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The Innocent Buyer of Art Looted During World War II

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The Innocent Buyer of Art Looted During World War II

ABSTRACT

This Note considers the legal issues relating to innocent buyers of looted art. After providing some historical background on the massive displacements of art that took place during World War II, the Note surveys recent developments, including the different types of disputes that have arisen in the past few years. It then provides a legal framework for analyzing one type of dispute, that of the innocent buyer of looted art.

Original owners face difficult evidentiary burdens and other litigation barriers, but law and policy nevertheless favor original owners above innocent buyers. In particular, courts have become increasingly impatient with the anarchy of the international art market and are prepared to impose a duty to search upon those who invest in valuable works of art. Under these circumstances, most disputes between original owners and innocent buyers are likely to be settled out of court. Moreover, the art world, in response to the duty to search, has begun developing title search methods and other title-related policies so future art buyers can rest assured that they have not brought looted property.

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I. INTRODUCTION

Looting and pillaging have been a part of warfare for millennia. In addition to simple pillage by common soldiers, warring states have for centuries looted one another in a systematic manner.¹ Nevertheless, World War II was different. In one sense, the difference was only one of scale.² Hundreds of thousands, perhaps millions, of paintings, sculptures, drawings, pieces of furniture, religious objects, and other works of art were looted by the Nazi government from Jews throughout Europe and from state museums, churches, and citizens in Eastern Europe and Russia.³ Most of these items were then sent back to Germany, where they were later found scattered in hiding places throughout the country.⁴ The Nazi looting bureaucracy was well-organized, powerful, and answered only to the top leaders of the party.⁵ The Soviet Army also systematically looted hundreds of thousands of artworks, as it marched into Germany, claiming them as reparations for its cultural property losses under the German occupation.⁶ Other pieces of art were taken by American

1. See, e.g., Jeanette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR*, 34, 34-38 (Elizabeth Simpson ed., 1997).

2. See Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, in *THE SPOILS OF WAR*, supra note 1, at 39.

3. See *id.*

4. See *id.* at 41-43. The Nazis also bought huge quantities of artworks on the booming art market. See *id.*

5. See HECTOR FELICIANO, *THE LOST MUSEUM* 33-38 (1997).

6. The historical section of this paper focuses on the looting undertaken by Germany. The history of Soviet looting and the legal issues relating to the Soviet Union's large stores of "trophy art" have been dealt with at length in other sources. See generally KONSTANTIN AKINSHA ET AL., *STOLEN TREASURE* (1995); Margaret M. Mastroberardino, *The Last Prisoners of World War II*, 9 *PACE INT'L L. REV.* 315 (1997); Sylvia L. Depta, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany*, 10 *TEMP. INT'L & COMP. L.J.* 371 (1996);

soldiers guarding German hiding places, by opportunistic art dealers who took advantage of their Jewish colleagues' positions, and by Germans who saw their chance in the chaos that accompanied the collapse of the Reich.⁷

Part II of this Note will provide a brief historical overview of why and how this artwork was looted, what happened to it during and after the war, and how innocent buyers later purchased many of the looted pieces. Part III will discuss recent developments. In particular, this section will explore why it has taken so long for these issues to come to light. It will also give an overview of the various legal scenarios that exist in relation to ownership of looted art, including possession by a state or public institution, possession by an innocent buyer, and possession by a thief. Part IV will focus on one particular scenario—the innocent buyer of looted art—and will explore some of the disputes that have already arisen. Part V will focus on the legal issues relating to ownership of these works, and it will also consider some of the policy, equity, and evidentiary issues that arise in these cases. It will also explain why the courts are likely to be highly pro-owner in such cases, finding against innocent buyers, and it will argue that the pro-owner stance is an appropriate response by courts to the anarchic international art market. Finally, it will discuss some of the implications of that pro-owner stance, including the likelihood of out-of-court settlements in many of these disputes.

II. HISTORICAL BACKGROUND

Adolf Hitler was an avid art collector, but his primary interest in art was related to his intent to build a great museum in the

S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany*, 18 HOUS. J. INT'L L. 59 (1995); Elissa S. Myerowitz, *Protecting Cultural Property During a Time of War: Why Russia Should Return Nazi-Looted Art*, 20 FORDHAM INT'L L.J. 1961 (1997).

7. See, e.g., *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 833-835 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982) (describing the disappearance of two Dürer portraits from a Thuringian castle during its occupation by American soldiers); Willi Korte, *Search for the Treasures, in THE SPOILS OF WAR*, *supra* note 1, at 150-52 (describing how a U.S. serviceman mailed home religious treasures from a church in Quedlinburg, Germany); Judith H. Dobrzynski, *A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES, Dec. 24, 1997, at E1 (recounting a Jewish art dealer's claim that her Schiele painting was taken from her under duress by a Nazi art dealer); Werner Schmidt, *The Loss of German Artistic Property as a Result of World War II, in THE SPOILS OF WAR*, *supra* note 1, at 95 (discussing thefts from German museums at the end of WWII).

Austrian town of Linz.⁸ He drew up the architectural plans for the museum himself.⁹ The museum was to be a monument to Nazism, with several large buildings and a huge collection of artwork spanning European history and prehistory.¹⁰ Nazi law gave Hitler the right to dispose of all confiscated artwork.¹¹ He had several agents charged with collecting artwork for the Linz museum, including Dr. Hans Posse.¹²

Hitler's second in command, Hermann Göring, was similarly ravenous for artwork but with different motives.¹³ He considered himself a "latter-day Medici," and his country estate, Carinhall, was a showcase for the works he collected.¹⁴ Göring was a double dealer of sorts, charged with assisting Hitler in filling the imaginary walls of Linz but also self-seeking in covering the walls of his own home.¹⁵ He was a frequent visitor to the *Jeu de Paume*, where confiscated artworks were stored before being shipped back to Germany, and he often selected works for his own collection from among the Führer's loot.¹⁶ Göring's position and resources, including a private train for transporting confiscated property back to Germany, allowed him to commandeer the bureaucracies charged with confiscation, including the *Einsatzstab Reichsleiter Rosenberg* (ERR).¹⁷

The ERR was headed by Alfred Rosenberg, a leading Nazi ideologue, who was essentially charged with studying the enemy.¹⁸ The ERR was initially established for the purpose of collecting Jewish religious objects and books for anti-Semitic research purposes, but it later became the primary organization for the confiscation of art.¹⁹

The Nazi looting of Europe was undergirded by Nazi ideology.²⁰ In justifying their looting, the Nazis pointed to the German treasures stolen during the Napoleonic Wars and World War I.²¹ When they confiscated the possessions of French-Jewish

8. See James S. Plaut, *Hitler's Capital*, ATL. MONTHLY, Oct. 1946, at 73.

9. See *id.*

10. See FELICIANO, *supra* note 5, at 21.

11. See James S. Plaut, *Loot for the Master Race*, ATL. MONTHLY, Sept. 1946, at 59.

12. See Plaut, *supra* note 8, at 73.

13. See FELICIANO, *supra* note 5, at 32-38.

14. Plaut, *supra* note 11, at 58.

15. See FELICIANO, *supra* note 5, at 36-38.

16. See Plaut, *supra* note 11, at 58.

17. See FELICIANO, *supra* note 5, at 36; Plaut, *supra* note 11, at 59-60.

18. See Jonathan Petropoulos, *German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich*, in THE SPOILS OF WAR, *supra* note 1, at 109.

19. See Nicholas, *supra* note 2, at 41; FELICIANO, *supra* note 5, at 34-35.

20. See FELICIANO, *supra* note 5, at 26-27.

21. See *id.* In 1940 Hitler commissioned art historian Otto Kümmel to write a catalog of works stolen from Germany since the beginning of the sixteenth

dealers, they were retaliating against the enemies of Germany, and when they pillaged "Germanic art" from museums, churches, and private collections throughout Eastern Europe, destroying what they did not want, they were simply taking back what was theirs and destroying items of no value.²²

Nazi ideology also determined which art was considered valuable.²³ Hitler did not like modern art, so the Monets, Cézannes, and Picassos that were so popular on the international art market were dubbed "degenerate art" and were only valuable to the Nazis as items they could sell or exchange for the art they preferred.²⁴ The art they considered valuable included Germanic art (though not modernist German art), as well as the work of many Dutch painters (though Rembrandt's fondness for Jewish subjects was troubling) and many French artists.²⁵

The Nazi obsession with art began to manifest itself well before the war began.²⁶ In 1937, Hitler ordered German museums to clear their collections of degenerate artworks.²⁷ There were "Degenerate Art" shows in Munich and throughout Germany, and many of the works were then sold at auctions of degenerate art.²⁸ After a final auction in March 1939, the nearly 5000 degenerate artworks that remained were burned in a bonfire.²⁹

The treatment of Jews in Germany deteriorated quickly after the Nazis came to power, of course, but the confiscation of personal property did not begin until *Kristallnacht* in November of 1938.³⁰ Soon afterward, confiscated art began to fill warehouses and museums throughout Germany.³¹

century. *See id.* at 24. Kümmel's report consisted of three volumes, detailing all of the works that were stolen and condemning France for its looting. *See id.* at 25-26.

22. *See* LYNN H. NICHOLAS, *THE RAPE OF EUROPA* 60-65 (1994).

23. *See id.* at 7-16.

24. *See id.*, 166-70; Nicholas, *supra* note 2, at 39.

25. *See* FELICIANO, *supra* note 5, at 18-21.

26. Artists in Germany, who had thrived under the Weimar Republic, were repressed by the Nazis as soon as the party came to power. *See* NICHOLAS, *supra* note 22, at 8-9. Nazi laws allowed the government to remove state employees, including museum staff, art teachers and university professors. *See id.* at 9. A regulatory organization called the *Reichskulturkammer* was set up for artists, musicians, art dealers, and others; those who did not join it could not sell or exhibit their work—and Jews, Communists, and "degenerate" artists could not join. *See id.*

27. *See id.* at 14-18.

28. *See id.* at 18-25; Nicholas, *supra* note 2, at 39-40.

29. *See* NICHOLAS, *supra* note 22, at 25.

30. *See id.* at 42-43.

31. *See id.* at 43-46.

When the Germans invaded Austria on March 12, 1938, the *Schutzstaffel* (SS) immediately began confiscating the possessions of wealthy Jews like Baron Louis de Rothschild.³² The more fortunate Jews, who had escaped before the invasion, had left behind many of their possessions, and those who remained were forced to register all their possessions with the Gestapo.³³ After the invasion, Jews were allowed to leave Austria only upon turning over their possessions to the Office of Jewish Emigration.³⁴

In Austria and Western Europe, the Germans systematically confiscated only property owned by Jews.³⁵ In Eastern Europe, however, the pattern was different.³⁶ Because the Slavs were considered an inferior race, the Germans looted and pillaged private homes, state museums, and churches.³⁷ They took all the "Germanic art" that they could find and destroyed what they did not take.³⁸

The Soviet Union was in particular badly looted.³⁹ Its museums were ill-prepared for the German invasion and were quickly stripped of the art that the Germans wanted.⁴⁰ What they did not want, they destroyed.⁴¹ Palaces, museums, libraries, and churches were completely plundered and left gutted.⁴² The numbers alone are mind-boggling: 427 Soviet museums were looted; 1670 Russian Orthodox churches were destroyed or damaged, along with some 500 synagogues.⁴³ Thirty-four thousand objects were removed from Peterhof in Leningrad and sent to Germany before the palace was destroyed; at Novgorod, 30,000 valuable books were taken.⁴⁴ The richest museums in the USSR together lost more than 500,000 items.⁴⁵ Moreover, many

32. See *id.* at 38-39.

33. See *id.* at 39.

34. See *id.*

35. See *id.* at 43.

36. See Nicholas, *supra* note 2, at 41.

37. See NICHOLAS, *supra* note 22, at 43-44. One recent dispute in a U.S. court involved a painting allegedly stolen from Poland by the Nazis. Prince Czartoryski filed suit in a New York court for the return of the painting after it was put up on auction at Sotheby's. The current possessor received it from his mother, who bought it from the Knoedler art gallery in 1959. See *Court Decisions*, N.Y.L.J., April 28, 1999, at 27 (quoting *Czartoryski-Borbon v. Turcotte*, QDS: 22310241 (N.Y. Sup. Ct. 1999)).

38. See Nicholas, *supra* note 2, at 41.

39. See generally Mikhail Shvidkoi, *Russian Cultural Losses During World War II*, in *THE SPOILS OF WAR*, *supra* note 1, at 67.

40. See AKINSHA ET AL., *supra* note 6, at 22-24.

41. See Shvidkoi, *supra* note 39, at 69.

42. See *id.* at 68-69.

43. See *id.* at 68.

44. See *id.* at 69.

45. See *id.*

of the items that were taken were completely unique, including the beautiful Amber Room of the Catherine Palace in Pushkin.⁴⁶ The room's amber panels were dismantled by the Germans and sent back to Germany, and they have not resurfaced since the end of the war.⁴⁷

When the Germans occupied Paris, they began systematically looting the property of French Jews, including several prominent art collectors and dealers.⁴⁸ In September 1940, the ERR was instructed to begin confiscating the property of Jews that had been "donated" to the French government for safekeeping by Jews who believed their possessions would be safer in the government's hands.⁴⁹ The Vichy government, seeking to appropriate for itself the property of Jews who had fled before the German occupation, nullified their citizenship, but the Germans themselves took advantage of that act to appropriate the property of these non-citizens.⁵⁰ In November 1940, Göring ordered the ERR to begin confiscating artworks owned by Jews.⁵¹ The confiscated works were taken to the *Jeu de Paume*, which became a repository for the art before it was shipped back to Germany.⁵²

The art market in Paris flourished under the Nazi occupation.⁵³ The Nazis were eager to sell off the "degenerate" works they disliked so much, and they used the funds from those sales to buy art that they preferred.⁵⁴ They highly undervalued the modernist and impressionist works, so they sometimes exchanged several Picassos or Monets for a single mediocre painting by a relatively unimportant Flemish artist.⁵⁵ German museums also sent representatives to Paris to purchase art.⁵⁶ For those with art to sell or with money to spend and especially for people interested in purchasing valuable modernist or

46. See *id.* at 68.

47. See *id.* at 69.

48. See generally FELICIANO, *supra* note 5. Feliciano's excellent book details what happened to the art owned by several prominent Parisian art collectors, especially Paul Rosenberg, the Rothschilds, David David-Weill, Adolph Schloss, and the Bernheim-Jeune family. See *id.* at 3. These art dealers and collectors, along with other Jewish dealers, were extremely prominent in Parisian art circles. See *id.* at 58-62. Paul Rosenberg was a friend and neighbor of Picasso. See *id.* at 60-64. The Bernheim brothers were patrons of Bonnard, Renoir, and Matisse long before modern art became well-accepted in France. See *id.* at 76-79.

49. See *id.* at 35; Plaut, *supra* note 11, at 57.

50. See NICHOLAS, *supra* note 22, at 126.

51. See FELICIANO, *supra* note 5, at 36.

52. See *id.*

53. See *id.* at 122.

54. See *id.* at 123.

55. See *id.* at 117.

56. See *id.* at 129-36.

impressionist art at below-market value, the Nazi art market provided incredible opportunities.⁵⁷ Among the people most likely to have money to spend in the middle of the war were the neutral Swiss.⁵⁸ Swiss dealers purchased a great deal of confiscated art, and Swiss law made it very difficult to retrieve that looted art after the war.⁵⁹

As the tide of war turned against the Germans, they began moving the thousands of artworks they had acquired into castles, salt mines, bunkers, churches, and other locations throughout Germany and Austria in order to hide and protect them from Allied bombs.⁶⁰ After occupying Germany, the American and British armies established a small group of art specialists, known as monuments officers, to salvage, protect, and sort the stolen works.⁶¹ The thousands of works that were found hidden in caves, mines, public buildings, and private homes throughout Germany at the end of the war were eventually repatriated by the Allied forces.⁶² On the other hand, many important works disappeared in transit, from their hiding places, or even from museums in the chaos that followed the end of the war.⁶³ Others may have been destroyed by the bombs and fires that leveled much of Germany.⁶⁴

When the Soviet army marched into Germany, it also systematically plundered its enemy in retaliation for the destruction the Germans had wrought on Russian territory and as reparations for the destruction of Russian cultural property.⁶⁵ Thousands of artworks from Germany were shipped back to Russia, where they were hidden for decades.⁶⁶ With the fall of the Soviet Union, Russian museums have begun to disclose the incredible extent of their trophy collections.⁶⁷ New issues are

57. See *id.* at 122-25.

58. See *id.* at 155-62.

59. See *id.* at 155-62, 190-205.

60. See Nicholas, *supra* note 2, at 42.

61. See *id.* at 43.

62. See *id.* at 44.

63. See, e.g., Werner Schmidt, *The Loss of German Artistic Property as a Result of World War II*, in *THE SPOILS OF WAR*, *supra* note 1, at 95 (claiming that 97 paintings disappeared from the Weimar Museum and 15,000 works of art were stolen from the Dresden Kuperstich-Kabinett by the Red Army). Germany at the end of the war was completely leveled; it was full of starving citizens, freed prisoners, refugees, and demobilized soldiers, and there was no government to protect cultural treasures. See Nicholas, *supra* note 2, at 43. That duty fell on the Allied armies. See *id.* American and British soldiers also looted some art. See *supra* text accompanying note 7.

64. See Schmidt, *supra* note 63, at 95-98.

65. See *id.*

66. See generally AKINSHA ET AL., *supra* note 6.

67. See *id.*; Konstantin Akinsha & Grigorii Kozlov, *The Discovery of the Secret Repositories*, in *THE SPOILS OF WAR*, *supra* note 1, at 162-65. For the legal

likely to develop as these Russian trophy collections are exposed to public scrutiny, as they doubtless include many pieces that the Germans had stolen from Jews and others.⁶⁸

Most of the artwork that was simply shipped back to Germany was either retrieved by the Allies after the war or was taken by the Soviet army.⁶⁹ However, many of the artworks that were confiscated by the Nazis and then sold off have since been resold to unsuspecting buyers.⁷⁰ That is the primary reason why many individuals, states, and institutions throughout the world now unknowingly possess artworks that were at one point Nazi loot.⁷¹

III. RECENT DEVELOPMENTS

A. *Why Has it Taken So Long?*

Since 1945, several disputes have arisen in the United States relating to art looted during World War II, including several cases in which American servicemen allegedly looted German castles, homes, or churches.⁷² However, there has been only one court case concerning works confiscated from Jewish owners by the

issues surrounding the Russian trophy art, see Armin Hiller, *The German-Russian Negotiations Over the Contents of the Russian Repositories*, in *THE SPOILS OF WAR*, *supra* note 1, at 181; Sylvia L. Depta, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany*, 10 *TEMP. INT'L & COMP. L.J.* 371, 387-90 (1996); S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany*, 18 *HOUS. J. INT'L L.* 59, 106-10 (1995) (arguing that the looted art should remain in Russia); Margaret M. Mastroberardino, Comment, *The Last Prisoners of World War II*, 9 *PACE INT'L L. REV.* 315, 353-54 (1997) (concluding that the looted art in Russian museums should be returned to the heirs of individual German owners); Elissa S. Myerowitz, Comment, *Protecting Cultural Property During a Time of War: Why Russia Should Return Nazi-Looted Art*, 20 *FORDHAM INT'L L.J.* 1961, 2002 (1997) (arguing that the UNIDROIT Convention requires Russia to return the art to the German government in exchange for compensation).

68. See FELICIANO, *supra* note 5, at 206-212 (suggesting that recent evidence, such as the discovery of Alain de Rothschild's driver's license in a Moscow archive, indicates that the Soviets may also have many of the Nazi-confiscated artworks that could not be found after the war).

69. See *supra* text accompanying notes 65-67.

70. See *infra* text accompanying notes 118-61.

71. See *id.*

72. See *Stiftskirche-Domgemeinde of Quedlinburg v. Meador*, CA3-90-1440-D (N.D. Tex. June 18, 1990); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd* 836 F.2d 103 (2d Cir. 1987); *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982).

Nazis.⁷³ Given the huge number of artworks stolen by the Germans, the lack of litigation may seem surprising.

One of the reasons often given for this fifty-year silence is the Cold War.⁷⁴ The need for America and its Western European allies to present a unified front may have contributed to a desire not to inquire too deeply into the activities of those allies during and after the war. Moreover, much of the information that is now being used by researchers had been classified material, kept in secret archives or behind the Iron Curtain for much of the past fifty years.⁷⁵ The end of the Cold War led to the opening of archives in Eastern Europe, the revelation of the trophy art collections in Russia, and declassification of U.S. and Allied records relating to the restitution efforts after the war.⁷⁶

Another reason why we have seen little litigation on these issues is that Holocaust victims lost many other types of cases in U.S. courts.⁷⁷ Since the war, there has been litigation relating to claims for restitution of property and compensation for property confiscated by the Nazis.⁷⁸ Many of these cases were barred by the Act of State doctrine or by other jurisdictional problems, with courts deciding that there was simply no remedy for these victims in U.S. courts.⁷⁹ Given the unwillingness or inability of American courts for many years to right the wrongs perpetrated by the Nazis, there may have been understandable fear by Jews that the courts would not help them regain their stolen property.

The Holocaust survivors who are still alive today are aging, and many are dying. A sense of urgency has therefore developed that, in combination with all the newly available information, may be an important reason why these claims are now emerging.⁸⁰

The media has also contributed by bringing Holocaust asset issues to the forefront. The history of Nazi looting is extremely interesting, and the personal stories can be very compelling. In

73. See *Menzel v. List*, 267 N.Y.S.2d 804 (Sup. Ct. 1966).

74. See Stuart Eisenstat, *Foreign Press Center Briefing* (Nov. 24, 1998), in FED. NEWS SERV., Nov. 24, 1998.

75. See Adam LeBor, *The Last Nazi Art Scandal*, INDEPENDENT, Nov. 18, 1998, at 9.

76. See *id.*; Desson Howe, *A Wealth of New Information on Holocaust: Declassified Wartime Documents at Archives are Generating Lots of Interest*, WASH. POST, Nov. 18, 1998, at B1.

77. See Stephen A. Deburg, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 240-46 (1998).

78. See, e.g., *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947); *Wolf v. Federal Republic of Germany*, 1997 U.S. Dist. LEXIS 6963 (N.D. Ill. 1995), *aff'd*, 95 F.3d 536 (7th Cir. 1996); *Kalmich v. Bruno*, 450 F. Supp. 227 (N.D. Ill. 1978).

79. See Deburg, *supra* note 77, at 245-46.

80. See Eisenstat, *supra* note 74.

the past few years, hundreds of stories about looted art have been published in American, British, and German newspapers and magazines.⁸¹ The success of the claims against the Swiss banks for their complicity in the seizure of bank accounts has certainly encouraged media attention for other asset issues.⁸² Also, Hector Feliciano's book about the looting of Jewish-owned art collections in Paris, *The Lost Museum*, was first published in English in 1997, and it has been extremely influential in raising awareness among many in the art world.⁸³

In the past few years, Jewish non-governmental organizations have become very active in lobbying for more attention to these issues and in helping to investigate and press Holocaust claims. Many of these organizations have websites that make it easier to investigate and pursue claims.⁸⁴ The opening of the National Holocaust Museum may also have had an effect in increasing public awareness and in opening up topics that previously were not part of public discourse. The Museum has been instrumental in providing information to people seeking restitution of their assets, and it recently co-hosted (with the U.S. State Department) an international conference on Holocaust assets.⁸⁵ The conference had an important effect in bringing the issue of Nazi-looted art to the attention of the public, and it concluded with forty-four countries adopting guidelines for the discovery and return of looted art.⁸⁶

A final reason for the recent attention to Nazi-looted art is that we have gained some historical distance from the events. In the early post-war period, many people, including victims, victors, and perpetrators, had a certain interest in putting the past behind them. The Swiss bank settlement, the recent lawsuits against German corporations that used slave labor, and the outrage against the wartime activities of insurance companies demonstrate that today there is a great interest in bringing past wrongs to light and in righting them if possible.

The new openness has prompted responses among governments and among individuals. During the summer of 1998, the Austrian government passed a law, which provided that art that was confiscated by the Nazis from national museums had

81. See, e.g., LeBor, *supra* note 75; Howe, *supra* note 76.

82. See LeBor, *supra* note 75.

83. See FELICIANO, *supra* note 5.

84. See, e.g., *Commission for Art Recovery of the World Jewish Congress* (visited Nov. 9, 1999) <<http://www.wjc-artrecovery.org/sub.htm#2>>.

85. See Thomas W. Lippman, *44 Nations Pledge To Act on Art Looted by Nazis*, WASH. POST, Dec. 4, 1998, at A-2.

86. See *id.*

to be returned. The Austrian government began returning the property of the Rothschild family in February 1999.⁸⁷ The Swiss have also come under attack, with a prominent researcher claiming not only that Swiss art dealers were deeply involved in the illegal sale of confiscated art,⁸⁸ but also that the Swiss government, banks, and museums stonewalled investigative efforts after the war and may continue to hold many such artworks.⁸⁹

One area of great interest to investigators of Nazi looting is Latin America, long considered a haven for Nazis after the war.⁹⁰ In August 1998, there were reports that investigators in Brazil had recovered four paintings there, including a Picasso and a Monet, both believed to have been stolen from Holocaust victims.⁹¹

B. Four Scenarios Relating to Looted Art

In the past few years, several different types of ownership disputes have arisen, all relating to World War II loot, but each with very different features.

1. Looted Art in a State-Owned Museum or Public Institution

In the first scenario, the government of a country possesses a work that was stolen from private individuals in World War II. Many European countries have been accused in the past year or two of displaying looted art in state museums or in governmental buildings.⁹² For example, the French government has been

87. See Jane Perlez, *Austria Moves Toward Returning Artworks Confiscated by Nazis*, N.Y. TIMES, Sept. 11, 1998, at A10; see also *Nazi Art Loot Going Back to Rothschilds*, CHI. TRIB., Feb. 12, 1999, at N-16. Most of these items were sold at an auction in July 1999, which made headlines with record bids for some items. See Carol Vogel, *At \$90 Million, Rothschild Sale Exceeds Goals*, N.Y. TIMES, July 9, 1999, at A6.

88. See FELICIANO, *supra* note 5, at 193.

89. See FELICIANO, *supra* note 5, at 190-205.

90. See *Picasso and Monet Works Recovered by Nazi Loot Hunters in Brazil*, DEUTSCHE PRESSE AGENTUR, Aug. 31, 1998.

91. See *id.*

92. See, e.g., *British Join Hunt for Stolen Art*, BOSTON GLOBE, Nov. 18, 1998, at A-4; *Czech Galleries, Museums Possess Jewish Objets D'Art*, CTK NAT'L NEWS WIRE, Dec. 5, 1998; Judith H. Dobrzynski, *Claims for Art Collection Pose a Challenge to Hungary*, N.Y. TIMES, July 7, 1998, at Bull. E-1; *French Ministries Display Art Looted from Jews*, AGENCE FRANCE PRESSE, Feb. 12, 1999; *Law Does Not Allow Return of Stolen Jewish Property*, CTK NAT'L NEWS WIRE, Dec. 15, 1998; *President on Return of Art Misplaced During World War II*, POLISH NEWS BULL., Dec. 7, 1998; Alan Riding, *Dutch Bar Claim to Art Taken by Nazis*, N.Y. TIMES, Mar. 27, 1998, at E-37; Andrei Zolotov, Jr., *Ministry Says Jews May Not Get Art*, MOSCOW TIMES, Dec. 23, 1998.

accused of failing to return known loot to its rightful owners.⁹³ After World War II, Allied investigators collected looted artwork found throughout Europe and redistributed it to the various governments of the countries where it had originated.⁹⁴ Those governments were charged with the responsibility of locating the owners and restituting the property.⁹⁵ Many owners came forward to reclaim their possessions, but the French government was then left with some 2000 artworks that were classified as "heirless."⁹⁶ These were distributed to museums throughout the country, where they were then held for the true owners.⁹⁷ However, many allege that France did not do enough to locate the missing heirs.⁹⁸ Hector Feliciano has criticized the French museums not only for failing to research the owners but also for making research on these artworks extremely difficult.⁹⁹ In response to critics like Feliciano, the French Minister of Culture has established a website with documentation and photographs of the heirless artworks.¹⁰⁰ In April of 1999, the French government, without litigation, returned a Monet painting to the family of Paul Rosenberg.¹⁰¹

Holland also has some 3500 artworks that were returned to it by the Allies.¹⁰² The owners of these works could not be found after the war, and they were distributed to Dutch museums as "anonymous donations."¹⁰³ In a recent high-profile dispute, the

93. See FELICIANO, *supra* note 5, at 217-19.

94. See Nicholas, *supra* note 2, at 44.

95. See *id.*

96. See FELICIANO, *supra* note 5, at 218. There were actually about 15,000 unclaimed pieces, but the French government deemed most of these unimportant and sold them at auction. See *id.*

97. See *id.*

98. See, e.g., *id.*, at 217-19.

99. See *id.*

100. Ministère de la Culture et de la Communication, *Catalogue des Musées Nationaux Récupération* (visited Jan. 23, 1999) <<http://www.culture.fr/cgi-bin/wave.cgi?dqi=mnrbis&icon=/documentation/icones>>. Feliciano criticizes the website as a mere public relations ploy, since it contains little ownership information about the artworks. See FELICIANO, *supra* note 5, at 234-35. The World Jewish Congress also attacked the French government for keeping looted art in the chateau at Rambouillet where the peace talks on Kosovo were held, as well as in the French U.N. Mission in New York. See Ben Barver, *Nazi-Stolen Art at Rambouillet*, WASH. TIMES, Feb. 24, 1999, at A11.

101. See Alan Riding, *France Restores a Looted Monet to Owner's Heirs*, N.Y. TIMES, Apr. 30, 1999, at E-36.

102. See *Walsenkinder fuers Museum*, SÜDDEUTSCHE ZEITUNG, July 15, 1997, Feuilleton.

103. See *id.*

Dutch government refused to return a painting that was sold to Göring by a Jewish art dealer, possibly under duress.¹⁰⁴

There have been allegations that Switzerland may also have played an active role in helping the Nazis sell artworks and may still have artworks hidden away in the vaults of its museums and banks.¹⁰⁵ Some of these may have been hidden there by their owners, but others were placed there for safekeeping by Nazis or by those who bought the works from the Nazis.¹⁰⁶

The Soviet Army engaged in systematic and organized looting as it occupied Germany at the end of the war, and many looted works have been discovered in the storerooms of Russia's museums.¹⁰⁷ The Russians have taken the position that this artwork was rightfully taken as reparation for the massive destruction of cultural property in the Soviet Union perpetrated by the Germans earlier in the war, and they have refused to repatriate these items.¹⁰⁸

2. Looted Art in the Possession of a Thief

There may also be cases in which an actual thief, or a thief's heir, is discovered still in possession of the stolen artwork.¹⁰⁹ One possible scenario, of course, would be a Nazi discovered in Latin America with looted artwork. Another scenario is an American soldier who stole artworks and is discovered in possession of the items.

The most famous case of art in the possession of the looter was the case of the Quedlinburg Treasure.¹¹⁰ An American serviceman, Joe Meador, had stolen valuable religious artifacts from a church in Quedlinburg, Germany.¹¹¹ He mailed these home to his mother, then later kept them in his own apartment in Dallas.¹¹² After he died, his heirs began appraising the treasures and attempted to sell them.¹¹³ The Quedlinburg church filed suit

104. See Riding, *supra* note 92. The government argued that the heirs had decided not to seek restitution in 1952 and should be bound by that decision. See *id.*

105. See, e.g., FELICIANO, *supra* note 5, at 190-205.

106. See *id.*

107. See AKINSHA ET AL., *supra* note 6, at 247.

108. See *id.* at 249.

109. See, e.g., Korte, *supra* note 7, at 150-52; see also *Stiftskirche-Domgemeinde of Quedlinburg v. Meador*, CA3-90-1440-D (N.D. Tex. June 18, 1990).

110. See Korte, *supra* note 7, at 150-52; see also *Stiftskirche-Domgemeinde*, CA3-90-1440-D.

111. See Korte, *supra* note 7, at 150; see also *Stiftskirche-Domgemeinde*, CA3-90-1440-D.

112. See Korte, *supra* note 7, at 150-51.

113. See *id.*

for return of the items, but it later settled, paying Meador's heirs \$1 million to relinquish the items.¹¹⁴ Criminal charges were brought against the heirs, but they were later dismissed due to the running of the statute of limitations.¹¹⁵

3. Looted Art in the Possession of a Knowledgeable Buyer

In the third possible scenario, a buyer knowingly purchases looted art. Where the buyer is completely aware of the history of his purchase, she is unlikely to publicize or display the artwork, and so a dispute is unlikely to emerge. No official record is kept of most art purchases, and such purchases are often kept confidential by both buyer and seller. The rightful owner of the artwork would, therefore, have a very difficult time tracking down the artwork if it is not on display.

There have also been cases in which a buyer did not have actual knowledge or suspicion of the shady provenance of an artwork, but a court nevertheless found that a reasonable person would have known or suspected.¹¹⁶ The innocence of the buyer is unlikely to make a significant difference to the outcome of the case, but it is clear that a knowledgeable buyer may not present a statute of limitations defense, while an innocent buyer might be able to in some cases.¹¹⁷

4. Looted Art in the Possession of an Innocent Buyer

Many of the artworks that were not recovered were sold on the international market made their way to buyers who did not suspect their provenance. Years later, those artworks may be discovered by the heirs of the original owner, leading to the types of disputes and lawsuits that have prevailed in the past two years.

114. See *United States v. Meador*, 138 F.3d 986, 988 (5th Cir. 1998).

115. See *id.* at 990.

116. See *infra* text accompanying notes 188-206.

117. See discussion *infra* Part IV.

IV. THE INNOCENT BUYER

A. *Who is an Innocent Buyer?*

There have been situations in which the current possessor of an artwork is, in fact, an innocent buyer. Such a buyer did not know the artwork was stolen or looted and had no suspicions of that theft at the time she bought the piece.¹¹⁸ This scenario presents some of the most difficult questions that can arise in the context of Nazi-looted art. The original owner has lost possession of his property, but the current possessor is not in any sense "guilty" of perpetrating the theft. The dealer she buys the work from (often for a great deal of money) may herself be several transactions removed from the original "guilty" dealer who did have reason to suspect how the Nazis acquired the painting they sold him.¹¹⁹ The innocent buyer may be a museum or a private collector. The painting is then publicly displayed or cataloged, and the original owner or her heirs finally discover its whereabouts. Both parties are innocent; both parties "deserve" to have the painting. The issue then becomes a legal one of who has the better title.

There are likely to be several complicating factors in such cases. The plaintiff may have very little evidence of her ownership, if, for example, the art was stolen at the same time that she was sent to a concentration camp. The large French collections were owned by wealthy art dealers like Paul Rosenberg or by powerful families like the Rothschilds, and these owners may have retained documentation of their ownership.¹²⁰ Others, however, may have no proof, and even if they have a photograph, it may not be conclusive evidence that the painting is really the same.

In addition, there may be cases in which an owner sold items under duress. In theory, such sales would be void, yet it may be very difficult for the owner to demonstrate that she was selling the painting under pressure from the Nazis rather than for financial reasons.

Another complicating factor is the incredible inflation of prices in the art market. A collector in the 1930s may have paid

118. See Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art—The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75, 77 (1993).

119. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966).

120. See FELICIANO, *supra* note 5, at 8.

relatively little money for a Matisse, or received a Picasso as a personal gift from the artist. Yet the subsequent buyer may have paid millions for it, and it may be worth even more by the time the dispute arises. The subsequent buyer may also have invested money in restoration work without which the painting would not have survived so long or have become so valuable. The burden on the subsequent buyer is very high if she is forced to return the work. The notorious history of an artwork can also increase its value, so that a publicized conflict may greatly benefit the winner when its ownership is finally decided.¹²¹

B. *Recent Disputes Involving Innocent Buyers of War Loot*

The first recent event to bring the issue of Nazi-looted art to the attention of the American public was the dispute that arose regarding two Egon Schiele paintings on loan from an Austrian museum to New York's Museum of Modern Art.¹²² Two Jewish alleged heirs of the paintings, who had long claimed ownership of the works, asked the Museum to keep the works in New York until ownership could be determined.¹²³ The District Attorney stepped in with a subpoena requiring the Museum to hold the paintings in New York until an investigation could be carried out.¹²⁴ The Museum, meanwhile, had a contract to return the artworks to the Vienna museum from which they were borrowed.¹²⁵ The New York State Court of Appeals held in September 1999 that the artworks were protected from seizure under the state's Arts and Cultural Affairs Law.¹²⁶ However, the federal government then stepped in and seized one of the paintings before it could be returned.¹²⁷ The painting's ultimate fate is still uncertain.¹²⁸

121. The Rothschild auction presented a striking example of this phenomenon. The pieces were almost certainly considered more valuable because of their Nazi history. For some of the record-breaking auction prices, see Carol Vogel, *At \$90 Million, Rothschild Sale Exceeds Goals*, N.Y. TIMES, July 9, 1999, at A6. The Nazis also often marked the works they confiscated with swastikas or other markings, and those marks may also affect auction values.

122. See Robert Hughes, *Hold Those Paintings!: The Manhattan D.A. Seizes Alleged Nazi Loot*, TIME, Jan. 19, 1998, at 70.

123. See *id.*

124. See *id.*

125. See *id.*

126. See Judith H. Dobrzynski, *Modern Wing Ruling on Art Seizure*, N.Y. TIMES, Sept. 22, 1999, at E-1.

127. See U.S. Blocks, *Return of Schiele Painting to Austria Dispute Court Ruling*, INT'L ENFORCEMENT LAW REPORTER Nov. 1999.

128. See *id.*

In 1994, the Metropolitan Museum of Art exhibited a Degas pastel called *A Landscape with Smokestacks*, on loan from the collection of Mr. & Mrs. Daniel Searle of Chicago.¹²⁹ The catalog for that exhibition was later seen by Nick and Simon Goodman, the grandsons of Friedrich Gutmann, a German banker killed at Theresienstadt who owned the painting before World War II.¹³⁰ The value of the painting was estimated at \$1.1 million at the time the dispute arose, and the Searles had paid \$850,000 for it in 1987.¹³¹ In July of 1997, the Goodmans filed suit against the Searles for the return of the painting.¹³² The case was settled in the summer of 1998.¹³³ Under the settlement, the Searles were to donate the Degas to the Art Institute of Chicago, with the Institute then paying the Goodmans half of the painting's fair market value.¹³⁴ In addition, a plaque was to be put in place which described the painting as a "purchase from the collection of Friedrich and Louise Gutmann and a gift of Daniel C. Searle."¹³⁵

More recently, the family of Paul Rosenberg, who was a prominent Jewish art dealer in Paris, sued the Seattle Art Museum for the return of a Matisse painting entitled *Odalisque* that was allegedly confiscated from Rosenberg in 1941.¹³⁶ Prentice Bloedel, who had bought it from the Knoedler Gallery in New York City, donated the painting to the Museum.¹³⁷ Bloedel's daughter, a trustee of the Seattle Art Museum, saw a photograph of it in Hector Feliciano's book and informed the Rosenbergs.¹³⁸ The Museum, claiming that Bloedel was a good faith buyer, in turn sued the Knoedler Gallery for fraud, breach of warranty of title, and negligent misrepresentation.¹³⁹ The Museum wanted the Gallery to compensate it if the painting had to be returned to the Rosenberg family.¹⁴⁰ Finally, after investigating the Rosenbergs' claims, the Museum decided to return the painting to Paul Rosenberg's heirs.¹⁴¹ The Museum's claim against the

129. See Hector Feliciano et al., *Nazi-Stolen Art*, 20 WHITTIER L. REV. 67, 89 (1998).

130. See *60 Minutes: The Search* (CBS television broadcast, Jul. 26, 1998).

131. See Marilyn Henry, *Holocaust Victims' Heirs Reach Compromise on Stolen Art*, JERUSALEM POST, Aug. 16, 1998, at 3.

132. See *id.*

133. See *id.*

134. See *id.*

135. *Id.*

136. See Judith H. Dobrzynski, *Seattle Museum is Sued for a Looted Matisse*, N.Y. TIMES, Aug. 4, 1998, at E-3.

137. See *id.*

138. See *id.*

139. See Robin Updike, *SAM Suing Gallery over Disputed Work*, SEATTLE TIMES, Aug. 26, 1998, at B1.

140. See *id.*

141. See Robin Updike, *SAM to Return Matisse Stolen During WWII*, SEATTLE TIMES, June 15, 1999, at A1. Two months after the Museum returned it,

Knoedler Gallery was dismissed, with a District Court judge finding that the Museum did not have standing to sue.¹⁴² The decision suggested that the Bloedels might have standing.¹⁴³

During the first week of December 1998, the Holocaust Museum and the State Department co-sponsored a conference on Nazi-looted art.¹⁴⁴ That same week, the Boston Museum of Fine Arts acknowledged that *Waterlilies 1904*, one of the paintings in its blockbuster exhibit, "Monet in the 20th Century," was looted by the Nazis from the collection of Paul Rosenberg.¹⁴⁵ The plaque next to the painting in the exhibit had read, "recovered after World War II."¹⁴⁶ In a landmark decision that suggests the French government is paying more attention to these issues, the painting was returned to the Rosenberg family in April of 1999.¹⁴⁷

A dispute has arisen in Britain concerning a series of Dürer drawings looted by the Nazis from the city of Lvov, Poland for Hitler's personal collection.¹⁴⁸ The drawings were recovered from a salt mine after the war but the drawings were sold into private collections after the war instead of being repatriated by the Allies.¹⁴⁹ They were later donated to British museums.¹⁵⁰

In a separate case, a British judge in September 1998 ordered the return of a painting by the Dutch Master Wtewael to Germany.¹⁵¹ The work was apparently stolen by Soviet soldiers during the war and later smuggled out of Russia and sold to a Panamanian company.¹⁵² The British courts became involved

Rosenburg's family sold it to Steve Wynn, owner of the Bellagio Casino in Las Vegas. See Christine Clarridge, *Matisse Returned by SAM Now in Las Vegas Casino*, *Seattle Times*, Sept. 5, 1999, at B2. The painting now hangs in the casino's gallery. See *id.*

142. See Regina Hackett, *Art Museum Can't Sue Matisse Dealer*, *Judge Rules*, *SEATTLE POST-INTELLIGENCER*, Oct. 15, 1999, at C-10.

143. See *id.*

144. See *Morning Edition: Holocaust Assets Conference* (NPR radio broadcast, Nov. 30, 1998).

145. See Alan Riding, *France Restores a Looted Monet to Owner's Heirs*, *N.Y. TIMES*, Apr. 30, 1999, at E-36.

146. *Id.*

147. See *id.*

148. See John Harlow, *Museums Fight to Keep Hitler Art Treasures*, *SUNDAY TIMES*, Aug. 30, 1998, Home News.

149. See *id.*

150. See *id.*

151. See *City of Gotha v. Sotheby's*, (Q.B., Sept. 9, 1998) transcript available in LEXIS, All Sources: Country & Region: U.K.: case law: England and Wales Reported and Unreported Cases; Will Bennett, *Judge's Ruling on Pounds 700,000 Painting at the Centre of Russian Smuggling Operation Bars London Sales of Huge Quantities of Stolen Art*, *DAILY TELEGRAPH*, Sept. 10, 1998, at 12.

152. See Bennett, *supra* note 151.

when the company attempted to auction off the work at Sotheby's.¹⁵³

In January 1999, a French judge ordered the Strasbourg Museum of Modern and Contemporary Art to return a Gustav Klimt painting that was confiscated in Vienna in 1940 from Karl Grunwald, an Austrian Jew, after Grunwald fled the country.¹⁵⁴ The painting was sold by the Nazis to a local artist, who later sold it to the city of Strasbourg.¹⁵⁵ The judge ruled that museum curators should have known from the low price they paid that the painting was stolen.¹⁵⁶ The decision is being appealed.¹⁵⁷

Other countries continue to struggle outside the courts with the issue of whether to return looted artwork or not. Recently, Germany's Foundation for Prussian Cultural Heritage decided to return a five million-dollar Van Gogh painting that had been hanging in the National Gallery in Berlin to its rightful owner in Britain.¹⁵⁸

Austria passed a law providing for the return of looted artworks in December 1998, and the Austrian decision to return many of the Rothschild artworks that it had in its possession was widely acclaimed.¹⁵⁹ However, a few months later, the Austrian government decided not to return several looted Klimt paintings to another heir, although it did return many other less valuable items from the same collection.¹⁶⁰ A few days after that decision, an unrelated vote by the City Council of Linz authorized the

153. See *id.*

154. See *Morning Edition: Judge Orders Work of Art Stolen from Jewish Family During World War II be Returned* (NPR radio broadcast, Jan. 13, 1999).

155. See *Un "Klimt" exposé en France doit être restitué à des Autrichiens*, AGENCE FRANCE PRESSE, Jan. 12, 1999.

156. See *Morning Edition: Judge Orders Work of Art Stolen from Jewish Family During World War II be Returned*, *supra* note 154.

157. See *Un "Klimt" exposé en France doit être restitué à des Autrichiens*, *supra* note 155.

158. See Kate Watson-Smyth, *Nazi Art Theft Decision Hailed*, INDEPENDENT, June 5, 1999, at 8; see also John Marks, *A Half Century Later, Art Stolen by the Nazis is Returned to the Heirs of its Owners*, U.S. NEWS & WORLD REPORT, June 28, 1999, at 42. The Board of the Foundation decided to give its president power to return paintings without resorting to the courts.

159. See *Nazi Art Loot Going Back to Rothschilds*, CHI. TRIB., Feb. 12, 1999, at N-16.

160. Diane Haithman, *Austrian Decision Ends Hope for Restitution on Klimt Works*, L.A. TIMES, June 30, 1999, at F-2. The decision was apparently based on a document written before the war by Ferdinand and Adele Bloch-Bauer, the Jewish owners of the painting, expressing their wish that the artworks be donated to Austrian museums. See *id.* The attorney for the Bloch-Bauers' heir argued that the Austrian government was being disingenuous in relying on that document, which was drafted before the Bloch-Bauers lost their Austrian business to the Nazis and were forced to leave Austria. See *id.* He claimed the document did not represent the owners' true wishes at the time of their death. See *id.*

restitution of a painting that had been sold to the Linz municipal museum by an art dealer who had bought it from the Nazis.¹⁶¹

V. LEGAL FRAMEWORK FOR INNOCENT BUYER CASES

A. Looting During Wartime

Looting has, of course, always been a part of war, and many of the world's museums are filled with objects removed during wartime.¹⁶² For millennia, the pillage of cultural property from occupied territories was seen as a normal phenomenon that accompanied war and, at least until recent times, would not have been described as illegal.¹⁶³ By the beginning of World War II, however, looting during wartime was no longer seen as legally acceptable, and there was a regime in place to protect cultural property.¹⁶⁴

The Hague Convention of 1907 regulated the protection of cultural property during wartime.¹⁶⁵ Article Forty-Six of the Convention outlawed the confiscation of private property, Article Forty-Seven outlawed pillage, and Article Fifty-Three stated that works of art could not be seized, even if they were in a state-owned institution.¹⁶⁶ Germany signed this treaty, along with the United States, Great Britain, France, Russia, and some forty other states.¹⁶⁷ Thus, even if customary international law did not forbid looting by the time of World War II, Germany had committed itself to a treaty forbidding the pillage of cultural property.¹⁶⁸

At the Nuremberg trials, several individuals were convicted for pillaging cultural property after the Tribunal declared that the

161. See *Painting Lost in Holocaust Returned to Family's Hands*, RECORD, July 13, 1999, at A1.

162. See Greenfield, *supra* note 1, at 34-38.

163. See *id.*

164. See Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, in THE SPOILS OF WAR, *supra* note 1, at 102.

165. See Convention on Laws and Customs of War, Oct. 18, 1906, 36 Stat. 2277, T.S. No. 539; Victoria A. Birov, *Prize or Plunder: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, 207-08 (1998).

166. See Convention on Laws and Customs of War, Oct. 18, 1906, 36 Stat. 2277, T.S. No. 539, art. 47, 56.

167. See Kaye, *supra* note 161, at 102.

168. See *id.*

Hague Convention had become customary international law.¹⁶⁹ Alfred Rosenberg, the leader of the ERR, was convicted for destruction and pillage of cultural property.¹⁷⁰ This outcome was extremely significant in two ways. First, it established individual accountability for crimes committed in war,¹⁷¹ but more importantly for purposes of this Note, it established that artwork plundered by the Nazis was, in fact, illegally taken.¹⁷²

In 1966, the New York state courts were faced with *Menzel v. List*, the first, and thus far only, replevin action in the United States by a Jewish owner to recover art looted by the Nazis and later sold to an innocent buyer.¹⁷³ The Menzels had an apartment in Brussels, where they kept their Chagall painting.¹⁷⁴ In 1941, as the Nazis marched into Belgium, the Menzels fled, leaving the painting in their apartment.¹⁷⁵ The ERR confiscated the painting, taking it into "safekeeping."¹⁷⁶ In 1955, a New York art gallery bought it from a reputable gallery in Paris, and Mr. List purchased it in New York later that year.¹⁷⁷

The defendants argued, among other things, that the Chagall was voluntarily relinquished by the owner and then became "legal booty," so that the original owner's title was extinguished by its legal confiscation under the laws of war.¹⁷⁸ After dismissing the argument that the painting was voluntarily abandoned, the court proceeded to consider the booty issue.¹⁷⁹ It defined booty, which may legally be taken by an invading army as "property necessary and indispensable for the conduct of war, such as food, means of

169. See Birov, *supra* note 165, at 211; *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, 1 INTERNATIONAL MILITARY TRIBUNAL 56, 240-90 (Nuremberg, 1948) [hereinafter Nuremberg Trial].

170. See Nuremberg Trial, *supra* at 296.

171. See Birov, *supra* note 165, at 211.

172. See *Menzel v. List*, 267 N.Y.S.2d 804, 813-14 (Sup. Ct. 1966).

173. See *id.* at 806. There have been several other cases involving Nazi looting. Some of those were brought by German art-owners whose property was stolen by American troops. See, e.g., *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987); *Stiftskirche-Domgemeinde of Quedlinburg v. Meador*, CA3-90-1440-D (N.D. Tex. June 18, 1990).

174. See *Menzel*, 267 N.Y.S.2d at 806.

175. See *id.* at 806-07.

176. See *id.* at 806.

177. See *id.* at 807.

178. See *id.* at 809.

179. See *id.* at 810. The court held that abandoning property at the approach of the enemy did not cause forfeiture of the property. See *id.* It analogized the situation to a person abandoning property during a holdup in order to save her life. See *id.*

transportation, and means of communication."¹⁸⁰ It stated that artwork owned by private citizens could not be legal booty.¹⁸¹ Although the taking of property as legal booty would extinguish title, when an army pillages, taking private property that is not necessary for the war, title is not extinguished.¹⁸²

The defendants also argued that, under the Act of State doctrine, as articulated in the *Sabbatino* case, a U.S. court should not assume jurisdiction of this case since it involved a taking action by a sovereign government.¹⁸³ The court rejected this argument as well, rigidly applying the factors required by *Sabbatino*.¹⁸⁴ In particular, it determined that the doctrine does not apply where the acting foreign government no longer exists, but it also stated that the taking was not by a foreign sovereign government at all. Instead, it argued that the findings of Nuremberg, which imposed individual responsibility, demonstrated that Rosenberg and the ERR, rather than the German government, conspired to steal art.¹⁸⁵ As none of the factors required by *Sabbatino* existed in *Menzel*, the court refused to apply the Act of State doctrine.¹⁸⁶

Menzel v. List, in holding that the Menzels' painting was illegally taken, adopted as New York law the legal principles of the Hague Treaty and the precedents of Nuremberg. It is a leading case that has been cited by other courts in dealing with similar situations.¹⁸⁷ Thus, after *Menzel*, it appears that American courts will treat art pillaged by the Nazis exactly like other stolen art, allowing neither booty defenses nor application of the Act of State doctrine.

180. *Menzel*, 267 N.Y.S.2d. at 810 (citing 5 HACKWORTH, DIGEST OF INT'L LAW 682, 689 et seq.; *Planters' Bank v. Union Bank*, 16 Wall. [83 U.S.] 483, 495 (1872)).

181. *See id.* at 811-12.

182. *See id.* at 811.

183. *See id.* at 809, 812-13; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

184. The *Menzel* court stated the *Sabbatino* test as requiring that (1) the taking must be by a foreign sovereign government; (2) the taking must be within the territorial limitations of that government; (3) the foreign government must be extant and recognized by [the U.S.] at the time of suit; (4) the taking must not be violative of a treaty obligation. *Menzel*, 267 N.Y.S.2d. at 813 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

185. *See Menzel*, 267 N.Y.S.2d. at 813-15.

186. *See id.* at 813.

187. *See, e.g.,* *Autocephalous Greek-Orthodox Church v. Goldberg*, 717 F. Supp. 1374, 1400-03 (S.D. Ind., 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990); *DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103 (2d Cir. 1987); *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 833-35 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

B. *Property Law Principles*

In the United States and other common law countries, a thief cannot pass title.¹⁸⁸ This means that absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.¹⁸⁹ This rule, the U.S. rule, which is also the rule in England and other common law countries, differs sharply from the rule in most civil law countries. In most civil law countries, a thief can pass title to a good faith purchaser if the owner does not find the stolen item or the thief within very few years.¹⁹⁰ The civil law rule has the advantage of quieting title after a period of time to a bona fide purchaser who does not know she is buying stolen goods and assigning the risk of theft to the owner, who is theoretically in the best position to protect her possessions. However, this could also present a huge and unfair burden in the situation arising from looting during the Holocaust since in many cases there was really nothing the owners could have done to better protect their property.

A plaintiff seeking the return of stolen property files a replevin suit.¹⁹¹ This cause of action requires the defendant to return the item in lieu of damages.¹⁹² If the plaintiff's title is established, the defendant must return the item unless the statute of limitations has run.¹⁹³ However, a statute of limitations will not run at all unless the buyer is a bona fide purchaser.

A bona fide purchaser, also called an innocent buyer, is a buyer who does not know of any defect in the title of the item she is buying.¹⁹⁴ A buyer is not innocent if she should have known of the defect, for example if the circumstances of the sale were suspicious or the price was too low.¹⁹⁵ There are several factors that a court might consider in deciding whether a buyer is truly innocent. First of all, courts might expect more care from a

188. See *Menzel*, 267 N.Y.S.2d at 819; 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, 50 (1995).

189. See *Montagu*, *supra* note 118, at 77.

190. Claudia Fox, *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. & POLY* 225, 229-30 (1993).

191. See Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 *DUKE L.J.* 337, 341 (1993).

192. See *id.* at 342.

193. See *id.*

194. See *Montagu*, *supra* note 118, at 77.

195. See, e.g., *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1400-03.

sophisticated art purchaser than from a novice. They are also likely to question the innocence of the buyer if the purchase price was unusually low, if the seller was somehow suspicious, if there was documentation easily available on the ownership of the artwork, or if the nature of the artwork itself would warrant extra vigilance.¹⁹⁶

One recent case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, demonstrates how carefully a court determines whether a buyer is really innocent.¹⁹⁷ The case concerned valuable mosaics looted during the 1970s from a church in northern Cyprus.¹⁹⁸ An American art dealer, Peg Goldberg, who claimed that she was an innocent buyer, later purchased these mosaics.¹⁹⁹ Since there was a possibility that Swiss law might apply in this case (the actual sales transaction having occurred at the Geneva airport), the Swiss trial court analyzed Goldberg's claim that she was an innocent buyer.²⁰⁰ It rejected the claim that she was an innocent buyer by citing the following: the rapidity of the sale; Goldberg's lack of knowledge of the seller; the suspicious middlemen involved in the sale; the low price Goldberg paid (\$1.08 million, compared with her selling price of \$20 million six months later); the special nature of the mosaics as religious objects clearly removed from the walls of a church; the feebleness of Goldberg's inquiries before buying the mosaics.²⁰¹

In the case of Nazi-looted art, there is, today at least, a great deal of information available about what happened during World War II, and there is a great awareness even among the general public of the danger that an artwork may have been looted. It is highly unlikely, therefore, that an art buyer who purchases a looted artwork today can later claim to have been completely innocent. However, much of this information has become publicly available only in the past few years.²⁰² For an artwork purchased earlier, a court is likely to inquire what sort of ownership information was available, whether the buyer made any efforts to research the provenance of the work, whether the buyer had the resources to do more research, and, in general, whether the buyer was reasonable to purchase an expensive

196. *See id.*

197. *See id.*

198. *See id.* at 1400.

199. *See id.* at 1383.

200. *See id.* at 1400-03. Under Swiss law, a thief can pass valid title to an innocent buyer. *See id.* at 1376.

201. *See id.*

202. *See supra* text accompanying notes 72-91.

artwork without knowing all the details of its ownership history. In particular, a court might find that special care was warranted if certain art dealers were found on the chain of title, such as art dealers who were known to have been very active in dealing with the Nazis. This may appear to be a case of 20/20 hindsight, but this is precisely the type of standard that the U.S. Court of Appeals for the Seventh Circuit applied to Peg Goldberg in *Autocephalous*.²⁰³ Told in narrative form by a court years later, Goldberg's story makes the sale look very suspicious, yet it is possible that she was simply naive or unaware of the value of what she was buying and that she really was *not* suspicious at the time.

Nonetheless, in the United States, even an innocent buyer does not have title to a stolen artwork. The U.S. rule clearly favors the original owner, but in many cases that rule is softened by the use of statutes of limitations, which are designed to settle title after a certain period of time.²⁰⁴ Statutes of limitations attempt to balance the owner's rights against the buyer's need for stability.²⁰⁵ They also encourage owners to be diligent in seeking the return of their stolen property.²⁰⁶

C. Statutes of Limitations

The period of time during which the original owner can claim the stolen object varies by jurisdiction, but it is generally just a few years.²⁰⁷ The more difficult issue, and the one that has seen the most divergence among jurisdictions, is the question of when the statute of limitations begins to run.²⁰⁸

The traditional statute of limitations was based on simple adverse possession. If the stolen goods were used "openly and notoriously" and in good faith for a certain period of time, title was deemed to have passed to the possessor of the stolen goods.²⁰⁹ This rule may have worked well for stolen donkeys or usurped land, but over the years it became clear that it was not an effective rule for certain types of personal property.²¹⁰ It is especially ill-suited for personal property that is movable and

203. See *supra* text accompanying notes 197-201.

204. See Hayworth, *supra* note 191, at 341-42.

205. See *id.* at 337-43.

206. See *id.* at 342-43.

207. See Montagu, *supra* note 118, at 81.

208. See *id.*; Hayworth, *supra* note 191, at 343-44.

209. Hayworth, *supra* note 191, at 347-48.

210. See *id.* at 348-49; see also *O'Keeffe v. Snyder*, 416 A.2d 862, 871 (N.J. 1980) (stating that "[l]ike many kinds of personal property, works of art are readily moved and easily concealed.").

easily concealed, such as artwork or jewelry, which, even if used openly, is highly unlikely to give the owner actual notice.²¹¹

Many courts have now recognized that adverse possession imposes an unfair burden on the original owner, who is often not in a position to find the thief or the stolen item.²¹² This led most U.S. jurisdictions to adopt the discovery rule, which developed out of the medical malpractice doctrine.²¹³ Under the discovery rule, the statute of limitations begins to run on the date when the owner discovers or should have discovered the identity of the possessor or the whereabouts of the item.²¹⁴ Once the owner knows where the artwork is, she must quickly bring her legal claim or the claim will be barred.²¹⁵ This rule attempts to reward diligent owners and to punish those who do not act quickly to discover their stolen property.²¹⁶ The discovery rule is now the majority rule in the United States.²¹⁷

The courts of New York have developed an alternative rule for determining when the statute of limitations begins to run.²¹⁸ In a series of stolen artwork cases, the New York courts have stated that the statute of limitations does not begin to run until the owner has demanded the return of the stolen item, and the current possessor has refused to return it.²¹⁹

In one case that applied this demand rule, the court also inquired whether the original owner had been diligent in searching for the item.²²⁰ In *DeWeerth v. Baldinger*, the U.S. Court of Appeals for the Second Circuit applied the demand rule to a German art owner whose Monet painting disappeared during World War II.²²¹ The court found that the owner had lacked due diligence in searching for the work.²²² Although she did make

211. See *O'Keeffe*, 416 A.2d at 873 (establishing new statute of limitations rule in which court will inquire into the owner's diligence in pursuing her property); *DeWeerth v. Baldinger*, 658 F. Supp. 688, 694 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103, 108 (2d Cir. 1987) (requiring an inquiry into the owner's diligence).

212. See *O'Keeffe*, 416 A.2d at 872.

213. See Hayworth, *supra* note 191, at 349; see, e.g., *O'Keeffe*, 416 A.2d at 872.

214. See Hayworth, *supra* note 191, at 349-50.

215 See *id.* at 350.

216. See *id.* at 357-58.

217. See, e.g. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1386; *O'Keeffe*, 416 A.2d at 872.

218. See Hayworth, *supra* note 191, at 360.

219. See *id.* at 360.

220. See *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987).

221. See *id.* at 104-06.

222. See *id.* at 111-12.

efforts to find the work until 1957, she then discontinued the search for twenty-four years.²²³

However, within a few years, the demand rule as applied in *DeWeerth* was overturned.²²⁴ In *Guggenheim v. Lubell*, the New York Court of Appeals abandoned the due diligence requirement from *DeWeerth*, holding that the statute of limitations begins to run when the plaintiff demands the return of her artwork, regardless of how many years have passed or whether the plaintiff has been diligent in seeking her property.²²⁵ The court left open the possibility of using a laches defense, thus allowing some inquiry into the plaintiff's diligence, although a laches defense is difficult for defendants to establish.²²⁶

This demand and refusal rule, as it is now applied in New York, strongly favors the original owner, as the diligence of the original owner in seeking her stolen property is not an element of the statute of limitations.²²⁷ It is even more indulgent towards owners than the discovery rule, which tolls the statute of limitations at the time that the owner discovers the location of the stolen work and which does incorporate diligence in inquiring whether a reasonable owner would have discovered it. New York is the most important jurisdiction for stolen artwork cases since so many art transactions occur there, and its pro-owner stance makes it difficult for many innocent buyers to use the statute of limitations to bar the previous owner's claims.

The statute of limitations argument is unlikely to be a strong defense for an innocent buyer in the case of World War II looted art. Under New York's demand rule, in particular, an owner of art looted by the Nazis will be automatically protected from the statute of limitations until she has demanded the return of her painting, even if she knew the location of the painting for years.

223. *See id.*

224. *DeWeerth* was a diversity case in New York. *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994). The Second Circuit was applying New York state law, and thus had "guessed" at how the state courts would decide the case. *See id.* at 1272. After the *Guggenheim* case came down from the New York courts and it became clear that the federal court had guessed wrong, the plaintiff in *DeWeerth* brought a Rule 60(b)(6) motion to reopen the case. *See id.* at 1270. The Second Circuit held that a mere subsequent change in law is not an "extraordinary circumstance" under Rule 60(b)(6) and should not be allowed to disturb a judicial decision. *See id.* at 1273.

225. *See Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

226. *See id.*; 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, 66-68. (1995). *But see Court Decisions*, N.Y.L.J., April 28, 1999, at 27 (quoting *Czartoryski-Borbon v. Turcotte*, QDS: 22310241 (N.Y. Sup. Ct. 1999) (rejecting summary judgment motion on grounds that defendant might be able to prove laches).

227. *See id.*

Under the discovery rule, courts are unlikely to hold that Holocaust victims should have located the artwork earlier. Many such owners were, for a time at least, in no position to look for their missing art. Some were in concentration camps or were on the run at the time the confiscation occurred.²²⁸ Many spent years as refugees in new countries, with far more basic concerns than the hunt for their lost possessions. In some cases, the owner was killed in a concentration camp, leaving her heirs no information on where to begin the search.²²⁹ The owners may also have lacked the resources to search effectively, especially given the anarchic state of the international art market. On the other hand, they may simply have had no reason to believe that their lost property survived the war.

However, there may be cases in which a court would impose a statute of limitations. For example, there may be situations in which the previous owner knew exactly where her painting was but chose not to bring suit for financial reasons, for fear that she could not prevail or for lack of a court with jurisdiction. In such a case, a discovery rule jurisdiction might in fact bar the claim, though New York, under *Guggenheim*, would not.²³⁰

There may also be other cases in which the owner *should* have discovered the location of the lost artwork. Many of the current disputes involve wealthy art collectors who, despite the disruption to their lives and businesses, escaped Europe with significant funds and continued to prosper after arriving in the United States or other countries.²³¹ They may have retrieved much of their personal property after the war, and they may have continued their art dealing and collecting activities in their new homes. Thus, they may have had the expertise and resources to track down their missing artworks. It is possible that in some of these cases, with the right set of facts, a court might find that the owner should have acted more expediently and diligently to find the artwork.

D. Barriers to Litigation

Even if statutes of limitations are not applied, however, plaintiffs face a difficult evidentiary burden in proving their own

228. See, e.g. *Menzel v. List*, 267 N.Y.S.2d 804 (1966).

229. See, e.g., *60 Minutes*, *supra* note 130.

230. See *supra* text accompanying notes 218-26.

231. See, e.g., FELICIANO, *supra* note 5, at 67-72 (describing Paul Rosenberg's escape to the United States and his resumption of his art dealing activities in New York).

title.²³² For some owners, especially the important Parisian art dealers and collectors, this would not be difficult, since their artworks were cataloged and in many cases photographed.²³³ For other owners, however, and especially for those whose possessions were plundered after they were sent to concentration camps, proving ownership will be a very difficult proposition.²³⁴ They may have no documentation, photos, or witnesses to prove their ownership. Of course, this evidentiary problem could be a huge deterrent for many people with otherwise valid claims. The plaintiff might also face difficulties in proving that the painting possessed by the defendant is the same one that she claims to own. In some cases, the plaintiff might also have difficulty proving that she is the rightful heir of the person who owned the property. These evidentiary burdens clearly mean that many original owners will not be able to establish ownership during litigation. However, in non-litigation situations, an innocent buyer, such as a museum, might be willing to accept a lower level of ownership proof before handing over the artwork simply because of its public relations interests.

The problem is somewhat alleviated by the impeccable records often maintained by the Nazis, as they plundered Europe and the papers prepared by the Allied investigators after the war. Some of the latter have been declassified in the past few years,²³⁵ while others have been available for decades.²³⁶

Many countries, especially civil law countries, are far more protective of innocent buyers than is the United States. Under Swiss law, for example, a thief can pass title to a bona fide purchaser. The artworks looted by the Nazis were originally sold in Paris, Geneva, or other European capitals, and subsequent sales may also have occurred in such countries. Thus, there could be conflict of law issues in these cases. Of course, American plaintiffs pursuing claims against innocent buyers in other countries could also face difficult jurisdictional hurdles.

An additional bar to the plaintiff is the amount of time that such a lawsuit could take.²³⁷ One case brought by a German

232. For an argument that this alone is a major hurdle for plaintiffs in these cases, see Feliciano, et al., *supra* note 129, at 74.

233. See Thomas Kline, *Conference: Neutrality, Morality, and the Holocaust: The Recovery of Stolen Art Sold in the United States from a "Neutral" Country*, 14 AM. U. INT'L L. REV. 243, 247-48 (1998).

234. See Feliciano, et al., *supra* note 129, at 74.

235. See FELICIANO, *supra* note 5, at 128.

236. In particular, a list of names compiled by the Office of Strategic Services was well-known to researchers and scholars for many years but was not published until January 1999, when *The Art Newspaper* printed it. See Jay Rayner, *Rogues' Gallery*, OBSERVER, Jan. 17, 1999, at 1.

237. See Kaye, *supra* note 164, at 104-05.

owner to recover art looted by U.S. soldiers took eight years to resolve.²³⁸ The litigation costs would, of course, also be prohibitive for many potential plaintiffs.

E. Buyer's Other Recourse

The law clearly favors the original owner over a subsequent innocent purchaser in stolen art cases. States have attempted to protect good-faith purchasers to some extent through various statute of limitations schemes. However, statutes of limitations are probably irrelevant in most World War II loot cases since the owners were generally in no position either to prevent the theft in the first place or to search effectively for their property after the end of the war.²³⁹

The good-faith purchaser is not left entirely without recourse, however. There remains the possibility of demanding compensation from the dealer from whom the work was purchased and who may have had a duty to inspect the title.²⁴⁰ In theory, the line of purchasers could be traced all the way back to the first dealer who knowingly purchased the work from the Nazis or other looters. Of course, the result of such actions could be additional cost and time burdens on the plaintiff.²⁴¹

One new development that might help to protect good faith purchasers is title insurance for art.²⁴² Such insurance did not exist until very recently, so it is not a factor in disputes over artwork purchased before the 1990s.²⁴³ However, in the future, such insurance could help to mediate the harshness of current law towards innocent buyers.²⁴⁴

F. Policy Considerations and Equities

Favoring original owners over innocent buyers has several implications that should be considered in determining risk

238. See *id.* at 104 (discussing *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 833-35 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982)).

239. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) (stating that statutes of limitations in replevin actions begin to run upon demand, not at the time of the theft and rejecting the argument that the plaintiffs had relinquished title by abandoning their property.)

240. See *Feliciano, et al.*, *supra* note 129, at 79-80; see also *Updike, supra* note 141, at A1.

241. See *Feliciano et al.*, *supra* note 129, at 79.

242. See *Monet, Manet, Money*, WASH. POST MAG., June 24, 1999, at 22; *Ashlea Ebeling, Hey, That's My Picture on Your Wall*, FORBES, Dec. 14, 1998, at 258.

243. See *id.*

244. See *id.*

allocation. The first of these is the chilling effect that a harsh rule would have on the international art market.²⁴⁵ Given the current practical difficulties in checking the title of an artwork, buyers might simply decide that the risk of losing a painting with a shady past outweighs the benefits of investing in art.²⁴⁶ However, the art market is booming and the danger of it collapsing is probably fairly low. If courts are pro-owner, buyers will simply have to be more careful about what they buy. This is not an unreasonable expectation of buyers—after all, no one would buy an expensive house without first checking its title.

There is another chilling effect to favoring the original owners over innocent buyers—one that would deeply affect museums. Museums depend to a large extent on the willingness of art owners to lend or donate their possessions. An art owner who has heard the tale of the Searles' Degas painting, which was reclaimed by a previous owner after it appeared in an exhibit and catalog, might well be deterred from lending or donating her artwork.²⁴⁷ It is far safer to hang it in her living room. Moreover, the aggressive actions of the District Attorney in the case of the Schiele paintings exhibited at New York's Museum of Modern Art might even deter museums from lending artworks to other museums.²⁴⁸ This could particularly harm U.S. museums, since museums in civil law countries might see U.S. law as less protective of innocent buyers than their own laws.

The equities in cases arising out of Nazi looting are, of course, extremely compelling. There may be cases in which the original owner might have done more sooner; nevertheless, plaintiffs in such cases lost their possessions wrongfully and often under horrible circumstances. The defendants, on the other hand, are likely to be wealthy art buyers and, if truly innocent, are unlikely to have made a great effort to determine the provenance of the expensive artwork they were purchasing.

Finally, courts may consider the third-party interest of the public in having access to the artwork. These disputes are more likely to arise if an artwork is hanging in a museum since the original owner is more likely to hear of it in that situation. Yet the original owner may be interested in selling the artwork if she

245. See Charles D. Webb, *Whose Art is it Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883, 893-94 (1991).

246. See *id.*

247. See Judith H. Dobrzynski, *Lenders Pull Two Bonnard's From a Show at the Modern*, N.Y. TIMES, Apr. 29, 1998, at E-1 (explaining that two paintings were pulled from the Museum of Modern Art's Bonnard show because of the collectors' concerns following the Schiele seizures).

248. See generally Alexander Kaplan, *The Need for Statutory Protection from Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J.L. & POL'Y 691, 694-96 (1999).

regains it (or may be forced to do so to pay the litigation costs), with the possibility that it will be bought by a private collector who will put it in a vault for posterity. Although the public does not have a legally protectable interest in keeping the artwork where it is, the courts may nevertheless consider this policy issue when deciding ownership. For museums, which consider themselves public trusts, the public's interest in being able to see the artwork may be a primary goal in any litigation.

G. *Current Developments and Solutions*

In the past, courts have expressed impatience with the anarchy of the art market.²⁴⁹ Art theft continues to be a huge problem, but there is often simply no way for a conscientious buyer to determine whether the item is stolen. Museums that lose items to theft often do not publicize the theft for fear of scaring off potential donors. Sometimes owners keep the theft quiet in the belief that publicity would only drive the thief underground, making recovery even less likely.

Many thefts therefore remain a secret, and not even the most sophisticated art buyer has notice of the possibility that the stolen work will reappear on the market. In rare cases, the piece might be recognized by a buyer when the same piece is offered back to him to buy.²⁵⁰ However, even a buyer who is extremely cautious might find it difficult to research the provenance of the work.

Art experts have ways of researching provenance, including *catalogues raisonnés*. These are compilations of everything that is known about each artist's work, including ownership information. By studying a *catalogue raisonné* from early in this century, a buyer might be able to discover that a Jewish collector owned a particular painting at that time period. This might be a warning flag, but of course it could have been legitimately resold. Moreover, the *catalogue raisonné* is a research tool for art historians; it is not an effective title-searching method.

Thus, in many cases, there is simply no way for a buyer to be sure that her purchase is legitimate.²⁵¹ As discussed earlier,

249. See, e.g., *O'Keeffe*, 416 A.2d at 872; *Autocephalous Greek-Orthodox Church v. Goldberg*, 917 F.2d 278, 294 (7th Cir. 1990) (arguing that buyers of artwork on the international market purchase at their peril and that they have means to protect themselves).

250. See *Autocephalous*, 917 F.2d at 283 (describing how mosaics stolen from a Cypriot church were shown to a curator at the Getty Museum, who recognized them and then informed the government of Cyprus of their location).

251. See *O'Keeffe*, 416 A.2d at 872 ("The record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of

courts have developed statute of limitations rules that allocate the risk entirely to the buyer, and in some cases they have done so in conscious response to the perceived irresponsibility of the international art market.²⁵² Courts may be asking innocent buyers to do more title research than they can easily do, given the current state of the art market, but they are doing so to encourage development of methods for innocent buyers to protect themselves. In *O'Keeffe v. Snyder*, the Supreme Court of New Jersey stated:

It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.²⁵³

Although other courts have not been as explicit about the need for title-searching devices, they have similarly placed the risk squarely on the shoulders of even the most innocent of buyers.²⁵⁴ It would seem that the art world is being subtly encouraged to develop some way of protecting innocent buyers from buying stolen artwork.²⁵⁵ And yet the art market for many years did little to comply. However, the specter of massive losses due to the discovery of looted art seems to be changing that.

In recent years, there has been some action towards establishing registries of stolen art. Interpol and other law enforcement agencies have kept databases of stolen art in the past,²⁵⁶ but now a privately-funded Art Loss Register (ALR) is being developed as well.²⁵⁷ The discovery of Nazi-looted art has been one of the driving forces behind the ALR, and it now offers free registration for World War II losses and is working to improve

money sometimes are bought without inquiry into their provenance. There does not seem to be a reasonably available method for an owner of art to record the ownership or theft of paintings.”).

252. See, e.g., *id.*

253. *Id.* (citations omitted).

254. See *Menzel*, 267 N.Y.S.2d at 819; Solomon R. Guggenheim Found. 569 N.E.2d 426, 431 (N.Y. 1991); *Autocephalous*, 917 F.2d at 294.

255. See *O'Keeffe*, 416 A.2d at 872; *Autocephalous*, 917 F.2d at 294.

256. See, e.g., *National Stolen Art File* (visited Oct. 8, 1999) <<http://www.fbi.gov/majcases/arttheft/art.htm>>; *About the Cultural Property Program* (visited Feb. 24, 1999) <<http://www.usdoj.gov/usncb/cultprop/cultureabout.htm>>.

257. See *What is the ALR?* (visited Nov. 9, 1999) <<http://www.artloss.com/intro/about.htm>>; see also Tony Attrino, *Insurers Get Help in Tracking Stolen Art*, NAT'L UNDERWRITER, Aug. 17, 1998, at 45.

its registry of those items.²⁵⁸ Much of the impetus for the development of this register has come from insurance companies.²⁵⁹ Other registries exist, including one being developed by the Holocaust Art Restitution Project, specifically for the tracking of Nazi-looted art.²⁶⁰

Another recent change has been the increased vigilance of auction houses like Sotheby's.²⁶¹ Sotheby's has recently faced several lawsuits and legal disputes due to its involvement in selling looted art or smuggled cultural property.²⁶² As a result, it has established a Compliance Committee of lawyers to study export laws, inquire into the background of the seller, consider whether statutes of limitations have expired, and consult the ALR.²⁶³

Museums also have recently adopted new policies requiring increased vigilance in their purchasing activities.²⁶⁴ In 1998, the Association of American Art Museums issued a non-binding set of guidelines for museums requiring them to scour their current collections for artworks that may have been looted by the Nazis.²⁶⁵ However, no looted artworks have been reported as a result of that scouring process. British museums have adopted similar policies.²⁶⁶ At the recent Conference on Holocaust Assets, forty-four countries committed themselves to search their museums for looted artworks.²⁶⁷

Thus, the pro-owner property laws are beginning to have their effects on the art world. The current system is still far from ideal, and it is still quite easy for an innocent buyer to purchase a

258. See *What is the ALR?*, *supra* note 257.

259. See *id.*

260. See *Holocaust Art Restitution Project* (visited Nov. 3, 1999), <<http://www.lostart.org>>.

261. *When It's Too Late to Hand Back the Loot*, THE EVENING STANDARD, Aug. 24, 1998, at 45.

262. See, e.g., *City of Gotha v. Sotheby's*, (Q.B., Sept. 9, 1998) transcript available in LEXIS, All Sources: Country & Region: U.K.: case law: England and Wales Reported and Unreported Cases.

263. See *When It's Too Late to Hand Back the Loot*, *supra* note 261. Its new policy also requires Sotheby's to turn away art whose sale might encourage more looting or smuggling. See *id.* Sotheby's is also one of the major shareholders in the Art Loss Register. See *What is the ALR?*, *supra* note 257.

264. See Judith H. Dobrzynski, *Art Museums Promise to Review Holdings for Seized Nazi Loot*, N.Y. TIMES, June 5, 1998, at E-2.

265. See *id.*; Alan G. Artner, *Ethics and Art: Museums Struggle for Correct Response to Stolen Art Claims*, CHIC. TRIB., August 16, 1998, C6. The guidelines adopted by the Association of Art Museum Directors can be viewed at *Report of the AAMD Task Force on the Spoilation of Art During the Nazi/World War II Era (1933-1945)* (visited Nov. 9, 1999), <<http://www.aamd.org/guidln.shtml>>.

266. See *British Join Hunt for Stolen Art*, BOSTON GLOBE, Nov. 18, 1998, at A4.

267. See Lippman, *supra* note 85.

looted artwork without any knowledge of its defective title. However, if registries continue to develop, buying artwork may someday become relatively risk-free. The courts might remain pro-owner when disputes do arise, but a buyer would be far less likely to face such disputes since she would know whether the artwork she considers buying was stolen. Moreover, the owner might fail to fulfill her own duty of reasonableness if she fails to report the theft and place it on the ALR.

H. Settlements

Cases that pit two innocent parties against each other present opportunities for creative, out-of-court settlements. The plaintiff in many cases will face crippling litigation costs and a difficult evidentiary burden if she actually goes to court.²⁶⁸ The defendant, on the other hand, is in the far weaker legal position—if the plaintiff manages to establish title, the defendant can, at best, only invoke a statute of limitations or a laches defense by arguing that the plaintiff failed in her legal duty to search for the artwork. That argument is unlikely to succeed in Holocaust-context cases.

Moreover, these are cases in which both parties are likely to have significant non-monetary interests. Art collectors may view art primarily as an investment, but in many cases they are also art lovers who view an artwork as more than just a source of money. While plaintiffs may just be seeking the return of their possessions in order to sell them,²⁶⁹ they may also feel great sentimental attachment to works of art that represent not only their own family histories but the history of a lost culture. Since the costs of litigation would probably require the sale of the artwork, the plaintiffs who choose to litigate might be those who are more interested in publicly righting a wrong than in actually reclaiming the piece.

Given all these considerations, cases concerning looted art will probably be settled out of court. In some cases the subsequent buyer, especially if it is a museum, might prefer to simply turn over the work rather than face the ugly publicity that has already been associated with these cases.²⁷⁰ In other cases,

268. See Feliciano *et al.*, *supra* note 129, at 74-75.

269. It has been argued recently that the intervention of Jewish organizations and especially the proliferation of class-action lawsuits relating to the Holocaust is driven by a desire for money. See, e.g., Charles Krauthammer, *The Holocaust Scandal*, WASH. POST, Dec. 4, 1998, at A29. Krauthammer also argues that this recent flood of litigation is likely to revive anti-Semitism, especially in Europe. See *id.*

270. One recent settlement involved a painting that was looted by the Soviet army in 1945 from the Italian embassy in Berlin. See David D'Arcy, *Morning*

the settlements will probably include monetary payments for part of the work's value, but in some cases the parties might be satisfied simply to see the artwork donated to a museum where its provenance will be properly identified.²⁷¹

VI. CONCLUSION

This Note has focused on the innocent buyer of looted art. It is important to recognize that the Nazi looting of Europe has created many other legal problems, including in particular the issue of European governments that still possess "heirless" artworks repatriated after World War II but never returned to their owners.

Menzel v. List established more than thirty years ago that the Nazis illegally stole the artworks they confiscated from Jewish owners. The *Menzel* court also declined to apply the Act of State doctrine to cases involving Nazi-looted art so that these cases will be treated just like other stolen-art cases.

This Note has also examined the property law of the United States, focusing in particular on the statutes of limitations that could be applied to cases of innocent buyers of looted art. Such statutes, and especially the New York rules that will apply in so many of these cases, are tilted in favor of the original owner in most cases.

Since *Menzel v. List* was decided in 1966, no case concerning Nazi confiscation of Jewish-owned art has been decided by an American court. However, there is every indication that if such cases are brought to trial, the plaintiffs are likely to prevail. Of course, they face huge litigation costs and severe evidentiary burdens in proving that they own the artworks they claim to own, and many valid claims will never be litigated simply because of these burdens. Such factors may, however, become less important as Jewish non-governmental organizations step in and as more research is done in the formerly secret archives of the United States and European countries. Jewish owners are also

Edition: Retrieving Stolen Art, (NPR radio broadcast, June 24, 1998). The painting was later purchased by the Wadsworth Athenaeum in Hartford, Connecticut. See *id.* After 30 years of negotiations, the Wadsworth agreed to return the painting, in exchange for generous compensation—the Italian government agreed to lend the Wadsworth several Caravaggio paintings for an exclusive exhibition, which was funded by Italian-Americans in Hartford. See *id.* As the Italian Interministerial Commissioner pointed out, this "was a triumph, because the parties chose not to approach it from opposite sides of a lawsuit." *Id.*

271. See *supra* text accompanying notes 129-35 (describing the settlement in the Goodman Degas dispute).

likely to find sympathy in courts that are already impatient with the lack of title searching that they have seen in the international art market. Moreover, as victims of Nazi tyranny, plaintiffs in such cases are unlikely to find their cases dismissed due to statutes of limitation or lack of diligence on their part. The law, in fact, is highly favorable towards any original owner who can demonstrate ownership.

The effect of pro-owner laws may be to take expensive works of art away from completely innocent buyers who may have done all they reasonably could do to research provenance and who may have spent millions more than the original owner. These decisions may also make art purchases highly risky for innocent buyers and chill donations to museums. Courts have already imposed a duty on innocent buyers to search title, a duty that may be unrealistic given the current state of the art market. However, it is not an unreasonable requirement for people investing millions in artwork to be sure that the artwork has clear title—it is no more than what we expect buyers to do in other transactions. It is now time for the international art market to provide effective title search methods to protect buyers, as it has begun to do with computerized registries, title insurance, and policies requiring museums and dealers to exercise more care in their transactions.

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