gone far enough in its recent attempts to rectify its Nazi past.²⁴⁰ It also must not be forgotten that as recently as 2000, Jorg Haider's so-called Freedom Party was a part of the governing coalition in Austria.²⁴¹

B. CAFRA—Increasing Due Process Safeguards

Meanwhile, the U.S. Congress has tightened up the rules governing civil forfeiture actions by passing CAFRA:²⁴² "CAFRA revises almost all aspects of federal administrative and civil judicial forfeitures."²⁴³ Two sections of CAFRA potentially apply to stolen art

237. Eric Rosand, *Confronting the Nazi Past at End of Twentieth Century: The Austrian Model*, 20 BERKELEY J. INT'L L. 202 (2002) (providing the view of a representative of the State Department involved in the treaty negotiations).

238. *Id.*

239. Kelly Ann Falconer, Note, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 417 (2000).

Given Austria's then model behavior, the decision of the New York district attorney to seize the two allegedly looted works seemed "particularly insulting." When the district attorney seized the two paintings, Austria was attempting to come to terms with its past and to offer a fair resolution to the problem of Nazi-looted art. Unilateral action such as that of the New York District Attorney, thus not only shakes the trust underlying the international art trade, but also calls into question a nation's integrity. (internal citations omitted).

Id.

240. *E.g., id.* at 210 ("The difference of views concerning the adequacy of Austria's post-war efforts, however, was never, and probably never will be, finally resolved, given the historical and legal complexities involved.").

241. *E.g.,* Kate Connolly, *Remember Jorg Haider?*, THE GUARDIAN, Jan. 29, 2001, available at www.guardian.co.uk/print/0,3858,4126258-103478,00.html; Kurt Richard Luther, *The Self-Destruction of a Right-Wing Populist Party? The Austrian Parliamentary Election of 2002*, W. EUR. POL., Apr. 1, 2003 at 13B, available at 2003 WL 20032788; see also The Associated Press, *Pope Visits a Synagogue in Germany*, N.Y. TIMES, Aug. 19, 2005 (reporting Pope's statements about rising anti-Semitism in Europe).

242. 18 U.S.C. § 983 (2000) [hereinafter CAFRA].

243. Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349 (2004); see generally Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Act of 2000 Creates a Uniform Innocent*

litigation. Section 983(c)(1) alters the burden of proof in civil forfeiture actions and provides that “[i]n a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property . . . the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.” Previously, even as recently as 1999 when *Portrait of Wally* was seized, the government needed only to prove “probable cause” that the property at issue was subject to forfeiture.²⁴⁴

Section 983(d)(1)(A)(i) establishes a new innocent-owner defense, which places on a claimant the burden to prove by a preponderance of the evidence that the claimant dispossessed of property “did not know of the conduct giving rise to the forfeiture.”²⁴⁵ Because “CAFRA declares that an innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute,”²⁴⁶ “almost all federal civil forfeiture statutes are now subject to the innocent owner defense.”²⁴⁷ Importantly, § 983(d)(3) defines an “innocent owner” who obtains an interest in property *after* the conduct giving rise to the forfeiture has occurred as a person who, at the time of acquiring the interest in the property “(i) was a bona fide purchaser or seller for value; and (ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.”²⁴⁸

There is an important inconsistency in the cases thus far decided under CAFRA in terms of what a claimant must show to establish the innocent owner defense. Some cases hold that the claimant must show only that he, she, or it had “dominion and control over” the property at issue, whereas other cases hold that ownership must be established by “state law,”²⁴⁹ presumably after applying the state’s choice-of-law principles. Especially where there are two parties

Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government, 89 KY. L. J. 653 (2001).

244. Van Arsdale, *supra* note 243, at 349.

245. CAFRA, *supra* note 242, § 983(d)(2)(A)(i).

246. Van Arsdale, *supra* note 243, at 365.

247. *Id.* But see *U.S. v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1377 n.4 (S.D. Fla. 2003) (holding that CAFRA does not apply to forfeitures pursuant to customs laws, which the *Lucite Ball* court found do not constitute “civil forfeiture statutes” under CAFRA). See generally *U.S. v. An Antique Platter of Gold, Known as a Gold Phiale Mesomphalos*, C.400 B.C., 991 F. Supp. 222 (S.D.N.Y. 1997) (civil forfeiture where falsification of customs forms established that the platter was “stolen” within the meaning of the NSPA).

248. See CAFRA, *supra* note 242, § 983(d)(3)(A)(i)–(ii).

249. *Id.* Compare *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003) (holding that to qualify as an innocent owner under CAFRA for purposes of a challenge in federal forfeiture action, a claimant must establish the exercise of dominion or control over the property) with *U.S. v. 2001 Honda Accord EX*, 245 F. Supp. 2d 602 (M.D. Pa. 2003) (holding that for purposes of establishing the innocent owner defense to a civil forfeiture action under CAFRA, the claimant must prove by a preponderance of the evidence a legal interest in the property in accordance with state law).

claiming the same property, it seems that the state's choice-of-law principles would need to be applied to determine the relevant substantive law and decide fairly between the two claimants. Otherwise it is too difficult to see how competing claims can be resolved. Thus, the same law that would apply to a traditional civil dispute should control which of the two claimants is to be favored in a civil forfeiture proceeding.

Despite the dramatic changes brought about by CAFRA, the two art cases (loosely defined) to date that involve the application of CAFRA to specific facts have decided the question in the negative. *Wally* held that CAFRA did not apply because the government filed its forfeiture proceeding before CAFRA's effective date.²⁵⁰ *One Lucite Ball Containing Lunar Material* also held that CAFRA was inapplicable because the forfeiture was an administrative forfeiture under a customs provision, not a civil forfeiture to which CAFRA would apply.²⁵¹

The process whereby the government initiates a civil forfeiture action, which then forces the holder of the property to prove rightful ownership, has been criticized by many as unfair on many grounds.²⁵² This Article focuses on unfair aspects of civil forfeiture specifically related to stolen art. The government dramatically increases the leverage of claimants over current possessors in stolen art litigation in three primary ways.

First, the statute of limitations issues in traditional litigation often favors a defendant when the defendant has possessed art for a long time, particularly when the art was purchased in a civil law country with laws greatly favoring bona fide purchasers.²⁵³ In contrast, in civil forfeiture proceedings—at least those premised on an alleged violation of the NSPA—the triggering event is the modern-

250. *Portrait of Wally*, 2002 WL 553532, at *13-*14 (holding that government's filing of an amended complaint was irrelevant under the "relation back" doctrine and that CAFRA does not apply retroactively to pending forfeiture proceedings filed before its effective date). *But see* U.S. v. \$99,990 in U.S. Currency, 69 F. App'x 757 (6th Cir. 2003) (holding that CAFRA applies to judicial forfeiture proceedings pending on appeal on CAFRA's effective date); *see also* U.S. v. 5 S. 351 Tuthill Road, 233 F.3d 1017 (7th Cir. 2000) (leaving to the district court's discretion whether to apply CAFRA new burden of proof on remand and holding that retroactive application is particularly appropriate where a procedural rule is changed after a suit arises because rules of procedure regulate secondary rather than primary conduct).

251. *One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d at 1377 n.4, 1378.

252. *See, e.g.*, H.R. 1658, *supra* note 185.

253. *See* Patty Gerstenblith, *Cultural Property and World War II: Some Implications for American Museums a Legal Background* 40 A.L.I.-A.B.A. 17, 19-20 (1998) (explaining that in civil law countries a bona fide purchaser may acquire good title from a thief after the statute of limitations on the claim has passed).

day transport of the object across a border.²⁵⁴ Thus, a defendant's statute of limitations or laches defense,²⁵⁵ which would be available in traditional civil litigation, seems to be preempted when the government, instead of a civil plaintiff, initiates the suit. No case to date has explored how the running of the applicable civil statute of limitations impacts the categorization of the property as "stolen" under the NSPA or the application of the CAFRA "innocent owner" defense.

Second, it is widely accepted in Nazi-looted art cases that a plaintiff should not file suit if the art in questions is not worth at least \$3 million.²⁵⁶ This guideline, however, does not deter the government: the government, unlike private non-corporate plaintiffs, has great resources at its disposal to pursue litigation, including the ability to file parallel criminal charges, an idea that did not escape the American Association of Museums when *Wally* was filed.²⁵⁷ Additionally, in situations where more than one party claims entitlement to the object, both claimants would attempt to show the right to possess the object by the same burden of proof. But, as a practical matter, the government essentially would assist the claimant on whose behalf it initiated the forfeiture proceeding.

Third, a civil plaintiff would have to prove under the temporary restraining order (TRO) or injunction standards that the art should be seized before the end of trial. In contrast, even under the more restrictive standards of CAFRA, the government, in initially seizing the property, must show only probable cause to believe that the restrained assets are subject to forfeiture.²⁵⁸

In contrast to the other dramatic features of civil forfeiture—which seem to help only the would-be plaintiff in traditional civil litigation—attorney's fees and interest²⁵⁹ are available to any successful claimant under CAFRA. Thus, if a would-be defendant in traditional litigation can defeat the government's attempts to force a

254. CAFRA provides that "[n]o action pursuant to this section to forfeit property not traceable directly to the offense may be commenced more than 1 year from the date of the offense." CAFRA, *supra* note 242, § 984(c).

255. See, e.g., Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Foreign Art*, 103 YALE L. J. 2437, 2438 n.7, 2446–48 (1994) (discussing use of the laches rule by courts to curtail protection for buyers of stolen art).

256. Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS-CAM L. J. 441, 445 n.17 (1999) (internal citation omitted). See also HOWARD J. TRIENENS, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS* (2000) (discussion by the defense attorney who first coined the "rule of thumb").

257. See Am. Ass'n of Museums Br., *supra* note 38, at 28 and accompanying text.

258. U.S. v. Melrose E. Subdivision, 357 F.3d 493, 504–05 (5th Cir. 2004); Van Arsdale, *supra* note 243, at 349.

259. "[P]ost-judgment interest as set forth in [18 U.S.C. § 1961]" 28 U.S.C. § 2465(b)(1)(B).

forfeiture of artwork, reimbursement is possible.²⁶⁰ Attorney's fees and interest, of course, are not available in most traditional civil disputes.²⁶¹ Although a judge would have discretion to reduce the amount of fees awarded, the fees are not capped.²⁶² Additionally, at least one court has held that the attorney's fees provision applies retroactively even when the government filed the suit after CAFRA's effective date.²⁶³ Thus, the Leopold may be able to recoup much of its fees if it is ultimately successful in defeating the government's attempt to force forfeiture of *Portrait of Wally*.

C. Femme En Blanc²⁶⁴

The U.S. Attorney's Office in Los Angeles instituted another civil forfeiture proceeding to assist the heir of a Holocaust survivor pursuing a stolen art claim in *Femme en Blanc*.²⁶⁵ In 1933, fearing the Nazis' takeover of Berlin, Carlota Landsberg, a Jewish woman living in Berlin, sent *Femme en Blanc* to a reputable dealer in Paris, Justin Thannhauser.²⁶⁶ After Kristallnacht, November 9–10, 1938, Landsberg and her daughter fled Europe, eventually settling in New York in 1940 or 1941.²⁶⁷ The Nazis stole the painting in Paris in 1940, and as they usually did when looting art, they kept precise records of the painting and its last possessor.²⁶⁸ After the war, Landsberg, in accordance with the restitution mechanisms in place after the war, filed a claim for the painting with the

260. Van Arsdale, *supra* note 243, at 401.

261. See generally CAFRA, *supra* note 242; see also Ekanem v. Health and Hospital Corp. of Marion County, 778 F.2d 1254 (7th Cir. 1885) (holding that plaintiffs were not prevailing parties and thus not entitled to attorney's fees); Mercantile Nat'l Bank v. Bradford Trust Co., 850 F.2d 215 (5th Cir. 1988) (holding that recovery of attorney's fees is confined to two situations: (i) where under the restrictive American rule, attorney's fees are allowed and (ii) where controlling substantive law permits recovery).

262. FED. R. CIV. P. 56(d). See Hastert v. Ill. State Bd. of Election Comm'rs, 28 F.3d 1430 (7th Cir. 1993) (holding that although Federal Rule of Civil Procedure 56(d) creates a presumption that prevailing party will be awarded costs, decision to award costs is within the discretion of the district court).

263. 5 S. 351 *Tuthill Road*, 233 F.3d at 1017 (holding that retroactive application is particularly appropriate where a procedural rule is changed after a suit arises because rules of procedure regulate secondary rather than primary conduct).

264. *Femme en blanc* was painted in 1922 and dates from Picasso's "classic period"—the years immediately following World War I. Glen Chapman, *Fight for Picasso Piece Could Move to Chicago*, MUSEUM SECURITY MAILING LIST REPORTS, Jan. 11, 2003, www.museum-security.org/03/004.html.

265. Civil Forfeiture Compl., U.S. v. One Oil Painting Entitled "Femme en blanc" by Pablo Picasso, 362 F. Supp. 2d 1175 (C.D. Cal. 2005) [hereinafter Compl. *Femme Forf.*]

266. Compl., *Bennigson*, 2004 WL 803616.

267. *Id.*

268. *Id.*

Wiedergutmachungsamt von Berlin (Berlin Restitution Office).²⁶⁹ Thannhauser sent her a letter in 1958 before his death, detailing his knowledge of the looting and his persistent efforts to locate the painting since the war.²⁷⁰ It should also be noted that, as stated in Thannhauser's letter dated 1958, the painting was illustrated in a well-known book about Picasso's work, as well as in the *Repertoire des Biens Spolies en France Durant la Guerre 1939-1945* (List of Property Removed from France during the War 1939-1945), recorded under Thannhauser's name.²⁷¹ This book, published in 1947, is very well-known and is referred to in art circles as the "*Repertoire*."²⁷² The evidence was overwhelming: the case was one of clear-cut looting, and in 1969 the Berlin Restitution Office paid Landsberg DM100,000, approximately \$27,300, without prejudice to her right to recover the painting if it ever was located (presumably with the understanding that she would have to return the money if she successfully recovered the painting).²⁷³ "Despite decades-long correspondence with the post-war governments of France and Germany and with a variety of European art dealers, Landsberg was unable to locate the Picasso" before she died in 1994.²⁷⁴

Meanwhile, in 1975, exactly thirty years after the end of all World War II hostilities, New York art dealer Stephen Hahn purchased the painting from Maurice Covo, owner and manager of the Renou & Poyet art gallery in Paris, France for 630,000 French francs.²⁷⁵ The French statute of repose is thirty years.²⁷⁶ A few months later, Hahn sold the painting to Marilyn and James Alsdorff, Chicago art connoisseurs who have often acted philanthropically by donating paintings to museums.²⁷⁷ In regard to

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*; C. CIV. art. 2262 (Fr.) (2004), available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (last updated February 21, 2004); see *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, No. 98, 1999 WL 673347, at *6 (S.D.N.Y. Aug. 30, 1999) (noting that the French Civil Code bars actions for real and personal property after thirty years of prescriptive possession). *But see* *Warin v. Wildenstein & Co.*, 746 N.Y.S. 2d 282 (App. Div. 1st Dep't 2002) (declining to "take judicial notice of the subject French ordinances for lack of information sufficient to enable [the court] to determine their scope and effect").

277. Compl. *Bennigson*, 2004 WL 803616. It also should be noted that James Alsdorff, now deceased, "was a board member of the International Foundation for Art Research, which was created in 1969 to educate the public about problems and issues in the art world," and [IFAR] helped expand the Art Loss Register's data base of lost artworks." Howard Reich, *Whose Picasso is It?*, Museum Security Mailing List Reports, Jan. 21, 2003, www.museum-security.org/03/007.html. Additionally, Marilyn Alsdorff

the provenance of the painting, the receipt states only "Private Collection, Paris."²⁷⁸

This information must be viewed in light of the fact that during the war, the Renou & Poyet gallery "was known as Renou & Colle, and a report from the United States' Office of Strategic Services on that Paris gallery called it a 'firm of art dealers who handled looted art, notably from the Paul Rosenberg Collection.'"²⁷⁹ Hahn, who was recently interviewed about the painting and the lawsuit, stated: "When I saw that picture almost 30 years ago, nobody asked anything about those things. Mrs. Alsdorf called me [recently], and I gave her all the information I had and where I bought it. That's all I know."²⁸⁰ Since its purchase, "the painting remained in Mrs. Alsdorf's possession continuously and was not publicly displayed, although several museum officials apparently saw the painting in Mrs. Alsdorf's home over the years."²⁸¹

All of that changed in 2001 when Alsdorf sent the painting to be displayed in a small, public exhibition between September 20 and October 28, 2001 at the David Tunkl Fine Art gallery in Los Angeles, California.²⁸² After the exhibition, Tunkl returned the painting, but suggested to Alsdorf about January 2002 that he could sell the painting for her.²⁸³ On or about January 29, 2002, the painting was shipped from Chicago to Geneva, Switzerland.²⁸⁴ "In Geneva, the painting was viewed by Paris art dealer Didier Imbert, who was acting as an advisor to an unidentified European collector."²⁸⁵ Tunkl

presently is head of the Art Institute of Chicago's committee on European painting and the "Alsdorf Foundation is currently a financial supporter of IFAR." *Id.*

278. Compl. Femme Forf., *supra* note 265.

279. *Id.*

280. *Id.* The government's complaint in the forfeiture proceeding states that in an August 9, 2002 meeting between an Art Loss Register representative and Covo, Covo stated "that he had received the painting from a collector who had obtained it from a dealer who was investigated by a postwar tribunal on charges of benefiting from sales to the Nazis," although Covo also reportedly stated "that he believed the dealer to be honorable." *Id.* ¶ 39. It is unclear from the Complaint whether Covo indicated he knew of this history of the painting when he bought it. Covo stopped meeting with Art Loss Register representatives around September 12, 2002, when he wrote a letter to the Art Loss Register stating that he had "nothing to say unless the 'current holders of the painting as well as its claimants provided their written assurances that neither he, his gallery, nor anyone else would suffer any 'hardship or prejudice' as a result" of his disclosures. *Id.* ¶ 41. At this time, the Art Loss Register was representing Silva Case Foundation, see below, and seemed willing to issue such a letter to obtain the pre-1975 provenance of the work, but Alsdorf's representatives seem to have been unwilling as no "hold harmless letter was apparently provided to Covo by anyone." *Id.* Hahn has since signed an affidavit in Alsdorf's declaratory judgment action, see below, stating that he had no knowledge of the painting's Nazi taint when he purchased it.

281. *Id.* ¶ 19.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

seemingly arranged the meeting through a New York dealer, who was Imbert's contact for the viewing.²⁸⁶ "As part of his due diligence, Imbert contacted the Art Loss Register in London, England."²⁸⁷

"The Art Loss Register serves as a clearinghouse of historical information concerning Nazi looted paintings and at times assists in negotiating the resolution of disputes concerning the ownership of such paintings."²⁸⁸ Because the painting was listed in the *Repertoire*, a red flag went up.²⁸⁹ The court documents filed to date make no explanation why the meeting was scheduled in Geneva, when Imbert is based in Paris. Imbert is a well-known, reputable figure in the art world who likely travels frequently to Geneva, so it is possible that convenience was the only reason Geneva was chosen.²⁹⁰ On the other hand, perhaps Tunkl suggested they meet in Switzerland, which is well-known for its liberal statutes of limitation favoring purchasers who negotiate and conclude their purchases in Switzerland.²⁹¹ The government's complaint alleges that after an Art Loss Register representative first met with Imbert, the Art Loss Register representative wrote in his notes: "He [Imbert] definitely thinks that the picture is problematic and he has a feeling that the current owner does too because he said that the owner had not given permission for the picture to be taken to France (where pictures can be easily seized) but only to Switzerland (Freeport)."²⁹² Sometime during Spring or Summer 2002, Tunkl told Alsdorf that he had another potential purchaser, and again arranged for the painting to be shipped to Switzerland (presumably it was returned to the United States prior to this second shipment to Switzerland).²⁹³

During this time, the Art Loss Register continued to investigate and initially thought that the sole heir to the painting was the Silva Casa Foundation, a Swiss foundation related to the Thannhauser family.²⁹⁴ The Art Loss Register began negotiating on the foundation's behalf—first with Tunkl and then with his Los Angeles

286. *Id.*

287. *Id.* ¶ 22. This also indicates that at least for present-day purchases of high-quality art created before World War II, seeking out information about a painting's provenance during and after World War II is expected of one afforded bona fide purchaser status.

288. *Id.* ¶ 23.

289. *Id.*

290. *See, e.g.,* Dider Imbert Fine Art, *Complimentary Listings*, INTERNET ART RESOURCES, <http://www.artresources.com/guide/comp.ihtml?a=1437> (last visited Sept. 6, 2005) (listing the address of Dider Imbert Fine Art in Paris, France).

291. *See* Gaia Regazzoni, *The Beginning of the End?*, THE ART NEWSPAPER, www.theartnewspaper.com/news/article.asp?idart=9752 (noting that Swiss statute of limitations is about to be extended from five years to thirty years).

292. Compl. Femme Forf., *supra* note 265, at ¶ 26.

293. *Id.*

294. *Id.*

attorney, whom Alsdorf retained.²⁹⁵ Around May 2002, the Art Loss Register discovered that Thannhauser had been holding the painting on behalf of Landsberg, which documents in German archives in Berlin and Koblenz confirmed.²⁹⁶ The Art Loss Register later discovered that Landsberg had passed away in 1994, but in June 2002 the Art Loss Register located her sole heir, Thomas C. Bennigson, then a law student at the University of California at Berkeley Law School (Boalt Hall).²⁹⁷

Bennigson reportedly “did not know the painting existed, or that it had belonged to his grandmother, until the summer of 2002” when the ALR contacted him.²⁹⁸ The ALR “allegedly told Tunkl around the same time [June 2002] that Bennigson was the rightful owner.”²⁹⁹ The *Femme en Blanc* litigation started as civil litigation in a state court action filed in California by Bennigson. On December 10, 2002, Bennigson’s newly-retained Los Angeles attorney, E. Randol Schoenberg, contacted Alsdorf’s attorney, Bernard, about the dispute, and they agreed to meet the week of December 18, 2002 upon Bernard’s return to Los Angeles from New York.³⁰⁰

Meanwhile, Alsdorf met with Tunkl in Chicago on December 13, 2002. According to court documents, “[d]uring that meeting, Alsdorf learned for the first time that the ALR had changed its position regarding the history of the painting, and that someone other than the Silva Casa Foundation was now asserting an ownership claim to the painting,” and “[a]t that time knew nothing about the identity of the new claimant.”³⁰¹ The court also found:

Alsdorf, uncomfortable with the conflicting positions the ALR had taken regarding the painting’s history, and believing no sale was imminent, instructed Tunkl to return the painting to her in Chicago . . . When she instructed Tunkl . . . to return the painting, Alsdorf did not know it was a California resident who had asserted a claim of ownership to the painting, nor did she know a lawsuit was about to be filed in connection with that claim. The painting was picked up from Tunkl’s gallery by a shipper on December 18, 2002. On December 20, at 6:36 a.m., the painting left Los Angeles on a cargo plane bound for Chicago. Later that morning the court issued the TRO ordering that the painting remain in Los Angeles.³⁰²

Meanwhile, according to court documents, Schoenberg sent an email to Alsdorf’s attorney, Bernard, on December 16, 2002, asking to

295. *Id.*

296. *Id.*

297. *Id.*

298. Kenneth Ofgang, Chicago Philanthropist Sues Law Student to Secure Title to Picasso Allegedly Stolen by Nazis, METROPOLITAN NEWS-ENTERPRISE, Sept. 14, 2004, www.metnews.com/articles/2004/benn091404.htm.

299. *Id.*

300. Schoenberg Decl. ¶ 3, *Bennigson*, 2004 WL 803616.

301. *Bennigson*, 2004 WL 803616, at *2.

302. *Id.*

set up a meeting and view the painting, but received no response.³⁰³ On December 18, 2002, Schoenberg called Bernard, who allegedly stated that the painting was “on its way back to Chicago” and “that he believed that Illinois law would be better than California law for his clients [Alsdorf and Tunkl].”³⁰⁴ Bernard also allegedly stated, which seems to correspond to other reports about the case, that “his clients believed that Mrs. Landsberg had owned the painting and that it had been stolen by the Nazis from Thannhauser, but that they were not certain whether Mrs. Landsberg had merely entrusted the painting to Thannhauser or sold it to him.”³⁰⁵ That same day, Tunkl’s assistant contacted a Los Angeles shipper, Gallery Services, to have the company pick up the painting that day. Tunkl’s assistant also contacted the New York dealer who was the intermediary in the Imbert viewing to oversee the shipment.³⁰⁶

On December 19, Bennigson’s attorney rushed to the Los Angeles courthouse to file an action for replevin and injunctive relief prohibiting the transport of the painting.³⁰⁷ He also filed a motion for a temporary restraining order to prevent shipment of the painting.³⁰⁸ Judge Person refused to rule on the motion *ex parte*, but agreed to hear the motion the next day after Alsdorf had notice of it.³⁰⁹ At the hearing, the judge granted the TRO, but then Bernard informed the judge that the painting had been shipped a few hours earlier.³¹⁰ The judge modified the TRO to allow the painting to be held in Chicago.³¹¹ A hearing to determine whether the TRO should be converted into a preliminary injunction was scheduled for a later date because Alsdorf was vacationing.³¹²

Subsequently, Alsdorf acknowledged receipt of service of process but moved to quash it.³¹³ She alleged that the court lacked jurisdiction over her, arguing that the painting was no longer in California and that she did not have the requisite minimum contacts with California for its courts to exercise jurisdiction over the dispute.³¹⁴ One of the key issues was the determination of the effect of the shipment of the painting out of California on the very day the complaint was filed.³¹⁵ Beningson argued that Alsdorf had attempted

303. *E.g.*, Compl. Femme Forf., *supra* note 265, ¶ 45.

304. *Id.* ¶ 46.

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

to evade jurisdiction in California by having the painting sent back to Chicago.³¹⁶

The judge postponed the preliminary injunction hearing to rule on the motion to quash.³¹⁷ He ruled in favor of Alsdorf.³¹⁸ Bennigson appealed, but was denied relief by the California Court of Appeal on April 15, 2004.³¹⁹ Bennigson filed a petition for rehearing, which was denied on May 11, 2004.³²⁰ Bennigson petitioned the California Supreme Court to review the case.³²¹ On July 28, 2004, the justices on that court unanimously agreed to hear the case.³²² Bennigson and Alsdorf submitted opening briefs.³²³ The court scheduled oral arguments, but in light of subsequent events, there will be no need for the court to rule.³²⁴

Approximately two weeks after the California Supreme Court agreed to review the case, Alsdorf filed a declaratory judgment action in the United States District Court for the Northern District of Illinois in Chicago to seek to quiet title in relation to the painting.³²⁵ This case has since been dismissed,³²⁶ particularly because the FBI seized the painting in Chicago and because the United States Attorney's Office in Los Angeles initiated civil forfeiture proceedings against the painting *in rem* in October 2004.³²⁷ All litigation has since been dismissed because Bennigson and Alsdorf settled all the claims between them for \$6.5 million.³²⁸

D. Comparison of Portrait of Wally and Femme en Blanc

The risk of erroneously depriving an innocent purchaser of previously displaced art "is particularly high in light of the complex legal issues and historical data, covering decades or even centuries, that frequently must be taken into account in determining ownership of artwork."³²⁹ In such cases, "there is a more than normally high risk

316. *Id.*

317. *Bennigson*, 2004 WL 2806301, at *3.

318. *Id.*

319. *Id.* at *4.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *See, e.g.*, Press Release, FBI, \$10 Million Picasso Painting Stolen by Nazis During World War II Seized by U.S. (Oct. 26, 2004) (on file with author); Compl. Femme Forf., *supra* note 265.

325. *Alsdorf*, 2004 WL 2806301, at *4.

326. *Id.* at *11.

327. Press Release, FBI, *supra* note 324; Compl. Femme Forf., *supra* note 265.

328. Bob Egelko, *\$6.5 Million Settlement in Suit over Stolen Picasso Painting*, SAN FRANCISCO CHRONICLE, Aug. 9, 2005, at B1.

329. Am. Ass'n of Museums Br., *supra* note 38, at 11.

that accusations of possession of stolen artwork may be made on the basis of incomplete information that may subsequently be proven inaccurate.”³³⁰ In light of the high risk of false allegations that previously displaced art retains its looted taint, the government should take caution before initiating civil forfeiture proceedings. There are significant differences between *Portrait of Wally* and *Femme en Blanc* that dictate different conclusions as to the propriety of using the civil forfeiture mechanism in each case.

The most obvious factor in evaluating the propriety of initiating a civil forfeiture proceeding is the level of evidence indicating that the art in question was looted and never restituted. With *Femme en Blanc*, there was overwhelming evidence, consisting of many official documents, that the art was looted—the German government recognized the theft in a restitution proceeding immediately after the war, and the art indisputably never was returned to the victim. In fact, the Art Loss Register still reported the painting as looted when Alsdorf attempted to sell it in 2002, as initially was reflected in the Repertoire. In contrast, with *Portrait of Wally*, the only evidence in the record that the painting was, in fact, aryanized by Welz and never restituted, consists mainly of allegations about Bondi’s statements and her informal, undated, and unsigned note. But, of course, that evidence cannot be tested today in a court of law because Bondi is now deceased. Although in light of Welz’s post-war conviction for looting Jewish property, it seems likely that the property was looted, unsupported hearsay about the looting that cannot today be confirmed is much less persuasive evidence than the written documentation typically kept by the Nazis when they aryanized property.

There also remains some question as to what may have happened with *Portrait of Wally* between the war and Bondi’s death in London. The undated note found in Bondi’s London apartment after her death indicates that the painting never was restituted.

Museums frequently encounter such situations. One highly publicized example involved an allegation by Professor Sol Chaneles, former Chairman of the Department of Criminal Justice at Rutgers University, that a Chardin painting, *Boy Blowing Bubbles*, owned by the [Museum of Modern Art], had been seized from a Jewish family by Nazi agents. Based on investigations that he conducted, Chaneles alleged that, upon recovery of the Chardin, instead of returning it to its owners, American soldiers had smuggled it into the United States. Subsequently, [after just one day of researching its files, the Museum of Modern Art] was able to provide evidence that in fact the painting had been returned to its owners from whom the [Museum of Modern Art] had acquired the painting.

Id. at 12 n.9; Douglas C. McGill, *Met Painting Traced to Nazis*, NEW YORK TIMES, Nov. 24, 1987 at C19; *Editor’s Note*, NEW YORK TIMES, Nov. 25, 1987, at A3.

330. Am. Ass’n of Museums Br., *supra* note 38, at 12 n. 9.

Because the note was undated and Bondi and all other relevant witnesses are now deceased, however, one never can probe whether any informal arrangement about the painting may have been made between the date Bondi wrote the note and the date of her death. An informal arrangement through which the Belvedere agreed to purchase a significant amount of art through her gallery after the war if Bondi would not pursue the painting, is one possibility that is not precluded by the contents of the note.

Even if such an informal arrangement never was reached, key differences exist regarding the application of such doctrines as laches, waiver, abandonment, and estoppel to the ownership analysis. First, with *Portrait of Wally*, Bondi's note demonstrates that she made a conscious decision not to pursue the painting in any formal proceeding. The note reflects that Bondi declined to formally pursue the painting because it would have been awkward or difficult to do so in light of the fact that she again took up her rightful position in the art community, operating the leading modern art gallery in Vienna. Bondi successfully navigated the Vienna courts to regain possession of her other property aryanized during the war; this fact indicates that systematic injustice after the war that may have infected the efficacy of the Austrian restitution mechanism was not the root of her decision not to pursue the painting. Accordingly, it seems problematic to proceed against Austria today, especially in light of the fact that it was known to Bondi that the painting was displayed prominently at the Belvedere.

In contrast, with *Femme en Blanc*, Landsberg was diligent in pursuing her art. She successfully pursued a restitution claim in Germany after the war to be compensated for the looted artwork, which was not located by authorities after the war. Nonetheless, Landsberg (and Thannhauser) actively sought the painting and had it listed in the *Repertoire*. It was not until Alsdorf offered the painting for sale in 2002 in a private sale that Landsberg or her heir, Bennigson, could have known of the painting's whereabouts. Until 1975, it seems the painting was hidden in a gallery known to have dealt in Nazi-looted art until it was purchased through a New York dealer by Alsdorf, who kept the painting hanging on a wall in her private residence. The painting was not publicized in brochures by galleries or museums because it never was publicly displayed until it was sent to the small Tunkl gallery in California in late 2001. A few months later, a potential buyer had a search run by the Art Loss Register, and Bennigson was located only a few short weeks thereafter and promptly initiated suit.

A third key difference is the strength of the evidence as to whether the current possessor should be considered a bona fide purchaser. In both cases, the evidence on this point is a bit problematic. Although no one in the art world seems to doubt Alsdorf's integrity, especially in light of the fact that she and her

husband (now deceased) were financial supporters of the International Foundation for Art Recovery, it is possible that at least the dealer from whom she bought the painting would not qualify as a bona fide purchaser. If that art dealer could be deemed, as a matter of law, to be Alsdorf's agent, then her status as a bona fide purchaser would be brought into question.³³¹

Also troubling is the fact that *Femme en Blanc* was purchased exactly thirty years after the war, exactly when the French statute of limitations likely elapsed on Nazi-looted art. On the one hand, this favors finding that a purchaser would have believed he or she was gaining valid title, which would seem to render it more difficult for the government in a civil forfeiture proceeding to establish scienter, as required by the NSPA. On the other hand, some might view the fact negatively, reasoning that the purchaser was unfairly trying to buy stolen art, which was no less stolen because the applicable statute of limitations had elapsed. Compounding suspicion, the potential purchaser of *Femme en Blanc* reportedly stated to the government that he felt the seller (Alsdorf) may have had knowledge the painting was looted because she would only authorize the painting to be viewed in Switzerland, not France where looted art is more likely to be seized.

Finally, Alsdorf engaged in "jurisdictional hopscotch," moving the painting from one location to another, seemingly to make it more difficult for Bennigson to file a traditional civil suit against her. The painting was moved from Los Angeles, California, to Chicago, Illinois, after Bennigson's lawyer, who was located in Los Angeles, had contacted Alsdorf's lawyer. Although not found by the California court, Alsdorf's lawyer's statements about the decision to move the painting could mean that the move was based, at least in part, on a desire to avoid California's laws, which generally could be described as favoring Holocaust survivors, and secure a more favorable forum for the dispute in Chicago by initiating the declaratory judgment action there. In contrast, although *Portrait of Wally* was slated to be shipped from New York back to Austria because the Schiele exhibition at the MOMA came to an end, Austria did not

331. Further, although also quite possibly an innocent purchase and perhaps inadmissible in the event that a trial ever would have occurred in the case, the Alsdorfs had been connected once before with stolen antiquities. Charles F. Keyes, *The Case of the Purloined Lintel: The Politics of a Khmer Shrine as a Thai National Treasure, in NATIONAL IDENTITY AND ITS DEFENDERS: THAILAND 1939-1989* 261, 270 (Craig J. Reynolds ed., Silkworm Books 1993) (discussing a lintel that disappeared from Phanom Rung):

[i]t reappeared in 1967 when a Mr. James Alsdorf presented it as a loan to the Art Institute of Chicago where it has remained ever since; in 1983 the Alsdorf Foundation made the lintel a gift to the Institute. Alsdorf said he had purchased the lintel in 1967 from an art dealer in New York.

preemptively move the painting to avoid a lawsuit by the time the civil forfeiture proceeding was filed.

These differences between the two cases indicate that the case of *Femme en Blanc* is much stronger than the *Portrait of Wally* case. Granted, there is a common issue as to the applicable statute of limitations in both suits. Nonetheless, *Femme en Blanc* clearly was looted, and absolutely no evidence would support application of the doctrines of laches, waiver, estoppel, or abandonment had the litigation proceeded as a traditional civil suit. To the contrary, Landsberg diligently sought the painting, filed a formal restitution claim in relation to the painting, had the painting included in the *Repertoire*, and never had an opportunity to file traditional civil litigation to recover the painting because it never was publicly displayed until 2001. In contrast, although the evidence regarding *Portrait of Wally* indicates that the painting was looted, the evidence is hearsay that no longer can be substantiated because Bondi is deceased. Further, the undated, unsigned note, while making one sympathetic to Bondi's plight, constitutes evidence that would support strongly application of the doctrines of laches, waiver, estoppel, and abandonment had traditional civil litigation been filed, especially because *Portrait of Wally* was known to hang in the Belvedere since the 1950s.

As discussed in Section IV, these differences render *Femme en Blanc*, but not *Portrait of Wally*, appropriate for a civil forfeiture proceeding premised on a purported violation of the NSPA.

IV. CONCLUSION

One could argue that every tool in the arsenal should be used to restore Nazi-looted art to survivors who owned it before the war and their heirs. Certainly, many believe that morality firmly supports this view.³³² There are, however, some negative consequences of using NSPA criminal prosecutions or civil forfeiture proceedings too aggressively, and many of those consequences are not widely reported in the press.³³³

For example, as stated by one scholar in regard to application of the NSPA to foreign archaeological materials:

332. See e.g., Hector Feliciano, *Nazi Plunder: Seeking Moral Justice by the Return of Looted Art*, L.A. TIMES, Jan 11, 1998, at M1 ("Returning looted art is, fundamentally, a matter of moral justice and memory. Our chance to do today that which we will not be able to do even a few years from now—to gather all the pieces of the puzzle.").

333. Cf. Nowell, *supra* note 32, at 95–97.

Broad application [of the NSPA] limits the negotiating position of the State Department in establishing, by international agreement, the details of protection of cultural materials . . .

The theft and removal of cultural materials from their country of origin is an international problem. The NSPA, however, is a national statute, with prosecution dependent upon Justice Department interpretation. To the extent that NSPA prosecutions interfere with or retard efforts at a more comprehensive solution to the entire movement of foreign origin archaeological materials problem, prosecution should be reconsidered.
334

This scholar's warnings, written in 1978, remain sound and have relevance to the current controversy concerning the use of the civil forfeiture mechanism to seize Nazi-looted art.

The CAFRA innocent owner defense insulates a true bona fide purchaser from civil forfeiture premised on a NSPA violation. Although the NSPA likely would not apply to most purchasers of Nazi-looted art, it could apply to current possessors of Nazi-looted art who obtained the art during or even shortly after the war—when the issue of Nazi looting was commonly known and European nations passed laws vitiating racially-motivated sales during the war.³³⁵ This issue has never before been presented to a U.S. court, and it is possible that a U.S. court would take such an approach, even if the passage of time since World War II might have shielded a current possessor from civil liability pursuant to later-enacted, valid statutes of limitation or repose in European nations.³³⁶ Although some such possessors may assume that their purchases are now insulated, at least in terms of civil liability, transporting Nazi-looted art into the United States or across a state line would trigger the NSPA because the triggering event is the transport of the art, not the initial purchase.³³⁷ Regardless of the fact that a civil litigant's remedy may

334. *Id.* at 95–96 (internal citations omitted).

335. Although under the *McClain* doctrine, local law where an object was acquired is deemed to control whether an object was “stolen” for purposes of the NSPA, Germany and Austria declared after the war that all property transfers pursuant to Nazi laws were void. Eric Rosand, *Confronting the Nazi Past At End of the 20th Century: The Austrian Model*, 20 BERKELEY J. INT’L L. 202 (2002). Finding the names of certain dealers known to have traded in artwork looted from Jews in the provenance of a work is a sufficient red flag to potential purchasers that the work was looted. *E.g.*, Kaye & Spiegler, *supra* note 1, at S3 (“In recent years lists of dealers who collaborated closely with officials of the German government and Nazi Party members have generally been circulated.”). Whether a purchaser should qualify as a bona fide purchaser of an artwork with such a provenance could turn on whether the artwork was purchased by the time it was widely known that the dealer at issue was a Nazi-collaborator. *Id.*

336. *But see* Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2438 n.7, 2446–48 (1994).

337. *Cf. Portrait of Wally*, 2002 WL 553532 (holding that the NSPA may be triggered in civil forfeiture cases, contrary to the doctrines which normally apply in civil forfeiture cases). *See also cf.* Upton, *supra* note 60, at 571 (“the *McClain* convictions set a precedent which would expose museum trustees to the risk of federal

be barred by the statute of limitations, valid legal—as opposed to marketable—title³³⁸ would not be deemed to have passed under the law of any state in the United States. It is presently unclear whether subsequent vesting of title under a foreign statute might, for purposes of the NSPA, be deemed to have vitiated the relevance of the initial theft.³³⁹

Additionally, the term “stolen” in the NSPA was interpreted in *McClain* to mean “acquired or possessed, as a result of some wrongful or dishonest act of taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefits of ownership.”³⁴⁰ As *McClain* established, courts should apply the U.S. definition of theft to cases where the object in question was taken abroad;³⁴¹ this definition could be deemed to apply to Nazi-looted art, regardless of whether foreign civil statutes of limitation or repose might shield the current possessor from civil liability.

This issue was not presented in the archaeological cases, *Hollinshead*, *McClain*, or *Schultz*, because the laws in Guatemala, Mexico, and Egypt clearly vested ownership in the state, thereby rendering the objects “stolen” under the NSPA standard and satisfying the scienter requirement.³⁴² A case-by-case analysis of the national laws applicable to individual works of art, as well as their individual factual histories and the current possessor’s knowledge of the relevant law and factual history, would be necessary to predict whether transporting specific pieces of art that were looted sixty

criminal prosecution if the museum arranges an interstate loan of pre-Columbian objects.”).

338. *E.g.*, Kaye & Spiegler, *supra* note 1, at S2 (“A basic tenet of U.S. law that distinguishes it from that of most civil law countries is that no one, not even a good faith purchaser, can obtain good title to stolen property.”).

339. The *McClain* doctrine provides that “courts should apply the broad American definition of theft and use foreign local ownership laws to determine whether foreign origin archaeological materials have been ‘stolen.’” Nowell, *supra* note 32, at 92 (citing *McClain I*, 545 F.2d 988 at 1001–02). For examples of application of the broad definition, see *U.S. v. Turley*, 532 U.S. 407, 417; *U.S. v. Anderson*, 532 F.2d 1218, 1227 (9th Cir. 1976) *cert. denied* 429 U.S. 839 (1976) (“‘stolen’ means acquired or possessed, as a result of some wrongful or dishonest act or taking whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership”); *Lyda v. U.S.*, 279 F.2d 461 (5th Cir. 1960) (holding that § 2314 reaches all ways by which owners are wrongfully deprived of the use or benefit of their property).

340. *McClain I*, 545 F.2d 988, 993–84 (emphasis added); see also, *e.g.*, *U.S. v. Anderson*, 532 F.2d 1218, 1227 (9th Cir. 1976) *cert. denied* 429 U.S. 839 (1976).

341. See, *e.g.*, Nowell, *supra* note 32, at 95 (“The *McClain* court’s decision to apply the American definition of theft to cases of foreign situs removal of archaeological materials supports the intent of the NSPA to protect owners of property.”).

342. See *supra* Section I.

years ago by the Nazis could potentially subject someone to criminal liability under the NSPA.

Although prosecuting a criminal claim now for what was an act of theft sixty years ago may seem like an unlikely exercise of prosecutorial discretion,³⁴³ since the mid-1990s, numerous U.S. governmental entities have demonstrated a strong commitment to remedying the vestiges of legal injustices of the Holocaust that to this day still remain.³⁴⁴ Further, the executive branch under President Clinton dedicated significant resources to successfully negotiate the creation of European funds known as “foundations,” to compensate Holocaust survivors in exchange for “legal peace” for German and Austrian government and industry in the United States.³⁴⁵ The executive branch is bound to enter “Statements of Interest” under the executive agreements entered in conjunction with the creation of the foundations, which encourages U.S. courts to dismiss cases that could be resolved through the foundations rather than U.S. courts. None of the executive agreements, however, specifically applies to artwork

343. “It is within the power accorded to the executive branch to say when the policy embodied in the criminal statute should prevail and prosecution be instituted.” *McClain I*, 545 F.2d at 1002 n.30 citing *U.S. v. Cox*, 342 F.2d 167 (en banc) cert. denied 381 U.S. 935 (5th Cir. 1965). Of course, “due process is offended when a prosecution is arbitrary or instituted without fair notice that the challenged activity is in violation of the law.” Upton, *supra* note 60, at 609 (criticizing *McClain I*).

344. *E.g.*, Holocaust Victims Redress Act, Pub. L. No. 105–158, § 1564, 112 Stat. 15 (1998).

345. *See generally* STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2004); MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (2003); Garrett Perdue, *The Victim's Fortune: The Struggle for Restitution for Holocaust Victims*, 7 N.C. BANKING INST. 423 (2003). *But see* William Glaberson, *Holocaust Survivors in U.S. Say Settlement Slights Them*, N.Y. TIMES, Nov. 14, 2003, at B4, 2003 WLNR 5645268.

(although the Austrian agreement mentions chattels).³⁴⁶ Indeed, the agreements expressly carve out art litigation from their scope.³⁴⁷

The State Department has not filed a Statement of Interest in any of the Nazi-looted art cases. This is true despite the fact that survivors, their purported heirs, or both have filed suit in the United States against current possessors of Nazi-looted art. This has occurred in the wake of *Wally*, which was filed before the agreements were reached, no doubt increasing the pressure on Austria to enter an agreement.³⁴⁸ The closest the State Department came to expressing its views in an art case was when it filed an amicus brief in *Altmann* after the Supreme Court granted certiorari on a narrow jurisdictional issue unrelated to the merits of the case.³⁴⁹ The brief supported the Austrian National Gallery and argued for dismissal of the plaintiff's case.³⁵⁰ Nonetheless, U.S. courts have not dismissed Nazi-looted art cases summarily—even as late as sixty years after the war—on statute of limitations grounds.³⁵¹ Finally, as discussed in Part III, two U.S. Attorney's Offices have filed civil forfeiture suits over Nazi-looted art—one in 1998 and another in 2004.³⁵² Thus, the policy of the United States seems to be that the doors to the courts are open to survivors seeking justice.³⁵³

346. On July 17, 2000, non-governmental organizations, plaintiffs' attorneys, the United States, Germany, Israel, and a number of other countries signed an agreement to resolve almost all pending claims of Holocaust survivors and heirs against German companies. Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, available at <http://www.usembassy.de/germany/img/assets/8497/agreement.pdf> (last visited Oct. 27, 2005). Annex A to the Agreement, however, does "not preclude an applicant from bringing an action against a specific German entity (i.e., government agency or company) for the return of a specifically identified piece of art if the action is filed in the Federal Republic of Germany or in the country in which the art was taken, provided that the applicant is precluded from seeking relief beyond or other than the return of the specifically identified piece of art. Annex A, ¶ 14. See also Rosand, *supra* note 335 (discussing similar Austrian Foundation). The Swiss banks entered a settlement of class action litigation that resulted in a similar foundation, although it was not created pursuant to international agreement.

347. See e.g., Annex A of the Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, available at http://www.state.gov/www/regions/eur/holocaust/000717_agreement_anex_a.html.

348. *Portrait of Wally*, 105 F. Supp. 2d 288.

349. 540 U.S. 1101 (2004).

350. Brief for the United States as Amicus Curiae Supporting Petitioners, *Altmann*, 541 U.S. 677 (No. 03-13), available at 2003 WL 22811828.

351. See, e.g., *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir. 1994) (discussing the difficulty of resolving the statute of limitations issue).

352. See *supra* Section III.

353. Additionally, both New York and California have exerted regulatory pressure, passed laws encouraging settlement of claims that may not have been legally viable at this late date. N.Y. TAX LAW § 13 (McKinney 1999) (providing tax exemptions for targets or victims of Nazi persecution and "qualified settlement funds established

Utilizing criminal prosecutions or civil forfeiture proceedings too aggressively, however, could cause the art community to regress from its movement toward open provenance research. In the past, at least one scholar, in the context of discussing ways to cut back on the black market in archeological materials, has advocated that civil remedies to combat looting are preferable to criminal remedies.³⁵⁴ Among other reasons for advocating the use of civil remedies over criminal remedies, that scholar maintained that the NSPA's "application is limited to cases involving easily proved thefts."³⁵⁵ This scholar concluded that "civil recovery is probably a more efficient general use of United States Government resources than application of the NSPA" and advocated for modification of traditional civil remedies in the form of attorney fee and cost shifting statutes or even for the U.S. government "to represent national or private owners of stolen cultural property in civil actions for recovery."³⁵⁶

This approach seems wise, in the limited context of archeological materials which have strong indications of being recently stolen, although the adoption of CAFRA makes civil forfeiture pursuant to the NSPA fairer than it had been. Nonetheless, in the context of claims that arose over sixty years ago, using the NSPA to stack the litigation so strongly in favor of the claimant runs a high risk of unfairly punishing bona fide purchasers who, for over sixty years, had little indication that there was any problem with their title. The Nazi-looted art problem is much like the black market antiquities market, in that overly aggressive use of the NSPA runs the high risk of "unnecessarily alienat[ing]" "dealers, scholars, and museum staff members, upon whose expert knowledge, services, and cooperation successful" return of stolen objects depends.³⁵⁷

Although it may be true that the current possessors could in turn sue the individuals or galleries who originally sold them the art, it is highly unlikely that most current possessors would be made whole by a lawsuit for two reasons. First, the original sellers may be deceased or defunct. Second, legal fees would cut into the profits. The legal fee issue is the same for survivors and their heirs suing as plaintiffs unless they are represented pro bono. In fact, most scholars and practitioners in the art law field regard litigation as a poor means to

for the benefit of victims or targets of Nazi persecution by or in the Swiss Confederation"); CAL. CIV. PROC. CODE § 354.3 (West 2004) (providing that any action against a "museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance" for return of "Holocaust-era artwork" "shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010."). Further, every state has a statute prohibiting the receipt of stolen property.

354. See Nowell, *supra* note 33, at 102–07.

355. *Id.* at 86–87.

356. *Id.* at 104–05.

357. *Id.* at 97.

resolve these disputes. Nonetheless, it would be naïve to believe that survivors or their heirs would have met with as much success as they have if no successful law suits had been filed to date.

Another potential negative consequence if forfeiture is too widely used (and if statutes of limitation are too liberally construed in U.S. courts) is a reduction in the amount of art sent to the United States for display. The art community is in widespread agreement that the international exchange of art generally is beneficial to mankind for intellectual, cultural, and political reasons.³⁵⁸ On the other hand, most in the art community are of the opinion that “stolen art . . . should not travel freely.”³⁵⁹ Nonetheless, many in the art community caution that pursuing stolen art too aggressively drives it underground to the point that the chances of recovery become close to nonexistent; they further contend that aggressive pursuit cuts down on the amount of art—even without provenance problems—that lenders are willing to ship to the United States.³⁶⁰

In the end, each case brought in pursuit of Nazi-looted art is unique and should be treated as such. Thus, the pursuit of civil forfeiture should not be a knee-jerk reaction automatically regarded as wise when purported heirs of survivors seek return of art looted at one time by the Nazis. The potential negative consequences are real and should be considered seriously before a U.S. Attorney’s Office decides to seek civil forfeiture of stolen art or criminal prosecution of those currently possessing the art, sixty years after the war. Given the passage of time, it is likely that few current possessors of Nazi-looted art, in contrast with those who bought and sold European art sixty years ago, acted with scienter in acquiring or retaining the art.

A moderate approach to civil forfeiture is best to balance the interests of present-day possessors with the interests of present-day possessors of the art. Otherwise, in cases where the present-day possessor is foreign, the actions of an individual U.S. Attorney’s Office may interfere with the ability of the State Department to resolve remaining legal issues pertaining to the Holocaust at a diplomatic level.³⁶¹ Regardless of whether the present-day possessor

358. Ely Maurer, *The Role of the State Department Regarding National and Private Claims for the Restitution of Stolen Cultural Property*, in *THE SPOILS OF WAR* 142 (Elizabeth Simpson ed., 1997).

359. PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* 33 (1981) (speaking in the context of cultural antiquities and archeological treasures).

360. See Am. Ass’n of Museums Br., *supra* note 38, at 26–27 (describing instances where foreign lenders have withdrawn offers to lend art to U.S. museums because of *Portrait of Wally*). See also *id.* at 29 n.27 (discussing inadequacy of Immunity from Seizure Act to provide a full remedy to the problem).

361. Cf. Judith H. Dobrzynski, *Strategy in Schiele Art Case Questioned*, N.Y. TIMES, Oct. 12, 1999, at E3 available at 1999 WLNR 3092467 (“The State Department, wary of an international contretemps, was reluctant to intervene” in the *Portrait of*

is foreign or domestic, wisely choosing which cases warrant use of the civil forfeiture mechanism will prevent alienating the art community, whose cooperation (in regard to access to information and funding) is essential to learning more about the provenance of art looted during World War II. The Department of Justice should exercise control over individual U.S. Attorneys to insure that prosecutorial discretion is exercised in favor of initiating a civil forfeiture proceeding only when the balance of the factors below favors such action.

1. The evidence that the painting was looted and never restituted is extremely strong and well-documented, particularly by governmental records of the Nazi regime or post-war European governments' restitution tribunals.

2. The claimant can demonstrate conclusively that he or she is the Holocaust survivor from whom the art was looted or a valid heir. The government generally should initiate a civil forfeiture proceeding only if all heirs will file claims in the suit. Otherwise, the civil forfeiture proceeding will not conclusively establish ownership of the art.

3. Even if the statute of limitations would have run had the suit been filed as traditional civil litigation today, the Holocaust survivor or heir was not inactive in pursuing the artwork. This should hold true when the whereabouts of the artwork could have been easily known to the survivor (or his heirs) such that the doctrines of laches, waiver, abandonment or estoppel very likely would have prevented the claimant from winning traditional civil litigation.

4. Evidence that the current possessor did not purchase the painting in good faith and likely would not successfully assert the CAFRA innocent owner defense, such as where the present-day possessor purchased the art from a reputable dealer between the years 1980 and 1994.

5. The current possessor, instead of engaging in good-faith settlement negotiations, is engaging in "jurisdictional hopscotch" such that the Holocaust survivor or heir is having difficulty finding a forum to hear a traditional civil suit.

In conclusion, following these guidelines would allow the Department of Justice to evaluate when justice requires initiation of a civil forfeiture proceeding or restraint.

Wally controversy when the claimants initially sought governmental help to effect seizure.).
