

THE GREATEST ART THEFT IN HISTORY: HOW BIPARTISAN LEGISLATION ATTEMPTS TO REDRESS NAZI-LOOTED ART

Abstract: In 2016, President Obama signed into law the Holocaust Expropriated Art Recovery Act (HEAR Act) which expanded the opportunities for survivors of Nazi persecution, and their heirs, to recover art that was looted by the Nazis. The HEAR Act allows such individuals to bring a claim within six years of locating the art, creating a uniform statute of limitations. The bipartisan legislation was passed, in part, as a response to the bureaucratic and legal obstacles that many Holocaust survivors' heirs faced in their efforts to repossess family heirlooms. Prior to the adoption of the HEAR Act, many cases over Nazi-looted art were dismissed because of a procedural technicality, the lapsed state statute of limitations for such a property claim. Following the HEAR Act's enactment, more Nazi-looted art cases can be evaluated on their merits, and courts are better able to determine the rightful ownership of Holocaust-era works. As the HEAR Act is set to expire in 2027, this Note argues for Congress to not only renew the Act but also examine the statute's shortcomings and work to clarify its ambiguous standards to continue promoting policies of justice for victims of Nazi persecution and their heirs.

INTRODUCTION*

On the wall of the Detroit Institute of Art hangs a humble, but conspicuous, depiction of two men digging up a tree stump, a quintessential Vincent van Gogh oil painting from his time in the south of France.¹ What the brush strokes fail to capture, however, is the years-long court battle that has ensued over the painting's rightful owner.² In 2007, in *The Detroit Institute of Arts v. Ullin*, the defendants, who were the heirs of Martha Nathan, a victim of Nazi persecution, argued that Nathan was forced to sell the van Gogh painting under duress and severe financial distress.³ Ultimately, the U.S. District Court for the

* This Note is dedicated to my Grandmother, who nurtured my love for art, taught me to appreciate Jewish culture, and instilled in me an enduring belief in the importance of family.

¹ See Vincent van Gogh, *The Diggers* (oil painting), in *Collection: The Diggers*, DETROIT INST. OF ARTS, <https://dia.org/collection/diggers-46067> [<https://perma.cc/4W43-CGT3>] (using dramatic brush strokes to depict two men digging up a tree stump).

² See *Detroit Institute of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007) (determining whether Martha Nathan or the Detroit Institute of Art was the rightful owner of the van Gogh painting, *The Diggers*).

³ See BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES 253–54 (2017) (explaining the defendants', who were Nathan's heirs, argument that Nathan was forced to sell the painting in order to pay to flee Nazi Germany). Nathan's heirs argued that because Nathan was under

Eastern District of Michigan ruled for the museum on the grounds that the Michigan statute of limitations had expired and that Nathan's heirs were barred from bringing a claim of ownership as a result.⁴

The story of Nathan and the accompanying *Ullin* case are not unique in the current legal landscape of Nazi-looted art.⁵ Between 1933 and 1945, scholars estimate that the Nazi Party stole more than 600,000 works of art from Jewish people throughout Europe in what some call the "greatest art theft in history."⁶ Of these hundreds of thousands of works of art, it is unclear how

the threat of Nazi persecution, she was forced to sell the van Gogh, and other works, for far below their market value. *See id.* (discussing Nathan's heirs' argument for ownership over the painting).

⁴ *See Ullin*, No. 06-10333, at *4 (holding that because Nathan's heirs' claims were barred by the state's statute of limitations, their claims must be dismissed).

⁵ *See HAY, supra* note 3, at 1–4 (remarking that, beginning in the early 2000s, there began an influx of cases in American courts over the rightful ownership of artwork claimed to have been stolen from victims of Nazi persecution and detailing several such cases). The case that first changed the American legal landscape on Nazi-looted art was *United States v. Portrait of Wally*. *See id.* at 1–2 (introducing *Portrait of Wally* and explaining its significance); *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 289 (S.D.N.Y. 2000) (considering the issue of the painting's ownership). In *Portrait of Wally*, the plaintiffs, as heirs of the initial owner of the painting *Portrait of Wally* by Egon Schiele, brought a claim against the Austrian Leopold Museum, who loaned the painting to the Museum of Modern Art, for rightful ownership. *See Portrait of Wally*, 105 F. Supp. 2d at 290 (discussing the plaintiff's claim); *HAY, supra*, at 16. Lea Bondi, a Jewish woman in Vienna, owned an art gallery and separately held the *Portrait of Wally* in her personal collection. *See Portrait of Wally*, 105 F. Supp. 2d at 289 (describing Bondi's connection to the painting). In 1938, following the annexation of Austria by Germany, Friedrich Welz, a member of the Nazi Party, confiscated Bondi's art gallery in an effort to "aryanize" Jewish property. *See id.* (explaining how Bondi's art collection was seized). A year later, Welz demanded that he was entitled to the *Portrait of Wally* and Bondi surrendered it to him, fearing that he would inhibit her ability to flee Austria. *See id.* (noting the power that Welz held over Bondi). Following World War II, Bondi searched for the painting and made numerous attempts to contact its subsequent owners until her death in 1969. *See HAY, supra*, at 15–16 (illustrating Bondi's thorough, but unsuccessful pursuit of the painting). In the 1990s, Bondi's heirs embarked on a decades-long fight against the holders of the painting, the defendant Leopold Museum, that resulted in a settlement in which the Museum agreed to purchase the painting from the heirs for \$19 million. *See id.* at 16–18, 41 (summarizing the litigation and the resulting settlement); Press Release, U.S. Att'y S. Dist. of New York, United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> [<https://perma.cc/9C97-5YV6>] (announcing the settlement agreement resolving the litigation). *Portrait of Wally* garnered international attention and shocked the art world, which had previously ignored the suspicious ownership trails that often accompanied Holocaust-era art. *See HAY, supra*, at 1 (highlighting *Portrait of Wally*'s importance within the legal landscape of Nazi-looted art). The case opened the floodgates for subsequent litigation by the heirs of Nazi-persecuted art owners. *See id.* at 1–4 (explaining *Portrait of Wally*'s influence on other Nazi-looted art cases).

⁶ *See* Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/photos/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment> [<https://perma.cc/7JKC-5DVM>] (valuing the Nazi Party's mass art theft at \$2.5 billion in 1945, or \$35 billion today); MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 202 (2003) (noting that the Nazis stole art from private collections and museums throughout Europe, including sculptures, paintings, prints, furniture, and more).

many pieces have been returned, are still lost, or were destroyed.⁷ Survivors of Nazi persecution, and their heirs, have spent decades searching for, and proving ownership of, their family heirlooms.⁸ For many, art represents a unique type of property as it can carry cultural and historical significance, as well as sentimental value.⁹ Even as decades continue to pass since the end of World War II, Jewish families around the world continue their efforts to recover their families stolen possessions.¹⁰

In the 1930s, as the Third Reich rose to power and gradually expanded its control across Europe, the Nazi Party methodically confiscated art from Jews with terrifying efficacy.¹¹ Post-World War II, in the late 1940s, countries took varying approaches to the restitution of Nazi-looted art.¹² Although both nations and private individuals alike have had some success in locating Nazi-looted works of art, widespread destruction of such property, both because of World

⁷ See Sophie Hardach, *Art Theft: The Last Unsolved Nazi Crime*, THE ATLANTIC (Nov. 18, 2013), <https://www.theatlantic.com/international/archive/2013/11/art-theft-the-last-unsolved-nazi-crime/281566/> [<https://perma.cc/9TCG-5A5Y>] (explaining the challenges of finding and returning Nazi-looted art).

⁸ See Nina Siegal, *Heirs Awarded Nazi-Looted Art Are Still Waiting, 17 Years Later*, N.Y. TIMES (Mar. 13, 2024), <https://www.nytimes.com/2024/03/13/arts/heirs-awarded-nazi-looted-art-are-still-waiting-17-years-later.html> [<https://perma.cc/66V2-3V4A>] (identifying the hurdles for who seek the return of Nazi looted art). In 1940, Anna Jaffe, daughter of the King of Belgium's physician, revised her will and left her extensive art collection, including *Unloading the Hay Wagon* by Isaac van Ostade, to her nieces and nephews, citing the "tragic situation" of the Nazi invasion of France. *See id.* (tracing ownership of the artwork at issue). When Jaffe died in 1942, her collection was seized by the pro-Nazi government and purchased for a German minister's personal collection until the war ended and it was discovered in a looted art collection. *See id.* (describing how the collection was taken by the pro-Nazi government in occupied France). When Jaffe's heirs discovered the painting, which had been mistakenly returned to the Netherlands, her heirs filed a restitution request, to which the Dutch Restitution Commission concluded that the painting should be returned because it "was indeed a case of involuntary loss of possession." *See id.* (recounting the decades-long search for Jaffe's art collection following World War II). In spite of this, the painting has yet to be returned given the administrative and procedural hurdles put in place by the Dutch government. *See id.* (chronicling the challenges of recovering Nazi-looted art).

⁹ See Bernard Mumford, *The Importance of Family Heirlooms and Why You Should Restore Them*, MUMFORD RESTORATION (Sept. 3, 2024), <https://mumfordrestoration.com/blog/importance-of-family-heirlooms#:~:text=Art%20can%20be%20used%20as,our%20ancestors%20and%20their%20stories.> [<https://perma.cc/DCT5-WTT5>] (describing the importance of the preservation of family heirlooms, especially art and furniture, as they embody the culture, history, and personal stories of generations).

¹⁰ See Siegal, *supra* note 8 (narrating Jaffe's heirs' decades-long pursuit of her stolen art collection in the face of delays, missing paperwork, and other administrative roadblocks).

¹¹ See Hardach, *supra* note 7 (noting the multitude of ways the Nazis were able to facilitate art theft). As a part of the Nazi Party's anti-Semitic tactics, Nazis purchased Jewish collections of art for bargain prices using duress and the threat of persecution, looted the art of Jews who were sent to concentration camps, and confiscated Jewish art from museums and other collections that they deemed "degenerate." *See id.* (explaining the Nazi Party's arguments used to justify their seizure of Jewish art).

¹² See NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART, at x–xi (2017) (discussing the variety of perspectives that different countries have taken to address Nazi-looted art including litigation and negotiations).

War II and the Nazi Party's attempts to cover its tracks, has rendered it impossible to know with certainty how much history and culture was permanently lost.¹³

Following World War II, it became clear that locating and recovering Nazi-looted works of art would only be half the battle for many Jewish victims of Nazi persecution in their quest for restitution.¹⁴ As the victorious Allied powers, including the United States, invested time and energy in the restitution of Nazi-looted art, litigation disputes began to arise over the rightful ownership of the thousands of displaced objects.¹⁵ To recover personal property in the United States, an individual is generally required to bring a common-law tort claim of conversion or replevin, two related but distinct legal claims.¹⁶ Conversion

¹³ See Hardach, *supra* note 7 (noting the challenges of identifying lost works of art and noting a 2012 example where over 1,400 works that had been hidden away in a Munich apartment by the son of a Nazi art dealer were randomly discovered during a tax investigation). One of the root causes of the widespread destruction of art, beyond the general wreckage of wartime injury, was Adolf Hitler's own instruction to demolish anything that could be used in the prosecution of the Nazi Party. See *Hitler's Scorched Earth Decree (Nero Decree) (March 19, 1945) and Albert Speer's Response (March 29, 1945)*, GERMAN HIST. IN DOCUMENTS & IMAGES, <https://germanhistorydocs.org/en/nazi-germany-1933-1945/ghdi:document-1590> [<https://perma.cc/563N-UCAT>] (translating Hitler's order for the destruction measures within the Reich). Hitler, despairing the state of the Nazi Party as World War II came to an end, issued the Nero Decree, commanding the complete destruction of German infrastructure so that the enemy would discover nothing but "scorched earth." See *id.* (listing Hitler's commandments as: (1) destruction of "[a]ll military traffic, communications, industrial and supply installations as well as objects within Reich territory that might be used by the enemy," and (2) an instruction "to destroy . . . other objects of valu[e]"). With some foresight, a small group of Allied powers in 1943, including the United States, established the Monuments, Fine Arts, and Archives (MFAA) Section program that attempted to protect and mitigate damage to cultural property in war-torn areas. See Jim Morrison, *The True Story of the Monuments Men*, SMITHSONIAN MAG. (Feb. 7, 2014), <https://www.smithsonianmag.com/history/true-story-monuments-men-180949569/> [<https://perma.cc/DKD9-NP47>] (sharing the work and the story of the MFAA). A small group of soldiers, art historians, and professors that later became known as the Monuments Men searched for and saved tens of thousands of the countless works looted by the Nazis. See *id.* (noting that the Monuments Men's work saved an enormous number of priceless European works that the Nazis were planning to destroy).

¹⁴ See O'DONNELL, *supra* note 12, at x (remarking that the "central paradox" of Nazi-looted art is that even when there is no dispute that a piece of art was confiscated by the Nazi Party, it still may never be returned to its original owners).

¹⁵ See *id.* at x–xi (explaining that because victims of Nazi persecution and their heirs are currently spread across the world and differing laws and jurisdictions apply, Nazi-looted art cases can seem like "dizzying prospect[s]"). In the context of Nazi-looted art, litigation is considered a "last resort" because of the complexities posed by different jurisdictions across the United States and Europe. See *id.* (noting that varying dispute resolution procedures and substantive property law make litigation regarding Nazi-looted art a challenging undertaking).

¹⁶ See Emily A. Graefe, Note, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 479 (2010) (introducing the causes of actions that heirs who wish to litigate Nazi-looted art claims must bring and noting the difficulties of overcoming the challenges created by time passing). Though these claims of rightful ownership are often brought in the form of property causes of action, Nazi-looted art remains a symbol of the brutal destruction by the Nazi Party and the recovery of these objects goes beyond the enforcement of property rights and is a meaningful act of justice. See *id.* at 474 (emphasizing the ethical duty that museums and international governments have to return wrongly taken art and cultural property to their rightful owners). ¹⁷ See *Conversion*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining conversion as "[t]he wrongful possession or disposition

involves the unlawful taking of goods but replevin refers to the repossession of such converted goods.¹⁷ Nonetheless, as Nazi-persecution victims and their heirs began to bring such claims, they were often dismissed in court because of a lapsed state statute of limitations.¹⁸ State statutes of limitations for the torts of conversion and replevin generally restrict the time during which a proceeding can be initiated to around three years following discovery, depending on the state.¹⁹

In 2016, in response to the dismissal of many Nazi-looted art cases on procedural technicalities before they could be evaluated on their merits, the Holocaust Expropriated Art Recovery Act (HEAR Act) was introduced by an unlikely bipartisan duo, Senators Chuck Schumer (D-NY) and Ted Cruz (R-TX).²⁰ The bill was subsequently passed unanimously and signed into law.²¹ The HEAR Act provides victims of Nazi persecution and their heirs the opportunity to recover looted art through the creation of a uniform six-year statute of limitations beginning at the point of discovery, extending the time during

of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property"); *Replevin*, BLACK'S LAW DICTIONARY, *supra* (defining replevin as "[a] lawsuit to repossess personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it").

¹⁷ See *Conversion*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining conversion as "[t]he wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property"); *Replevin*, BLACK'S LAW DICTIONARY, *supra* (defining replevin as "[a] lawsuit to repossess personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it").

¹⁸ See Emmarie Huettelman, *Senate Bill Would Help Recover Art Stolen by Nazis*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/arts/design/senate-bill-would-help-recover-art-stolen-by-nazis.html?_r=0 [<https://perma.cc/6EF8-YY9Z>] (noting that the variation between statutes of limitations across the United States created procedural difficulties for claims related to Nazi-looted art); see also *Orkin v. Taylor*, 487 F.3d 734, 742 (9th Cir. 2007) (finding that the district court correctly held that the plaintiff's claims for recovery of a painting were time-barred under California's statute of limitations); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *4 (E.D. Mich. Mar. 31, 2007) (dismissing the plaintiffs' claims because they were barred by the state statute of limitations).

¹⁹ See O'DONNELL, *supra* note 12, at xi (expounding on the problem that limited statutes of limitations pose for the recovery of Nazi-looted art).

²⁰ See Huettelman, *supra* note 18 (reporting on the importance of Holocaust-era art restitution and how the Holocaust Expropriated Art Recovery (HEAR) Act will aid in the repatriation of Nazi-looted art, especially compared to previous policy efforts); Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. (2016) (introducing the HEAR Act).

²¹ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(7), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (noting that the HEAR Act passed the House on December 7, 2016, subsequently passed the Senate on December 9, 2016, and was then signed into law on December 16, 2016).

which restitution claims may be brought.²² Following passage of the HEAR Act, courts have seen an uptick in Nazi-looted art cases that survive the pleading stage and are subsequently evaluated on their merits.²³

Part I of this Note expounds on the history of Nazi-looted art.²⁴ It discusses both how mass art theft occurred throughout World War II and how international actors, specifically the United States, aided in the restitution of Nazi-looted art through legislation and public policy.²⁵ Part II compares the background and resolution of two series of cases, one before and one after the passage of the HEAR Act.²⁶ Part II also explores the challenges of varied state statutes of limitations.²⁷ It uses case law both to illustrate the difficulties of bringing claims for Nazi-looted art prior to the adoption of the HEAR Act and the ways the HEAR Act has been used by judges following its ratification.²⁸ Finally, Part III discusses the HEAR Act's importance and positive impact as well as its relevant shortcomings.²⁹

I. THE RISE AND FALL OF THE NAZI PARTY'S CONTROL OF JEWISH ART

Adolf Hitler and the Nazi Party's rise to power in Germany during the 1920s and 1930s was accomplished using a chilling, systematic approach.³⁰ Us-

²² See *id.* §§ 2(6), 5 (providing victims of Nazi persecution and their heirs an opportunity to recover Nazi-looted art). The HEAR Act defines discovery as “knowledge” and further defines “knowledge” as the awareness of sufficient information “with regard to a relevant fact or circumstance to amount to actual knowledge” of the location of the art and one’s possessory interest in the property. *Id.* §§ 4(1), (4).

²³ See *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 624 (Sup. Ct. 2018) (finding that, under the HEAR Act’s statute of limitations, the plaintiffs made the claim in a timely manner), *aff’d*, 95 N.Y.S.3d 62 (App. Div. 2019); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 959 (9th Cir. 2017) (holding that the plaintiffs made a timely claim under the HEAR Act’s six-year statute of limitations).

²⁴ See *infra* notes 30–93 and accompanying text.

²⁵ See *infra* notes 30–93 and accompanying text.

²⁶ See *infra* notes 97–182 and accompanying text.

²⁷ See *infra* notes 97–182 and accompanying text.

²⁸ See *infra* notes 97–172 and accompanying text.

²⁹ See *infra* notes 183–213 and accompanying text.

³⁰ See *Adolf Hitler*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/adolf-hitler> [https://perma.cc/BS6H-8L56] (Mar. 21, 2017) (detailing Hitler’s rise to power and control of the Nazi Party in Germany). The full history of Hitler’s ascension to power and control over the Nazi Party in Germany is beyond the scope of this Note. See *infra* notes 36–53 and accompanying text (providing a background on the political atmosphere in post-World War I Germany that facilitated the rise of the Nazi Party and anti-Semitic legislation). From the outset, however, Hitler’s ideological goals, that he impressed upon the Nazi Party, included creating a “racially pure state” and the elimination of the Jewish people. See *Adolf Hitler*, U.S. HOLOCAUST MEM’L MUSEUM, *supra* (reviewing, in greater specificity, Hitler’s early years and his decades-long pursuit of control over the Nazi Party and Germany). Additionally, despite the relatively small Jewish population in Germany, the Nazis saw European Jews as a crucial part of Germany’s failures during World War I. See generally Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Recovery Act of 2016*, 20 CHAP. L. REV. 1, 6 (2017) (mentioning the grievances that the Nazi Party held against European Jews).

ing modern propaganda, violent intimidation, and targeting young, alienated voters, the Nazi Party became the largest political party in Germany and won 33.1% of the vote in the November 1932 parliamentary election.³¹ In 1933, Germany's President Paul von Hindenburg appointed Hitler as Chancellor, the head of government, and Hitler started to lay the foundation of what would become the racist and authoritarian Nazi state.³² Following President Hindenburg's death in 1934, and with the support of the German Army, Hitler abolished the position of President and appointed himself the Führer, or leader, of Germany.³³

Part A of this Section examines how the Nazi Party was able to legally acquire Jewish art and property with such success through its promulgation of anti-Semitic legislation between 1933 and 1939 and its continued harassment and intimidation of Jewish people during this period.³⁴ Part B considers legal solutions that the United States and other nations attempted to implement to facilitate the return of Nazi-looted art after the war ended.³⁵

A. The Legal Taking of Jewish Art and Property

In the years following the Nazi Party's takeover in Germany, Hitler created new governmental structures that controlled and oversaw the country's art and cultural institutions to further his goals of "Aryanization," involuntary seizure of Jewish assets, and promotion of German values.³⁶ Hitler and the Nazi Party realized that art and culture could play a powerful role in political propaganda and the rhetoric supporting the persecution of Jews.³⁷ The Reich Ministry for Public

³¹ See *Adolf Hitler*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 30 (discussing the Nazi Party's electoral breakthroughs in Germany and noting that through perpetual electioneering coupled with general intimidation, the membership of the Nazi Party grew to more than 450,000 in 1930).

³² See *id.* (explaining how Hitler's ascension to a leadership position in Germany allowed him to garner support for his anti-Semitic causes); Kreder, *supra* note 30, at 2 (noting that a part of Hitler's "Final Solution," or eliminating Jews, was to destroy all Jewish culture and art in an effort to promote German art).

³³ See *Adolf Hitler*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 30 (discussing how Hitler was able to become the leader of Germany and clarifying that he was not elected).

³⁴ See *infra* notes 36–63 and accompanying text.

³⁵ See *infra* notes 64–93 and accompanying text.

³⁶ See O'DONNELL, *supra* note 12, at 3–4 (discussing the subsidiaries that Hitler created as a part of the Nazi hierarchy that established control over what art was deemed acceptable or unacceptable). "Aryanization" referred to the Nazis' forced expulsion of Jewish people and the confiscation of Jewish art and property and its transfer to non-Jews. See Emily J. Cunningham, *Justice on the Merits: An Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 69 CASE W. RES. L. REV. 427, 430–32 (2018) (remarking that the agencies that Hitler put into place to oversee art and culture promoted policies that emphasized German art). Interestingly, Hitler's fascination with art was extremely personal and he considered himself an aspiring artist, despite failing the admissions exam to Vienna's Arts Academy on two separate occasions. See *id.* at 431 (noting the personal nature of Hitler's artistic interest and the influence of Vienna's anti-Semitic values on Hitler's goals of promoting German art).

³⁷ See Kreder, *supra* note 30, at 5 (outlining Hitler's effective use of propaganda techniques to influence German citizens and thwart political opponents).

Enlightenment and Propaganda (RVP) and the Reich's Chamber for the Visual Arts (RBK) were two well-known agencies, both established in 1933, that put in place a framework designed to alienate Jewish culture and to aid in the plundering of Jewish art.³⁸ From 1933 to 1939, Hitler and the Nazi Party passed hundreds of pieces of legislation that dehumanized Jewish people and stripped away their civil, political, and human rights, setting the stage for the large-scale looting and destruction to come.³⁹ Subsection 1 of this Section outlines the anti-Semitic legislation promulgated by the Nazi Party from 1933–1939.⁴⁰ Subsection 2 describes how such legislation was used to seize Jewish art.⁴¹

1. Anti-Semitic Legislation

The Nazi Party orchestrated the alienation and segregation of Jews from every aspect of society and at every level of government through a variety of decrees, guidelines, laws, and regulations.⁴² The first substantial restriction, the Law for the Restoration of the Civil Service (Restoration Law), took effect in April 1933.⁴³ This law excluded Jews from positions in politics and civil service, allowing the Nazis to quickly purge Jews from positions in academia, museums, and other cultural institutions.⁴⁴ Later in 1933, the Reich imple-

³⁸ See O'DONNELL, *supra* note 12, at 3–4 (translating the names of the agencies, the Reich Ministry for Public Enlightenment and Propaganda (RVP) and the Reich's Chamber for the Visual Arts (RBK) from their German identification, *Reichsministerium für Volksaufklärung und Propaganda* and *Reichskammer der bildenden Künste*, respectively, and explaining their functions in relation to Jewish art). The RVP and the RBK were two prominent examples of the way that Hitler utilized the state and governmental power to legally persecute Jews and subjugate Jewish culture. *See id.* at 4 (noting that the RVP and RBK agencies controlled “what were acceptable and unacceptable forms of art” and were able to further German ideals and the Aryanization of society).

³⁹ See *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939> [<https://perma.cc/6XAM-RVRU>] (sharing the general themes of the Nazi Party's legislation); *How Many People Did the Nazis Murder?*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/documenting-numbers-of-victims-of-the-holocaust-and-nazi-persecution> [<https://perma.cc/FP6S-SJJ7>] (Sept. 26, 2023) (documenting the mass murder of Jews that took place in the lead up to, and during, the Holocaust).

⁴⁰ *See infra* notes 42–53 and accompanying text.

⁴¹ *See infra* notes 54–63 and accompanying text.

⁴² See O'DONNELL, *supra* note 12, at 4–5 (explaining how control over German Jews was not only achieved through violence and intimidation, but also through increasingly restrictive legal directives); *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (laying the foundation for the introduction of hundreds of pieces of anti-Semitic legislation in the 1930s).

⁴³ See *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (introducing the Law for the Restoration of the Civil Service (Restoration Law)).

⁴⁴ See O'DONNELL, *supra* note 12, at 5 (presenting the Restoration Law and further explaining its significance in the removal of Jews from positions relating to art and scholarship). The Restoration Law was also significant because of its conception of the “Aryan Paragraph,” an edict used to segregate non-Aryans, including Jews, based on ancestral lineage, rather than religious belief. *See Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (sharing the lesser known significance of the Restoration Law and its implication for future anti-Semitic legislation).

mented laws forbidding Jews from engaging in certain professions and limited enrollment of Jewish students in German universities, further curtailing Jewish economic mobility and cultural involvement.⁴⁵

In 1935, the infamous Nuremberg Laws were passed, that legalized Nazi persecution of Jews, and began to lay the framework of what would soon lead to the Holocaust.⁴⁶ Jews were discharged from the military, forbidden from marrying non-Jews, prevented from following religious dietary restrictions, and more.⁴⁷ The Nuremberg Laws solidified what had been the de facto reality since the establishment of the Third Reich: Jews were seen as a separate race and, because of their heritage, could not be considered German citizens.⁴⁸ Continuing into 1937, the Nazi Party escalated its cultural persecution of Jews through the presentation of the Degenerate Art Exhibition in Munich that mocked and criticized Jewish art and artists.⁴⁹

In 1938, the Third Reich continued to enact legislation that restricted Jewish movement by excluding Jews from public places, closing Jewish businesses, and regulating the transfer of Jewish assets to non-Jews in Germany.⁵⁰ With regard to Jewish art, in April of 1938, the Reich issued an ordinance for the disclosure and registration of all Jewish assets and property, essentially creating a list of owners and locations of desired objects for the Nazis.⁵¹ Following a wave of violence in Germany known as *Kristallnacht*, or the Night of Broken Glass, during which the Nazis destroyed and burned many Jewish homes,

⁴⁵ See *id.* (using the variety of restrictions for Jewish people to illustrate the ways in which this anti-Semitic legislation permeated every aspect of Jews' livelihoods and identities).

⁴⁶ See Greg Bradsher, *The Nuremberg Laws: Archives Receives Original Nazi Documents That "Legalized" Persecution of Jews*, PROLOGUE MAG., Winter 2010, U.S. NAT'L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html> [<https://perma.cc/GV9P-CREK>] (noting how the Nuremberg Laws legalized the persecution of Jews).

⁴⁷ See *id.* (translating the Nuremberg Laws to English and explaining their significance with regard to the Reich's treatment of Jews); *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (listing examples of the anti-Semitic legislation).

⁴⁸ See O'DONNELL, *supra* note 12, at 5 (distinguishing between the two Nuremberg Laws: the Law for the Protection of German Blood and German Honor, and the Reich Citizenship Law, which, when taken together, marked the continuation of the Nazis' anti-Semitic policies).

⁴⁹ See *id.* (describing the array of Jewish art and artists that were exhibited in the Degenerate Art Exhibition and the show's significance in solidifying the Reich's anti-Semitic worldview); Lucy Burns, *Degenerate Art: Why Hitler Hated Modernism*, BBC (Nov. 6, 2013), <https://www.bbc.com/news/magazine-24819441> [<https://perma.cc/Y2NW-MLN8>] (explaining that the Degenerate Art Exhibition, to which over one million visitors attended, "encourage[d] the viewers to see it as a symptom of an evil plot against the German people").

⁵⁰ See *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (listing the variety of anti-Semitic legislation that the Nazis passed including: forbidding Jews from changing their names, invalidating Jewish passports, cancelling state contracts with Jewish-owned businesses, and many other regulations).

⁵¹ See O'DONNELL, *supra* note 12, at 6 (identifying the authority that forced Jews to register their assets that created an inventory of desired objects to make it easier for the Nazis to identify individuals to harass and coerce into giving up their property).

businesses, and places of worship, the Nazi Party issued a decree ordering Jews to surrender precious metals, stones, furs, and other valuables without compensation.⁵² As Hitler and the Nazi Party prepared to pursue their conquest of Europe, the anti-Semitic legislation that they disseminated for nearly a decade laid the foundation for even more radical oppression of Jews.⁵³

2. Takings Under Duress: The Realities of Nazi-Looting

In Germany, as Hitler and the Nazis intensified oppression of Jews, they also increased the legal and financial obstacles Jews would have to overcome to flee the country.⁵⁴ Frequently, Nazis would coerce Jews into selling a piece of art for a fraction of what it was worth, under duress, by taunting individuals with the opportunity to try and escape Germany through complex and expensive exit visas.⁵⁵ As Germany annexed Austria and then invaded Poland, sparking the commencement of World War II in 1939, Hitler and the Nazis intensified their massive art grab, using their opportune registration of Jewish property and assets that had been established the previous year.⁵⁶ Upon their invasion of Austria, the Nazis began confiscating all assets owned by Austrian Jews, taking particular interest in wealthy Jewish families' personal art collections.⁵⁷ Holocaust survivor Ernest Glanville recounted the day the Nazis entered his family's apartment in Vienna with disturbing simplicity: the soldiers simply

⁵² See *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (discussing a Nazi decree concerning precious stones and metals that required Jews to give up their silver, gold, and diamonds without compensation). Though the extent of the horrific violence that took place during *Kristallnacht* is beyond the scope of this Note, the violence was a well-planned, methodical attack where Nazi soldiers were given specific instructions to destroy as much Jewish property as possible and to arrest as many Jews as the local jails could accommodate. See generally *Kristallnacht*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/kristallnacht> [<https://perma.cc/T4QU-WE8P>] (Oct. 18, 2019) (reporting, in greater detail, the violence that took place during *Kristallnacht*).

⁵³ See O'DONNELL, *supra* note 12, at 6 (noting that by the time Germany started invading other countries across Europe, the Nazis had perfected their systemic persecution of Jews).

⁵⁴ See Gertjan Broek, *The (Im)possibilities of Escaping: Jewish Emigration 1933–1942*, ANNE FRANK HOUSE, <https://www.annefrank.org/en/anne-frank/go-in-depth/impossibilities-escaping-1933-1942/> [<https://perma.cc/N27Z-E6EK>] (explaining, in greater detail, why emigration was so difficult for Jews who wanted to escape Germany and discussing the myriad obstacles that Jews faced in applying for visas, including documentation and evidence).

⁵⁵ See Cunningham, *supra* note 36, at 432 (explaining how Jews who were desperate to flee the Nazi-controlled country were essentially forced to sell their personal belongings to gain liquid assets to use for an exit visa and other government obstacles to emigration).

⁵⁶ See *id.* at 433 (describing the connection between the onset of World War II and the increase of Nazis' art-looting practices); Broek, *supra* note 54 (detailing a timeline of World War II).

⁵⁷ See Cunningham, *supra* note 36, at 432–33 (outlining the Nazis' eventual seizure of the property and art of Austrian Jews following the German invasion of Austria).

exclaimed “Heil Hitler,” took what they wanted, and left.⁵⁸ In each country they invaded, the Nazis continued their systemic seizure of both private and state property.⁵⁹

From 1940 to 1944, the Nazis created and operated the *Einsatzstab Reichsleiter Rosenberg* (ERR), the Nazi office tasked with seizing Jewish art collections and looting Jewish cultural archives, including libraries and synagogues.⁶⁰ Following involuntary takings and sales under duress, the Nazis often used the looted artwork to increase revenue.⁶¹ Because Hitler had an unwavering idea of what German, or “Aryanized,” art should look like, the Nazis sold “degenerate,” or un-German, art at large auctions to generate profits to benefit the Reich.⁶² Despite longstanding global practices that generally forbid the plunder of sacred cultural and art objects, that would later be codified in the Hague Convention of 1954, Hitler and the Nazis persisted with their state-sanctioned art grab as World War II continued.⁶³

⁵⁸ See Hardach, *supra* note 7 (giving an example of the Nazi art looting that took place in Vienna and sharing Glanville’s experience with Nazi-looted art and his inability to find the remains of his family’s collection).

⁵⁹ See Cunningham, *supra* note 36, at 432–33 (noting that the Nazis’ pattern of destruction across Europe in the 1930s and early 1940s did not end with the looting of goods, as they continued expel individuals, notably Jews, to concentration camps). Notably, such extensive records exist from this time, despite the lack of many modern technologies, in part because the Nazis showed unusual deference to the use of legalistic formalities. See *id.* at 432 (exemplifying the Nazis’ respect for legal processes, noting they could require the signature of a person for their assets, even if that person was about to be sent to a concentration camp).

⁶⁰ See Stephanie J. Beach, *Nazi-Confiscated Art: Eliminating Legal Barriers to Returning Stolen Treasures*, 53 LOY. L.A. L. REV. 853, 858 (2020) (noting that the *Einsatzstab Reichsleiter Rosenberg* (ERR) was the legal enforcement for the looting practices of Jewish Art in Western Europe). By 1940, German Jews had lost their citizenship, and were considered “stateless,” meaning they were restricted from possessing any property rights and their art collections were considered “ownerless.” See *id.* at 858–59 (explaining how the looting of Jewish art was both a legal governmental policy and became easier as the Reich implemented more and more anti-Semitic legislation).

⁶¹ See *id.* at 858 (untangling another mechanism that the Nazis used to gain money and status through their art-looting practices).

⁶² See Kreder, *supra* note 30, at 3, 6 (discussing Hitler’s vision of German patriotic art that included order, symmetry, and natural colors, his disdain for works of modern art, and identifying how the Nazis sold looted art both to eradicate “degenerate” art and generate a profit). During litigation over Nazi-looted art ownership, these auctions and other instances of art changing hands exemplify how and why it can be so difficult to track down Nazi-looted art. See Michelle I. Turner, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT’L L. 1511, 1526 (1999) (identifying the common “innocent buyer” during this period, individuals who acquired a piece of art not knowing, or with only suspicions, that it was stolen or looted, and noting that such buyers create difficult questions for Nazi-looted art litigation).

⁶³ See Marc Balcels, *Plundering Boys: A Cultural Criminology Assessment of the Power of Cultural Heritage as a Cause for Plunder in Armed Conflicts Along History* (explaining that in Roman times, plundering was only legitimate during formal wars and was otherwise deemed to be theft or piracy, and that soldiers distinguished between items that were sacred and non-sacred), in CULTURAL HERITAGE IN THE CROSSHAIRS: PROTECTING CULTURAL PROPERTY DURING CONFLICT 329, 339–40 (2013); U.N. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, T.I.A.S. No. 09-313.1, 249 U.N.T.S. 216, 240 (recognizing and calling for the protection

*B. The Pendulum Swings Back: Modern Attempts to Find
Justice for Nazi-Persecuted Individuals*

By 1945, at the conclusion of World War II, the Nazis had killed over six million Jews.⁶⁴ Those who survived, in addition to facing the insurmountable loss of family and friends, quickly learned that their property had been destroyed, liquidated, hidden, or sold by the Nazis.⁶⁵ In the following years, the United States and other nations attempted to find, inventory, and return the stolen art, but the massive volume of works overwhelmed their capabilities.⁶⁶ This disorganization made for challenging and prolonged recovery procedures, and the complex changes in property ownership made many works impossible to trace.⁶⁷

Despite restitution efforts, victims of Nazi-persecution and their families generally lacked the resources and knowledge necessary to recover their property and assets.⁶⁸ Following the onset of the Cold War, the priorities of the United States and other nations shifted away from the restitution of Nazi-looted art, and it would be decades before restoration endeavors commenced again.⁶⁹ The 1990s generated a renewed focus on legal solutions for the restitution of Nazi-looted art.⁷⁰ The conclusion of the Cold War brought with it an-

and respect of cultural property during war); Beach, *supra* note 60, at 857 (noting the legal frameworks that permitted the Nazis' continued robbery of Jewish art and artifacts).

⁶⁴ See *How Many People Did the Nazis Murder?*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (documenting the mass murder of Jews that took place in the lead up to, and during, the Holocaust).

⁶⁵ See Beach, *supra* note 60, at 860 (observing that Jewish survivors of the Holocaust lost more than just loved ones when they discovered that their personal assets had been seized by the Nazis, further depriving them of their religious and cultural identities).

⁶⁶ See Cunningham, *supra* note 36, at 435–37 (noting that general confusion and the massive volume of works hindered efforts to return Nazi-looted art); see also Morrison, *supra* note 13 (highlighting the efforts of the Monuments Men who, following the end of World War II, recovered a significant amount of Nazi-looted art, especially those works that had been kept in salt mines for safekeeping during the bombings by the Allied powers).

⁶⁷ See Cunningham, *supra* note 36, at 434–35, 437 (explaining that United States' soldiers understood the murky nature of the transactions for the discovered works that the Nazis claimed were legal, but they lacked the capacity to find and return such pieces to their rightful owners).

⁶⁸ See *id.* at 436–37 (clarifying that because confiscation records were kept sealed from the public, it was often impossible for Holocaust survivors to know if their property and assets still existed, and if so, where they were). Although collection points for discovered art were established across Europe and governments were permitted to submit lists of Nazi-looted art, general disorganization and secrecy, anger towards Germany, and residual aversion towards Jews made owner reunification extremely difficult. See *id.* (identifying general obstacles to the post-war mission of Nazi-looted art recovery and reunification).

⁶⁹ See *id.* (arguing that restitution efforts waned as time went on and other geopolitical issues came to light).

⁷⁰ See O'DONNELL, *supra* note 12, at 29 (remarking that the newfound international focus on Nazi-looted art in the 1990s was due to numerous factors including the publishing of Lynn Nicholas's book, *The Rape of Europa*, which detailed the Nazis' systematic seizure of art, and seminal court cases regarding the rightful ownership for Nazi-looted art). *The Rape of Europa* was the "first comprehensive account" of how the Nazis destroyed thousands of invaluable works of art across Europe.

other change in the focus of international policy, and nations across the world began to refocus their attention on Holocaust remembrance and education.⁷¹

Subsection 1 of this Section gives an overview of the 1998 Washington Conference on Holocaust-Era Assets, an international summit focused on the restitution of Nazi-looted art, and discusses its principles and shortcomings.⁷² Subsection 2 examines more modern attempts to redress the Nazis' art grab and considers the background, legislative history, and effects of the 2016 HEAR Act.⁷³

1. The 1998 Washington Conference on Holocaust-Era Assets (Washington Conference)

In 1998, delegations from over forty nations gathered in Washington, D.C. to discuss lingering issues relating to Nazi-looted art and joint strategies to aid in the restitution of confiscated assets.⁷⁴ To create a common consensus in support of its goal, the Washington Conference released eleven principles: The Washington Conference Principles on Nazi-Confiscated Art (Conference Principles).⁷⁵ These principles acknowledged, however, that participating na-

See Donald Cameron Watt, *Hitler's Sticky Fingers*, N.Y. TIMES (Aug. 7, 1994), <https://www.nytimes.com/1994/08/07/books/hitlers-sticky-fingers.html> [<https://perma.cc/5SCC-XTYD>] (reviewing *The Rape of Europa*). Nicholas outlined the devastation of European art from Hitler's early campaigns to banish "degenerate" or modern art to the forced sales of Jewish-owned art to the Nazi Party. See *id.* (marking on certain tactics Hitler and the Nazis used to control the movement of artwork in Europe). Finally, Nicholas gives a "terrifying account" of the destruction of art during World War II, both resulting from confiscation and evacuation and as a product of wartime wreckage. See *id.* (noting the risky prospects for many works of art during World War II).

⁷¹ See O'DONNELL, *supra* note 12, at 29–30 (discussing how the end of the Cold War pushed countries to remember the horrors of the Holocaust and attempt to remedy some of the effects).

⁷² See *infra* notes 74–81 and accompanying text.

⁷³ See *infra* notes 82–93 and accompanying text.

⁷⁴ See O'DONNELL, *supra* note 12, at 29–30 (introducing the Washington Conference on Holocaust-Era Assets (Washington Conference) and its purpose in relation to Nazi-looted art). In his work, Nicholas O'Donnell uses U.S. Secretary of State Madeleine K. Albright's introductory address to identify the conference's objectives, that included: (1) pursuing justice; (2) opening access to records and archives; (3) noting the obligation to find the truth; (4) addressing the urgency resulting from the passage of time; (5) creating a common solution to issues surrounding Holocaust-era assets; and (6) advancing education, research, and remembrance of the Holocaust. See *id.* (summarizing speaker Secretary Albright's preliminary remarks that acknowledged her recent learning of her family's Jewish history). It is important to note that both Nicholas's book, *The Rape of Europa*, and litigation efforts, including *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000), contributed to the renewed efforts of different countries coming together to discuss the restitution efforts of Nazi-looted art. See *id.* at 29 (identifying certain factors that contributed to the inception of the Washington Conference); see also *supra* note 5 (discussing the historical background and resolution of *Portrait of Wally*).

⁷⁵ See *The Washington Conference Principles on Nazi-Confiscated Art*, OFF. OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/AY6E-A98S>] (explaining the purposes of the Washington Conference Principles on Nazi-Confiscated Art (Conference Principles)). The Washington Conference

tions would have to implement the agreed upon ideals within the context of their own unique legal systems.⁷⁶

The eleven Conference Principles set forth that: (1) confiscated art should be identified; (2) archives and records should be open to researchers; (3) resources should be available for identifying looted art; (4) ambiguities due to the Holocaust-era circumstances and the subsequent passage of time should be considered; (5) Nazi-looted art should be publicized to facilitate reunification; (6) a central registry providing information should be established; (7) victims of Nazi persecution and their heirs ought to be encouraged to assert claims of ownership for looted art; (8) if such individuals are identified, a “just and fair solution” should be found expeditiously; (9) if such individuals are not identified, a “just and fair solution” should still be found; (10) commissions to identify Nazi-looted art should be composed of a balanced membership; and (11) nations should implement their own processes to resolve ownership disputes.⁷⁷

The Conference Principles marked a step forward in garnering international attention and a newfound commitment to the restitution of Nazi-looted art.⁷⁸ But, because of the Conference Principles’ nonbinding nature, the standards set forth remained aspirational goals dependent on the signatory countries’ good faith.⁷⁹ Despite the initial awareness and call to action that the Confer-

set forth a series of non-binding principles that identified the issue of Nazi-looted art and suggested a series of goals to aid in the art’s restitution. *See* O’DONNELL, *supra* note 12, at 30 (noting the purpose of the Washington Conference).

⁷⁶ *See* OFF. OF THE SPECIAL ENVOY FOR HOLOCAUST ISSUES, *supra* note 75 (recognizing that the Conference Principles would have to be implemented differently within each nation’s current laws and legal structures).

⁷⁷ *See id.* (listing the Conference Principles). Although the Conference Principles quickly became well-known international policy, the Washington Conference was not the first task force to consider how to support the mission of restitution for Nazi-looted art. *See* O’DONNELL, *supra* note 12, at 51 (introducing the Association of Art Museum Directors (AAMD)). The AAMD, given the close relationship and potential for overlap between Nazi-looted art and museums, set forth their own report, directing members to: research collections to ascertain if there was any indication a piece of art had been unlawfully seized by the Nazis, review records and collaborate with those able to provide the provenance information of a piece, and facilitate the necessary funding to accomplish these goals. *See id.* at 52 (enumerating the list principles that the AAMD directed its members to follow).

⁷⁸ *See* Beach, *supra* note 60, at 863–64 (explaining that, immediately following the Washington Conference, many governments were spurred to aid in the restitution of Nazi-looted art). Following the Washington Conference, significant progress was made in the quest to return Nazi-looted art to rightful owners and five European countries instituted state advisory committees to provide claimants with a legal mechanism to seek restitution: Austria, Britain, France, Holland, and Germany. *See id.* at 864 (giving examples of how European countries applied the Conference Principles).

⁷⁹ *See* O’DONNELL, *supra* note 12, at 52 (noting that lack of an enforcement mechanism is a challenge for self-governing principles as implementation can vary). Another pertinent example of an international agreement that did not reach major success because it had no enforcement mechanism is the 2015 Paris Climate Agreement. *See* Paris Agreement to the U.N. Framework Convention on Climate Change, December 12, 2015, T.I.A.S. No 16-1104, 3156 U.N.T.S. 54113 (aiming to combat global warming through a voluntary reduction of carbon emissions for signatories). While the Agree-

ence Principles galvanized worldwide, the lack of comprehensive mechanisms for victims of Nazi persecution and their heirs to recover property underscored a general bureaucratic resistance to restituting Nazi-looted art.⁸⁰ Additionally, different countries' varied laws led to an inequitable application of resources for the victims of Nazi-looted art.⁸¹

2. The 2016 HEAR Act

Although the Washington Conference, and similar ethical efforts, illuminated international policy efforts to restitute Nazi-looted art, in United States courts, procedural obstacles stalled litigation and largely prevented victims of Nazi persecution and the heirs from bringing their claims.⁸² On December 16, 2016, President Obama signed the HEAR Act into law.⁸³ The Act's aim was to "provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis."⁸⁴ In considering whether to support the HEAR Act, the U.S. Senate Committee on the Judiciary (Committee on the Judiciary) recognized the United States' commitment to the restitution of Nazi-looted art and highlighted the court system's procedural hurdles that were preventing claims from being fully adjudicated and resolved on the merits.⁸⁵

ment requires signatory countries to monitor carbon emissions, it lacks the ability to actually force a country to reduce such emissions. *See id.* (lacking enforcement mechanisms to reach its collective goal).

⁸⁰ *See id.* at 32–33 (outlining the bureaucratic challenges identified by some Washington Conference delegations and speakers for returning Nazi-looted art to their rightful owners).

⁸¹ *See* Beach, *supra* note 60, at 865 (emphasizing the ever-weakening commitment to the Conference Principles over time using Russia, who has no claims process for Nazi-looted art despite being one of the largest repertoires for Holocaust-era artifacts, and Italy and Poland, neither of which has passed restitution laws to aid in the return of Nazi-looted art, as examples).

⁸² *See* S. REP. NO. 114-394, at 4–5 (2016) (introducing one of the HEAR Act's purposes, promoting policy in line with the Washington Conference and the Conference Principles and discussing the challenges of differing state statutes of limitations in Nazi-looted art cases).

⁸³ *See* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(7), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (describing the passage of the Act). Though other countries implemented post-war restitution efforts, this Note primarily focuses on the United States' efforts to aid the victims of Nazi persecution and their heirs in their restitution endeavors regarding art. *See id.* § 3(1)–(2) (outlining the purpose of the HEAR Act); Cunningham, *supra* note 36, at 459 (discussing President Obama's signing of the Act).

⁸⁴ *See* S. REP. NO. 114-394, at 1 (discussing the goals of the proposed bill).

⁸⁵ *See id.* at 3, 5 (noting late-twentieth century efforts to address the restitution of Nazi-looted art and their shortcomings). The Committee on the Judiciary recognized the undertakings of the Washington Conference and the Alliance of American Museums and discussed the United States' attempts to fulfill each group's principles through further legislation, including the Holocaust Victims Redress Act and the U.S. Holocaust Assets Commission Act of 1998. *See id.* at 3–4 (listing United States' continued efforts to facilitate the identification and return of Nazi-looted art). Notably, the Committee on the Judiciary discussed the 2009 Terezin Declaration that resulted from the Prague Holocaust Era Assets Conference, of which the United States was a participant, along with forty-seven other nations. *See id.* at 4 (introducing the Terezin Declaration, a summit to follow up on and continue the work of the Washington Conference). The Declaration implored signatories to "facilitate just and fair solutions" to Nazi-looted art through each

Prior to the passage of the HEAR Act, renewed public signaling of support for efforts to restore Nazi-looted art to its original owners in the twenty-first century led numerous Holocaust-era victims and their heirs to initiate legal action to recover their confiscated art.⁸⁶ Because of the passage of time since World War II, and the difficulty of establishing chains of ownership, the Committee on the Judiciary found that state statutes of limitations created unfair impediments on the ability of victims and their heirs to bring claims.⁸⁷ Statutes of limitations vary by state and limit the period during which a victim can bring an ownership claim based on certain triggering circumstances, including when the loss of property occurred or when it was discovered.⁸⁸ Thus, many state statutes of limitations barred modern Nazi-looted art claims, practically speaking, and prevented the claims from ever reaching a decision on their merits because the property loss and its discovery occurred decades earlier.⁸⁹

The HEAR Act was drafted to serve two distinct, but interconnected purposes: (1) to ensure that legislation governing Nazi-looted art and property claims advanced the United States' policy as established in the Washington Conference and other principles and summits; and (2) to resolve Nazi-looted art claims in an equitable manner and to guarantee that such claims would not be improperly barred by unduly burdensome statutes of limitations.⁹⁰

The HEAR Act recognizes the extensive procedural obstacles that Holocaust-era victims and their heirs face in bringing Nazi-looted art claims, and out-

country's respective legal system and to adjudicate claims expeditiously, "based on the [claim's] facts and merits." *See id.* (summarizing the Terezin Declaration's aims).

⁸⁶ *See* Kreder, *supra* note 30, at 19 (describing the painstaking process of discovery for individuals bringing ownership claims for Nazi-looted art as a part of the rationale for the necessity of the HEAR Act); O'DONNELL, *supra* note 12, at 29 (describing renewed Holocaust-era art restitution efforts following the Washington Conference).

⁸⁷ *See* S. REP. NO. 114-394, at 2, 5 (2016) (stating that the circumstances of World War II and the Holocaust created unique difficulties for victims and their heirs to establish the necessary documentation for the chain of ownership of their art and property).

⁸⁸ *See id.* at 5 (exemplifying some of the practical difficulties of inconsistent statutes of limitations for Nazi-looted art claims).

⁸⁹ *See id.* (underscoring the issues presented by varying statutes of limitations); Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(6), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (noting that in some states, the statute of limitations meant some claims expired before World War II had even ended).

⁹⁰ *See* S. REP. NO. 114-394, at 6 (summarizing the twin aims of the HEAR Act); Holocaust Expropriated Art Recovery Act § 3(1)–(2) (explaining the purpose of the legislation). The Senate Report of the HEAR Act noted the immense difficulties of recovering Nazi-looted art, even for those families with substantial resources. *See* S. REP. NO. 114-394, at 2–3 (summarizing the background and purpose of the HEAR Act). The Senate Report noted that following World War II, Jews whose art and property had been plundered by the Nazis lacked the resources, the information, and oftentimes the vigor to pursue litigation, or even locate their lost property. *See id.* (outlining some of the challenges that Jews face in their restitution efforts). In addition to the challenges Jews faced in locating their lost property, in many cases, restitution was nearly impossible because so many sales and changes of ownership were on the black market or went entirely undocumented. *See id.* (acknowledging that sometimes the circumstances of Nazi-confiscated art made determining the provenance of lost art impossible).

lines the historical basis and need for legislation addressing these issues.⁹¹ In response, the key provision of the Act creates a uniform six year statute of limitations, allowing claimants to recover art or other property that was “lost during the covered period because of Nazi persecution” within six years of “actual discovery” of: (1) the “identity or location” of the artwork and (2) a claimant’s “possessory interest” in the artwork.⁹² With its comprehensive drafting and broad reach, the Act began to usher in a new era of Nazi-looted art litigation.⁹³

II. A SIGNATURE AT GUNPOINT CANNOT LEAD TO A VALID CONVEYANCE

Following World War II, victims of Nazi-persecution and their heirs began to bring claims to recover their Nazi-looted art, but courts struggled to balance the United States’ goal to aid in the restitution of Holocaust-era art with long-standing state statutes of limitations.⁹⁴ Section A of this Part introduces

⁹¹ See Holocaust Expropriated Art Recovery Act § 2(6) (finding that there was a need for the HEAR Act because of the unique historical circumstances, and subsequent challenges, of bringing Nazi-looted art claims).

⁹² See *id.* § 5(a)(1)–(2) (defining, in general, the parameters of the HEAR Act’s uniform statute of limitations). Section 5 of the HEAR Act also includes subsections on the possible misidentification of artwork, preexisting claims, applicability, exceptions, and rules of construction. See *id.* § 5(b)–(f) (detailing further features of the provision).

⁹³ See Cunningham, *supra* note 36, at 459 (identifying that the HEAR Act will be used to allow claimants to bring ownership claims that previously would have been barred by shorter state statutes of limitations). In a June 2016 hearing regarding the HEAR Act, actress Helen Mirren, who starred in the film, *Woman in Gold*, which followed one woman’s journey in an effort to reclaim her family’s Nazi-looted art, testified that restitution was less about financial gain and more about the opportunity to give Jewish people the chance to reclaim their culture, memories, and histories. See Huetteman, *supra* note 19 (reporting on testimony that was given at a hearing prior to the passage of the HEAR Act).

⁹⁴ See HAY, *supra* note 3, at 103 (explaining how laws designed to facilitate the return of Nazi-looted art often failed to provide any sort of legal obligation for the courts). In 2010, in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, the First Circuit Court of Appeals evaluated these competing goals. See 623 F.3d 1, 9 (1st Cir. 2010) (determining whether a painting sold under duress was time-barred). Oskar Reichel, of Vienna, was a recognized Jewish art collector who owned a number of paintings, including *Two Nudes (Lovers)*, that he sold to Otto Kallir in a murky transaction following the Third Reich’s annexation of Austria in 1938. See *Seger-Thomschitz*, 623 F.3d at 3–4 (noting that the record did not confirm whether Reichel received any payment for the paintings); HAY, *supra*, at 203 (introducing Reichel and his art collection). Following the end of World War II, the painting changed hands several times until 1973 when a private collector bequeathed the painting to the Museum of Fine Arts (MFA). See *Seger-Thomschitz*, 623 F.3d at 4 (explaining *Two Nudes (Lovers)*’s chain of ownership). In 2003, the defendant, Claudia Seger-Thomschitz, Reichel’s sole surviving heir, recovered several of Reichel’s other paintings from the city of Vienna, finding that their sales had been under duress because of Nazi persecution. See HAY, *supra*, at 204 (explaining that Reichel sold the paintings to an artanized gallery that later sold them to the city of Vienna). In 2006, an attorney contacted Seger-Thomschitz to alert her that more of Reichel’s art might be located outside of Austria. See *Seger-Thomschitz*, 623 F.3d at 5 (clarifying how Seger-Thomschitz learned of *Two Nudes (Lovers)*). Seger-Thomschitz contacted the MFA in 2007 claiming rightful ownership of *Two Nudes* and requesting the painting’s return. See *id.* at 2 (noting Seger-Thomschitz’s argument that good title of *Two Nudes (Lovers)* was never passed to the MFA). In 2008, the MFA filed a suit in Massachusetts

two Nazi-looted art cases that were decided prior to the HEAR Act using state statutes of limitations, one involving a claim against a private individual and the other against a museum.⁹⁵ Section B of this Part presents a case that was heard after the HEAR Act's passage, applying the Act's uniform six-year statute of limitations and introduces some the Act's shortcomings.⁹⁶

A. A Procedural Blockade: The Successful Statutes of Limitation Defense

Prior to the HEAR Act's installation of a six-year uniform statute of limitations, cases regarding Nazi-looted art were often dismissed before reaching the merits, as they were time-barred by the states' statutes of limitations.⁹⁷

federal district court to establish valid title to the painting. See HAY, *supra*, at 204 (arguing that Reichel's sale of *Two Nudes (Lovers)* was voluntary because his sons never claimed its ownership, despite seeking compensation for other Nazi-looted property). Seger-Thomschitz answered, asserting conversion and replevin. See *id.* at 205 (considering if "Reichel had in effect been forced" to sell *Two Nudes (Lovers)* because of the rise of Nazism). The MFA argued that Seger-Thomschitz was time-barred from bringing a claim because of the applicable Massachusetts three-year statute of limitations, and it filed a motion for summary judgment. See *id.* at 204 (noting the MFA's procedural argument). The U.S. District Court for the District of Massachusetts granted the MFA's motion and held that the statute of limitations would have begun to run when the Reichel family reasonably should have discovered that they had a valid claim to *Two Nudes (Lovers)*. See Museum of Fine Arts, Boston v. Seger-Thomschitz, 08–10097–RWZ, 2009 WL 6506658, at *9 (D. Mass. June 12, 2009) (holding that Seger-Thomschitz's claims against the MFA would most likely have accrued no later than 2003 when Vienna returned Reichel's artwork to Seger-Thomschitz), *aff'd*, 623 F.3d 1 (1st Cir. 2010). The First Circuit agreed and found that because the Reichel family sought compensation for other Nazi-looted artwork, but not *Two Nudes (Lovers)*, they had notice of a claim prior to the filing of this lawsuit. See *Seger-Thomschitz*, 623 F.3d at 5, 8 (explaining the reasonable basis for the discovery of *Two Nudes (Lovers)* prior to 2007). Though the First Circuit affirmed that Seger-Thomschitz's claim was time-barred because of Massachusetts' statute of limitations, they warned that museums should work to determine the provenance of artwork with "unmistakable roots" in the era of Nazi-persecution. See *id.* at 9, 14 (affirming the district court's holding and emphasizing museums' important role in facilitating the return of Nazi-looted art).

⁹⁵ See *infra* notes 97–138 and accompanying text.

⁹⁶ See *infra* notes 139–182 and accompanying text.

⁹⁷ See S. REP. NO. 114-394, at 5, 9 (2016) (remarking that state statutes of limitations often undermined the policy of promoting Nazi-looted art restitution). Though a fuller discussion is beyond this Note's scope, another obstacle that Nazi persecution victims often face is the issue of jurisdiction that tends to arise in claims against foreign states. See HAY, *supra* note 3, at 4–5 (summarizing cases against foreign countries where heirs of Nazi persecution victims were barred from bringing suit due to foreign state immunity). For example, in 2021, in *Federal Republic of Germany v. Philipp*, the U.S. Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) of 1976 prohibited a foreign government from being sued in a U.S. federal court on such matters. 592 U.S. 169, 187 (2021); see Jeri Zeder, *Looted: A Saga of Nazi-Stolen Art*, B.C. L. SCH. MAG., <https://lawmagazine.bc.edu/2021/07/looted-a-saga-of-nazi-stolen-art/> [<https://perma.cc/CM6F-V9LN>] (Summer 2021) (explaining that the FSIA underscores the separation of powers principle and that because the President, within the Executive Branch, is responsible for handling foreign affairs, it is not the Judicial Branch's role to conduct foreign relations). In *Philipp*, the plaintiffs, the heirs of a group of Jewish art dealers, sought restitution for a portion of the Guelph Treasure, worth approximately \$250 million, that they alleged they were forced to sell to the Nazis in the 1930s for a fraction of its value. 592 U.S. at 174; see Zeder, *supra* (interviewing the heirs' attorney and laying out the background of the case). The heirs' attorney

Subsections 1 and 2 of this Section detail two cases that illustrate this procedural obstacle often faced by heirs of Nazi-persecution victims who brought claims prior to the HEAR Act.⁹⁸



Figure 1. Vincent van Gogh, *The Diggers*, 1889.⁹⁹



Figure 2. Vincent van Gogh, *Vue de l'Asile et de la Chapelle de Saint-Rémy*, 1889.¹⁰⁰

argued that the sale fell into one of the specific exceptions to the FSIA: that a foreign state shall not be immune in cases “in which rights in property [were] taken in violation of international law.” See Zeder, *supra* (introducing the heirs’ argument that the forced sale of their property had been a part of the Nazis’ genocide against the Jewish people, a violation of international law) (quoting Foreign Sovereign Immunities Act of 1976 § 4(a), 28 U.S.C. § 1605(a)(3)). Despite the compelling argument, the Court ruled that the exception did not apply and that cases involving a foreign state’s takings against its own citizens were not within the jurisdiction of U.S. courts. *Philipp*, 592 U.S. at 187; see Zeder, *supra* (describing the Court’s holding in *Philipp*).

⁹⁸ See *infra* notes 123–138 and accompanying text.

⁹⁹ Vincent van Gogh, *The Diggers*, *supra* note 1 (ownership at issue in *Detroit Institute of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007)).

1. The Story of *Orkin v. Taylor*

Margerete Mauthner, a German Jew, was a prominent socialite and dedicated art patron in the early 1900s and an early supporter of Vincent van Gogh's then contemporary-style works.¹⁰¹ In 1907, documentation showed that Mauthner purchased one of van Gogh's final paintings, *Vue de l'Asile et de la Chapelle de Saint-Rémy* (*Vue de l'Asile*), from an art gallery in Berlin.¹⁰² In 1939, Mauthner and her family fled Nazi Germany and settled in South Africa, where she died shortly after the end of World War II.¹⁰³ Though the fate of *Vue de l'Asile* was not entirely clear, Mauthner's heirs, her great-grandchildren, alleged that Mauthner had been forced to sell the painting to the Nazis under duress as she fled from Germany.¹⁰⁴

Mauthner's ownership of *Vue de l'Asile* was not in dispute, and both a 1928 and 1939 edition of an ownership catalogue of the van Gogh painting listed Mauthner as the current owner, indicating her ownership of the van Gogh right before she fled Germany.¹⁰⁵ Yet, a later edition of *Vue de l'Asile*'s

¹⁰⁰ Vincent van Gogh, *Vue de l'asile et de la Chapelle Saint-Paul de Mausole (Saint-Rémy)* (oil painting), in *Impressionist and Modern Art Evening Sale: Vincent Van Gogh (1853-1890)*, CHRISTIE'S, <https://www.christies.com/en/lot/lot-6140959> [<https://perma.cc/2UVF-KFPG>] (ownership at issue in *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007)).

¹⁰¹ See HAY, *supra* note 3, at 95 (noting Margarete Mauthner's participation in German culture and intellectual life). For the majority of his life, van Gogh's paintings were far from the institution that they are today and during his lifetime, he failed to sell many of his works. See Martin Bailey, *Why Did van Gogh Fail to Sell His Work?*, ART NEWSPAPER (June 3, 2022), <https://www.theartnewspaper.com/2022/06/03/why-did-van-gogh-fail-to-sell-his-work> [<https://perma.cc/B88E-3VEL>] (remarking that van Gogh was unknown and unsuccessful for the majority of his career). Although many theories exist surrounding his failure to sell his art, van Gogh's solitary demeanor contributed to his shunning by the established art community. See *id.* (discussing numerous theories as to why van Gogh failed to gain popularity during his lifetime).

¹⁰² See HAY, *supra* note 3, at 95 (explaining the evidence presented in court that Mauthner had been the owner of the van Gogh painting). *Vue de l'Asile et de la Chapelle de Saint-Rémy* (*Vue de l'Asile*) was an oil painting that depicted the mental institution that van Gogh was treated at for a year in Provence, France. See Nicholas O'Donnell, *What About Margarethe Mauthner? Van Gogh Once Owned by Elizabeth Taylor Heads to Auction Again with Scant Mention of Its Persecuted Former Owner*, SULLIVAN & WORCESTER: ART L. REP., <https://blog.sullivanlaw.com/artlawreport/vangogh/mauthner#page=1> [<https://perma.cc/4GVC-N4X4>] (Mar. 26, 2018) (describing *Vue de l'Asile*, the van Gogh painting at issue in *Orkin v. Taylor*).

¹⁰³ See HAY, *supra* note 3, at 95 (identifying the circumstances surrounding Mauthner's immigration to South Africa).

¹⁰⁴ See *Orkin v. Taylor*, 487 F.3d 734, 737 (9th Cir. 2007) (presenting the plaintiff's argument). The plaintiffs, who were Mauthner's heirs, argued that because Mauthner had fled under Nazi persecution, any sale of *Vue de l'Asile* should be considered coercive and invalid, absent evidence to the contrary. See O'Donnell, *supra* note 102 (describing how Mauthner's heirs tried to invoke Military Government Law No. 59); *Orkin*, 487 F.3d at 737 (discussing Military Government Law No. 59, which presented broad circumstances under which victims of Nazi persecution should have their property restored, including sales under duress or to a government actor from 1933–1945).

¹⁰⁵ See *Orkin*, 487 F.3d at 736 (listing Mauthner as the painting's owner in 1928); HAY, *supra* note 3, at 95 (noting evidence of Mauthner's ownership of *Vue de l'Asile*). The catalogue that documented Mauthner's ownership was referred to as a *catalogue raisonné* that listed, in great detail, the

catalogue listed businessman Alfred Wolf as one of the painting's subsequent owners, though it was not entirely clear how he acquired it.¹⁰⁶ In 1963, Alfred Wolf's estate sold *Vue de l'Asile* to art dealer Francis Taylor at a Sotheby's auction, and upon his death, it was inherited by his movie star daughter, Elizabeth Taylor.¹⁰⁷ Taylor proceeded to put *Vue de l'Asile* up for auction in 1990, but did not close the sale.¹⁰⁸

In the late 1990s, following the Washington Conference and renewed interest in the restitution of Nazi-looted art, Mauthner's heirs contacted a lawyer to investigate Mauthner's works.¹⁰⁹ They explained that they had little knowledge of any of the family's art that was lost in the Holocaust era because the family dealt with the trauma from the Holocaust with "total silence."¹¹⁰ In 2002, when Taylor again considered selling *Vue de l'Asile*, the heirs discovered the painting had at one point belonged to Mauthner.¹¹¹ A year later, in 2003, the lawyer representing the heirs contacted Taylor, asserted rightful ownership over *Vue de l'Asile*, and settlement negotiations proceeded unsuccessfully.¹¹² Thus, in 2004, in *Orkin v. Taylor*, in the U.S. District Court for the Central District of California, Mauthner's heirs filed suit to recover *Vue de l'Asile* and brought claims including replevin and conversion.¹¹³

chain of ownership of a piece of art. See *Orkin*, 487 F.3d at 736 (explaining the evidence of Mauthner's ownership and defining *catalogue raisonné*).

¹⁰⁶ See *Orkin*, 487 F.3d at 737 (documenting the murky history of *Vue de l'Asile*'s chain of ownership and revealing that a 1963 provenance list issued by Sotheby's auction house listed multiple owners of the painting in between Mauthner and Wolf).

¹⁰⁷ See HAY, *supra* note 3, at 95 (revealing how the van Gogh painting ended up with Elizabeth Taylor and why Mauthner's heirs brought a claim against her). The Taylor family purchased *Vue de l'Asile* for £92,000 and added the painting to their impressive collection of impressionist art. See *id.* (detailing Taylor's acquisition of the painting).

¹⁰⁸ See *id.* (highlighting Elizabeth Taylor's ownership of *Vue de l'Asile*).

¹⁰⁹ See *id.* at 96 (noting that the United States' recommenced policy interest in aiding victims of Nazi-persecution and their heirs in the restitution of their lost art and property from the 1930s and 1940s was the impetus behind the Mauthner heirs' interest in conducting a search for other art owned by their great-grandmother).

¹¹⁰ See Marcel Berlins, *Hanging in the Balance*, THE GUARDIAN (Dec. 6, 2004), <https://www.theguardian.com/artanddesign/2004/dec/07/art.secondworldwar> [<https://perma.cc/J3PK-2XSK>] (offering the Mauthner heirs' explanation for why they waited until the early 2000s to seek the return of *Vue de l'Asile* and suggesting that the family's pain and trauma from the Holocaust meant that it was not something that they discussed with any regularity).

¹¹¹ See HAY, *supra* note 3, at 96 (noting that internet rumors about Taylor's potential sale of *Vue de l'Asile* brought the painting back into the public eye).

¹¹² See *id.* (outlining the failed negotiations between Taylor and Mauthner's heirs and explaining that Taylor asserted that she held the valid title to *Vue de l'Asile*).

¹¹³ See *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (discussing the filing of Mauthner's heirs' amended complaint in 2005); HAY, *supra* note 3, at 96 (presenting the heirs' argument that Mauthner had left *Vue de l'Asile* in Germany involuntarily because of Nazi persecution and thus neither Wolf nor Taylor could have acquired valid title of the work or had the ability to sell it). The heirs noted that regardless of how Mauthner lost possession of the painting, the suspicious nature of the chain of ownership should have raised red flags for Francis Taylor, an experienced art dealer. See Berlins, *supra* note 110 (asserting the heirs' argument that the publicity surrounding Nazi-looted art in

In 2005, the district court ruled against Mauthner's heirs and granted Taylor's motion for summary judgment.¹¹⁴ On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment against Mauthner's heirs.¹¹⁵ Under California's three-year statute of limitations for replevin and conversion property claims, the Ninth Circuit found that the heirs' claims were time-barred.¹¹⁶ The court explained that an action for art recovery accrues when the owner discovers the work's whereabouts and that the impetus is on the claimants to perform a reasonable investigation to make such a discovery.¹¹⁷

The Ninth Circuit was unpersuaded by Mauthner's heirs' argument that they did not discover the painting until 2002, when Taylor was contemplating selling *Vue de l'Asile*.¹¹⁸ The court noted that prior to 2002, the painting had been held out for sale internationally in 1990 and that Elizabeth Taylor was listed as the owner of the painting in its 1970 catalogue.¹¹⁹ Thus, for the

the 1960s should have raised questions for Taylor when he noted Mauthner's name as the owner of *Vue de l'Asile* in 1939).

¹¹⁴ See *Orkin*, 487 F.3d at 741 (describing the U.S. District Court for the Central District of California's ruling).

¹¹⁵ See *id.* (discussing *Orkin*'s procedural history); HAY, *supra* note 3, at 97 (summarizing the holding of *Orkin*).

¹¹⁶ See *Orkin*, 487 F.3d at 741 (stating the California statute of limitations for actions arising out of "the taking, detaining, or injuring" of any "goods or chattels" and reiterating the holding of the case). The Mauthner heirs attempted to circumvent the state statute of limitations by arguing that they had a right to recover *Vue de l'Asile* under the federal Holocaust Victims Redress Act of 1998, that encouraged governments to allow Holocaust victims to locate and return Nazi-looted art. See HAY, *supra* note 3, at 97 (introducing the heirs' alternative argument to get around the time limitations imposed by the state statute of limitations). Although the Holocaust Victims Redress Act did not include any new remedies provided by the state's tort law, including replevin and conversion, it established a cause of action unconstrained by time limitations. See *id.* (defining the relevant portion of the Holocaust Victims Redress Act). Yet, because the Holocaust Victims Redress Act did not contain a provision concerning lawsuits, the court had to decide whether or not the statute created a private right of action to accomplish its lofty restitution goals. See *id.* at 97–98 (identifying the issue before the court regarding the language of the Holocaust Victims Redress Act). Ultimately, the U.S. Court of Appeals for the Ninth Circuit ruled that the Holocaust Victims Redress Act did not create a private cause of action for the Mauthner heirs because the statute did not include any "right- or duty-creating language." See *Orkin*, 487 F.3d at 739 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)) (implying that there was no private right of action). The court further explained that the purpose and legislative history of the Holocaust Victims Redress Act indicated that the statute was intended to encourage "governments to enforce existing rights for the protection of Holocaust victims," not to create individual rights or a private cause of action. See *id.* (reasoning that the Holocaust Victims Redress Act did not create an implied right of action because nothing in the statute could be characterized as mandatory); HAY, *supra*, at 104 (noting that the statute's intention "was not access to the courts; it was access to information").

¹¹⁷ See *Orkin*, 487 F.3d at 741 (describing California's statute of limitations with regard to artwork).

¹¹⁸ See *id.* (holding that the heirs' cause of action would have accrued when they reasonably could have discovered their claim to the property); HAY, *supra* note 3, at 111 (explaining the court's rationale in *Orkin*).

¹¹⁹ See *Orkin*, 487 F.3d at 741–42 (noting the publicly available sources that the heirs could have used to discover the whereabouts of *Vue de l'Asile*). The presence of an exhibition catalogue as the deciding factor for whether an heir should be on notice that their claim applies appears unreasonable.

Mauthner heirs, the clock to bring their claim likely started ticking in 1963, when the painting was first held out for sale in an international auction and sold to Francis Taylor.¹²⁰

Though the Mauthner heirs' claims were time-barred under the state's statute of limitations, under the HEAR Act, the heirs would have had six years to bring their claims after acquiring actual knowledge of the location of the artwork, and their possessory interest in it.¹²¹ Given that the Mauthner heirs seemingly did not discover their family's ownership of the painting until the early 2000s, it is more likely that under the HEAR Act's uniform statute of limitations, their 2004 claim could have reached the merits.¹²²

2. Detroit Institute of Arts v. Ullin

In 2006, in *Detroit Institute of Arts v. Ullin*, the U.S. District Court for the Eastern District of Michigan heard a counterclaim from the heirs of Martha Nathan—a Nazi persecution victim—against the Detroit Institute of Arts (Detroit Institute) for conversion and the restitution of a Vincent van Gogh painting—*The Diggers*.¹²³ Nathan and her husband were the owners of an extensive home art collection in Frankfurt, Germany before Nathan emigrated to Paris in 1937 in order to escape the Nazis' anti-Semitic persecution following her husband's death.¹²⁴ When Nathan returned to Germany in 1938 to collect some of

See O'Donnell, *supra* note 102 (explaining that the *Orkin* court found that the 1970 catalogue and 1990 auction triggered the start of the state's statute of limitations). In the 1990s and early 2000s, exhibition and auction catalogues were not universally accessible on the internet or any other platform. See *id.* (recognizing a challenge in utilizing catalogues as a proxy for notice). To suggest that the existence of a catalogue "instantly puts everyone . . . on notice" seems unfair to even the most diligent of plaintiffs. See *id.* (arguing that a document's mere existence in the public, does not mean that it is publically available to everyone). Because of the procedural obstacle of the statute of limitations, the *Orkin* court never even reached the factual question of the sale's validity. See *id.* (summarizing the holding in *Orkin*).

¹²⁰ See *Orkin*, 487 F.3d at 742 (reasoning that the heirs' claims were time-barred).

¹²¹ See Holocaust Expropriated Art Recovery Act of 2016, § 5(a)(1)–(2), 22 U.S.C. § 1621 note (creating a uniform six-year statute of limitations that begins to run when a claimant, or their agent, actually discovers the location and identity of the artwork, as well as their possessory interest); *Orkin*, 487 F.3d at 742 (finding that the Mauthner heirs' claims were time-barred under the state's statute of limitations).

¹²² See HAY, *supra* note 3, at 96 (explaining why the Mauthner heirs waited until the late 1990s to hire a lawyer to investigate their great-grandmother's property). Given the HEAR Act's six-year uniform statute of limitations, the Mauthner heirs' discovery of the painting in the early 2000s would have made their 2004 claim timely. See Holocaust Expropriated Art Recovery Act § 5(a)(1)–(2) (defining the uniform statute of limitations); HAY, *supra*, at 96 (discussing the heirs' discovery of the painting's ownership history).

¹²³ See *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007) (identifying the claim presented by Nathan's heirs who asserted, among other claims, that they were the rightful owners of *The Diggers*, the painting at issue).

¹²⁴ See HAY, *supra* note 3, at 253 (introducing the claimant's predecessor, Nathan's husband, and specifying how Nathan was dispossessed of the painting at issue).

her belongings, she was forced to surrender six paintings from her collection to the Nazis and later sold her other art, including the painting at issue, to a group of art dealers in Paris.¹²⁵ The art dealers quickly resold the painting to an American art collector, who, upon his death, bequeathed *The Diggers* to the Detroit Institute.¹²⁶

In 2004, Nathan's heirs contacted the Detroit Institute requesting that it return the van Gogh painting.¹²⁷ They asserted that Nathan sold the paintings to the Paris dealers under duress for less than a third of the insured values to pay for her escape from Germany.¹²⁸ In response, the museum investigated the matter and subsequently refused the heirs' request, noting that Nathan had voluntarily sold the paintings and that the prices were comparable to other works being sold throughout Europe at the time.¹²⁹

In 2006, the Detroit Institute filed suit in Eastern District of Michigan, requesting a declaration that it was the rightful owner of the van Gogh painting and ordering quiet title.¹³⁰ Nathan's heirs answered, stating that Nathan's sale of the painting had been under duress, and they filed counterclaims against the Detroit Institute, requesting restitution of the van Gogh.¹³¹

In March 2007, the U.S. District Court for the Eastern District of Michigan granted the Detroit Institute's motion to dismiss, explaining that the heirs' claim

¹²⁵ See *id.* (detailing the ownership chain of *The Diggers* that was later sold by the Paris dealers to an American art collector, who bequeathed it to the Detroit Institute of Arts (Detroit Institute). In 1939, Nathan moved to Switzerland where, after World War II, she began filing claims in Germany for her losses, including her home and for six of her paintings that had been seized by the Nazis. See *id.* (identifying the claims that Nathan attempted to bring to repossess her property and noting that, after her death, Nathan's brother, Willy Dreyfus, became the estate's executor and continued to pursue claims through the 1970s for other losses that their family's business had incurred at the hands of the Nazis).

¹²⁶ See *id.* (detailing the provenance of *The Diggers* and noting how the painting ended up in the United States).

¹²⁷ See *Ullin*, 2007 WL 1016996, at *2 (presenting the inception of Nathan's heirs' claims).

¹²⁸ See HAY, *supra* note 3, at 253–54 (explaining Nathan's heirs' arguments for the restitution of the van Gogh painting). Nathan is alleged to have sold two paintings, including the van Gogh, to Paris art dealers for \$16,000, approximately "one-third of their insured value." See *id.* (noting the sale of the van Gogh painting). Nathan's heirs note that the dealers immediately resold them for \$59,000. See *id.* at 254 (sharing the heirs' account of the paintings' sale prices).

¹²⁹ See *id.* (arguing that the Detroit Institute's ownership of *The Diggers* was valid and noting that Nathan made a conscious choice not to pursue restitution of the painting following the war, further suggesting that she recognized the sale as legitimate).

¹³⁰ See *id.* (noting the proceedings that started the litigation in the *Ullin* case). Simultaneously, the Toledo Museum of Art filed an ownership claim in the U.S. District Court for the Northern District of Ohio for the other painting that Nathan sold to the Paris art dealers, Paul Gauguin's *Street in Tahiti*. See *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803, 809 (N.D. Ohio 2006) (considering another Nazi-looted art claim against the Nathan heirs over the ownership of the other painting Nathan sold to art dealers in Paris).

¹³¹ See HAY, *supra* note 3, at 254 (outlining Nathan's heirs' counterclaims and response to the Detroit Institute's claim).

was barred under the state's three-year statute of limitations.¹³² The court explained that for commercial conversion claims, the statute of limitations begins to run on the day that the "dominion is asserted," meaning, regardless of whether a claimant knows about it, the claim starts to run once the conversion occurs.¹³³ For the Nathan heirs, under Michigan law, this meant their claim would have accrued on the day that Nathan sold the van Gogh to the Paris dealers.¹³⁴

Though the district court based its decision on the state's statute of limitations, the court also questioned the heirs' rightful ownership of the painting.¹³⁵ The court pointed out that Nathan failed to pursue a claim for the van Gogh painting when she sought restitution for her other wartime losses, including Nazi-looted art.¹³⁶ The court seemingly failed to consider that Nathan, like many other victims of Nazi persecution, may not have known that a judicial remedy existed for sales under duress.¹³⁷ When Congress voted to enact the HEAR Act, it noted that state laws such as Michigan's were inadequate to address the heavy burden on individuals seeking recovery of Nazi-looted art who

¹³² See *Detriot Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *4 (E.D. Mich. Mar. 31, 2007) (holding that Nathan's heirs' claims were time-barred). In deciding which statute of limitations to apply, the U.S. District Court for the Eastern District of Michigan found that the state's choice-of-law rules required it to apply the statute of limitations of the forum state, Michigan. See HAY, *supra* note 3, at 256 (determining which statute of limitations to apply in *Ullin*).

¹³³ See *Ullin*, 2007 WL 1016996, at *3 (explaining the Michigan statute of limitations for conversion claims); HAY, *supra* note 3, at 257 (noting that in *Toledo Museum of Art v. Ullin*, the case simultaneously filed in the Northern District of Ohio, the district court reached the same conclusion and held that Ohio's four-year state statute of limitations for recovering property began when Nathan had the necessary information to make a claim, and the heirs were thus time-barred from bringing a claim); see also *Toledo Museum of Art*, 477 F. Supp. 2d at 807 (explaining that Nathan should have made a claim when she pursued damages and restitution for her lost property, which was immediately after World War II).

¹³⁴ See *Ullin*, 2007 WL 1016996, at *3 (discussing the heirs' claims regarding the statute of limitations). The Michigan Eastern District court also stated that even if the discovery rule applied, meaning that the statute of limitations would have started to run when the plaintiff discovered, or should have discovered, a possible cause of action, the heirs' claim would still be time-barred. See *id.* (opining on another legal avenue for the plaintiffs but concluding it similarly would have been time-barred). The court explained that with reasonable diligence, the heirs should have discovered there was a possible claim for the painting in the 1970s, when other claims were made for Nathan's wartime losses. See *id.* (noting that the heirs' claims would still be time-barred even if a more lenient standard was applied to the statute of limitations).

¹³⁵ See HAY, *supra* note 3, at 255 (suggesting factors surrounding the circumstances of Nathan's sale of the paintings that brought into doubt the heirs' ownership of Nathan's property).

¹³⁶ See *id.* at 253, 255 (noting that the Michigan and Ohio district courts relied heavily on the fact that Nathan failed to pursue a claim for the paintings she sold to the Paris dealers and that because the sale did not benefit the Nazi Party it indicated that the sale was not made under duress).

¹³⁷ See *id.* at 255 (proposing other reasons that Nathan may have failed to pursue a claim for her lost art).

scrupulously construct their cases from a “fragmentary historical record ravaged by persecution, war, and genocide.”¹³⁸

B. Reaching the Merits: Post-HEAR Act Litigation

In December of 2016, President Obama signed the HEAR Act into law to aid in the recovery of Nazi-looted art.¹³⁹ The law’s legislative history reveals how the United States had previously failed to ensure that claims for art lost during the Nazi-era were resolved on their merits.¹⁴⁰ As the decisions in *Ullin* and *Orkin* illustrate, procedural hurdles such as limited state statutes of limitations created unfair impediments to recovery for Nazi-persecution victims and their heirs.¹⁴¹ Thus, the HEAR Act established a six-year federal statute of limitations for Nazi-looted art claims to guarantee that such cases were evaluated on their merits and resolved expeditiously in a just manner.¹⁴² Subsection 1 of this Section introduces a case where the plaintiffs successfully used the HEAR Act’s six-year statute of limitations period in their claim, demonstrating the positive impact that the Act has had on the resolution of Nazi-looted art claims in the United States.¹⁴³ Subsection 2 of this Section presents some scholarly critiques and challenges of the HEAR Act.¹⁴⁴

¹³⁸ See S. REP. NO. 114-394, at 8 (2016) (identifying the challenges that procedural obstacles, that impose time limits, present for Nazi-looted art recovery); *Ullin*, 2007 WL 1016996, at *3 (noting that the statute of limitations in Michigan is three years).

¹³⁹ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (providing victims of Nazi persecution, and their heirs, a fair opportunity to recover art and property lost during the Holocaust); Cunningham, *supra* note 36, at 459 (identifying President Obama’s signing of the Act).

¹⁴⁰ See S. REP. NO. 114-394, at 5 (noting the many hurdles that Nazi-era victims and their heirs had to overcome in the courts to bring claims for Nazi-looted art prior to the Act’s passage).

¹⁴¹ See *id.* (explaining how state statutes of limitations, as a practical matter, barred plaintiffs from bringing claims for the recovery of Nazi-looted art). See generally *Orkin v. Taylor*, 487 F.3d 734, 742 (9th Cir. 2007); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1, *4 (E.D. Mich. Mar. 31, 2007) (holding that the state statute of limitations barred the heirs’ claims).

¹⁴² See S. REP. NO. 114-394, at 5–6, 9 (establishing that a uniform federal statute of limitations would allow more Nazi-looted art claims to reach the merits and would better align with the United States’ policy to return art that was misappropriated or stolen by the Nazis).

¹⁴³ See *infra* notes 146–171 and accompanying text.

¹⁴⁴ See *infra* notes 172–182 and accompanying text.



Figure 3. Egon Schiele, *Model das Gesicht verbergend*, 1912.¹⁴⁵



Figure 4. Egon Schiele, *Frau mit schwarzer Schürze* 1910.¹⁴⁶

1. The Seminal Case *Reif v. Nagy*

Fritz Grunbaum, a Viennese Jew, was a cabaret performer in Austria in the early 1900s and an ardent criticizer of the Nazi Party.¹⁴⁷ Grunbaum was also an established art collector and owned several hundred artworks, includ-

¹⁴⁵ Egon Schiele, *Model das Gesicht verbergend* [Woman Hiding Her Face] (drawing), in *The Lost Collection of Fritz Grünbaum*, COLLECTION GRÜNBAUM, <https://www.collectiongruenbaum.com/wp-content/uploads/2016/09/JK-1101.pdf> [<https://perma.cc/S7PX-BQT2>] (one of two drawings at issue in *Reif v. Nagy*, 80 N.Y.S.3d 629 (Sup. Ct. 2018)).

¹⁴⁶ Egon Schiele, *Frau mit schwarzer Schürze* [Woman in Black Pinafore] (drawing), in *Past Auction: Egon Schiele*, ARTNET, https://www.artnet.com/artists/egon-schiele/frau-mit-schwarzer-sch%C3%BCrze-woman-in-black-i3_6doHT0kSbCYBx3S0l7g2 [<https://perma.cc/RJ43-CJWX>].

¹⁴⁷ See *Reif v. Nagy*, 80 N.Y.S.3d 629, 631 (Sup. Ct. 2018) (introducing the victim of Nazi persecution, Fritz Grunbaum, whose heirs brought a claim in this case), *aff'd as modified*, 106 N.Y.S.3d 5 (App. Div. 2019).

ing the two Egon Schiele drawings at issue in this case, *Model das Gesicht verbergend*, or *Woman Hiding Her Face*; and *Frau mit schwarzer Schürze*, or *Woman in Black Pinafore* (Schiele works).¹⁴⁸ In early 1938, Grunbaum was arrested and sent to the Dachau Concentration Camp, where he was coerced into executing a Power of Attorney to Elisabeth, his wife, so that the Nazis could access his art collection.¹⁴⁹ In April of 1938, when the Nazis passed an ordinance for the disclosure and registration of all Jewish assets and property, Grunbaum's wife was able to complete the declaration on his behalf.¹⁵⁰ Nazi official Franz Kieslinger appraised Grunbaum's property and documented the looting in the 1939 Jewish Property Declarations, indicating the legal plundering of Grunbaum's art.¹⁵¹ Grunbaum was murdered at Dachau in 1941, and his wife was killed soon after.¹⁵²

Following World War II, Grunbaum's sister-in-law asserted possession of the Schiele works and sold them to a gallery in Switzerland, maintaining ownership despite not being Grunbaum's rightful heir.¹⁵³ The Schiele works continued to change hands until defendant and art collector Richard Nagy purchased them in the early 2000s.¹⁵⁴ After Nagy exhibited the Schiele works at a public show in New York in 2015, the Grunbaum estate's rightful heirs, made a demand for the art's return.¹⁵⁵ Nagy refused their demand.¹⁵⁶ In 2015, in *Reif v. Nagy*, the Grun-

¹⁴⁸ See *id.* (identifying the works of art at issue in *Reif*).

¹⁴⁹ See *id.* (detailing how the Nazis coerced Grunbaum into transferring the rights to his property, while he was imprisoned in a concentration camp, so that they could later access his collection with ease).

¹⁵⁰ See *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* note 39 (noting the Anti-Semitic legislation); O'DONNELL, *supra* note 12, at 6 (identifying the authority that forced Jews to register their assets that created an inventory of desired objects and made it easier for the Nazis to identify individuals to harass and coerce into giving up their property); *Reif*, 80 N.Y.S.3d at 631 (discussing how the Nazi Party was able to inventory Grunbaum's collection). The decree regarding the reporting of Jewish property required Jews to declare any property that was worth 5,000 Reichsmarks (about \$40,000) or more. *Anti-Semitic Legislation 1933–1939*, U.S. HOLOCAUST MEM'L MUSEUM, *supra* (outlining the parameters of The Order for the Disclosure of Jewish Assets).

¹⁵¹ See *Reif*, 80 N.Y.S.3d at 631 (explaining that the act of stamping the Jewish property as “completed” and “blocked,” or “*Erledigt*” and “*Gesperrt*,” signified that the property now belonged to the Nazi Party).

¹⁵² See *id.* at 631, 634 (describing the fate of Grunbaum and his wife Elisabeth).

¹⁵³ See *id.* at 631, 634–35 (explaining the Schiele works' changes in ownership from Grunbaum's sister-in-law's sale to the Swiss gallery, Gutekunst & Klipstein, owned by Eberhard Kornfeld, who was later reported by the Swiss and German governments for trafficking Nazi-looted art).

¹⁵⁴ See *id.* at 631 (noting that, in 1956, Swiss gallery owner Kornfeld later advertised the Schiele works in a sale catalogue and that they ultimately ended up with the defendant, Richard Nagy).

¹⁵⁵ See Webster D. McBride, *Surprise Decision in Reif v. Nagy Raises as Many Questions as It Answers*, HUGHES HUBBARD & REED ART LAW (Apr. 23, 2018), [https://www.hhrartlaw.com/2018/04/surprise-decision-in-reif-v-nagy-raises-as-many-questions-as-it-answers/#_edn23%20name=\[https://perma.cc/QLJ6-BWSV\]](https://www.hhrartlaw.com/2018/04/surprise-decision-in-reif-v-nagy-raises-as-many-questions-as-it-answers/#_edn23%20name=[https://perma.cc/QLJ6-BWSV]) (suggesting that the plaintiffs in *Reif* discovered the defendants' possession of the Schiele works following the New York Salon Art + Design Show in 2015 at which the paintings were exhibited). Notably, though the Schiele works changed hands via sales by Grunbaum's sister-in-law, a legitimate relative, she had no legal right to the artwork and the true legal executors of

baum estate's rightful heirs filed suit before the Supreme Court of New York, alleging claims of replevin and conversion.¹⁵⁷ Nagy attempted to bring a series of defenses, including the lapsed state statute of limitations and laches.¹⁵⁸

The New York Supreme Court stated that the recent passage of the HEAR Act extended the timeliness of claims for Nazi-looted art to "six years 'from the actual discovery' . . . of the 'identity and location of the artwork.'"¹⁵⁹ The court emphasized that *Reif* was exactly the type of case that the HEAR Act was intended to apply to and that the Act compelled the court to aid in the return of Nazi-looted art to its rightful owners.¹⁶⁰ Thus, the court found that Nagy's defenses were unsuccessful.¹⁶¹

Overcoming the issue of timeliness, the court evaluated the Grunbaum heirs' claims on their merits.¹⁶² To establish a *prima facie* case for replevin and conversion, the court noted, the heirs had to assert that they had the "superior right of possession" to the Schiele works and that the property was in the unlawful possession of another.¹⁶³ The court, corroborating the heirs' arguments, found that Grunbaum's property had been looted by the Nazis in its entirety and was currently illegally held by another person.¹⁶⁴ Thus, the court determined that the heirs met the threshold for the "superior right of possession" to

Grunbaum's estate remained *Reif* and his co-executor. *See Reif*, 80 N.Y.S.3d at 631, 634 (explaining that the plaintiff heirs had a "superior right" of possession and noting that Grunbaum's sister-in-law had no legal right to sell the Schiele works).

¹⁵⁶ *See id.* at 631–32 (describing how the plaintiffs in *Reif* brought this action following the defendants' refusal of their demand for the art's return).

¹⁵⁷ *See McBride*, *supra* note 155 (detailing the plaintiffs' claims in *Reif*); *Reif*, 80 N.Y.S.3d at 631 (describing the property claims that the heirs asserted).

¹⁵⁸ *See Reif*, 80 N.Y.S.3d at 635 (describing the defendants' claims).

¹⁵⁹ *See id.* at 635 (quoting Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery))) (noting the HEAR Act's applicability to the issues in *Reif* and finding that the plaintiffs' action was timely).

¹⁶⁰ *See* Holocaust Expropriated Art Recovery Act §§ 2(6), 3 (explaining that the Act's purpose is to aid in returning Nazi-looted art to its rightful ownership and touching on the unique challenges of tracing the provenance of Holocaust-era artwork that necessitated the Act's passage); *Reif*, 80 N.Y.S.3d at 636–37 (discussing the HEAR Act's applicability in *Reif*).

¹⁶¹ *See Reif*, 80 N.Y.S.3d at 635–37 (holding for the plaintiff heirs and finding that the defendants' defenses were not persuasive).

¹⁶² *See id.* at 631, 634 (reviewing the plaintiff's *prima facie* case).

¹⁶³ *See id.* at 632 (defining a replevin action as one that requires a plaintiff to either show (1) legal title, or (2) a "superior right of possession," and a conversion action as one that requires the plaintiff to show that the property at issue is "in the unauthorized possession of another who acted to exclude the plaintiff's rights"); *see also Conversion*, BLACK'S LAW DICTIONARY, *supra* note 17 (defining conversion as the wrongful possession and use of another's property, whereby the other person is deprived of possession of or use of the property); *Replevin*, BLACK'S LAW DICTIONARY, *supra* (defining replevin as repossession of personal property that was wrongfully detained).

¹⁶⁴ *See Reif*, 80 N.Y.S.3d at 636–37 (holding for the plaintiff heirs).

the Schiele works, and established a claim of replevin and conversion.¹⁶⁵ Following the conclusion of the heirs' prima facie case, the burden of proof shifted to Nagy to establish that he had a superior claim to the Schiele works.¹⁶⁶

Through the lens of the unique brutalities of the Holocaust-era, the court determined that there were no facts to indicate that Grunbaum had ever voluntarily transferred his art collection during his life and that "a signature at gunpoint cannot lead to a valid conveyance."¹⁶⁷ Despite Nagy's argument that he had acquired the Schiele works in good faith, the court asserted that, absent a lawful conveyance, title remains with the original owner, and a thief is unable to transfer a good title.¹⁶⁸ Thus, given that Grunbaum never voluntarily transferred the Schiele works to his sister-in-law, she never legally owned them.¹⁶⁹

The court granted the heirs' motion for summary judgment on their claims of replevin and conversion and ordered Nagy to vest the titles of the Schiele works in Grunbaum's estate.¹⁷⁰ The court emphasized the importance of the HEAR Act in overcoming procedural obstacles in bringing claims of Nazi-looted art, and stressed its significance for the recovery of Nazi-looted art.¹⁷¹

¹⁶⁵ See *id.* at 634 (establishing the plaintiff heirs' prima facie case of both the replevin and conversion claims regarding the Schiele works).

¹⁶⁶ See *id.* (remarking that, after the plaintiffs' prima facie case is established, the defendant has the burden to try to "raise a triable issue of fact" of a superior claim to the art at issue).

¹⁶⁷ *Id.*; see McBride, *supra* note 155 (reasoning that Grunbaum had been forced by the Nazis who were holding him in a concentration camp to sign over his power of attorney to his wife, who was also later killed by the Nazis, so the transfer was involuntary).

¹⁶⁸ See Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. 1991) (asserting that New York protects the property of the rightful owner when that property has been stolen, regardless of whether or not the property happens to be in the possession of someone who purchased it for value, in good faith); *Reif*, 80 N.Y.S.3d at 631 (noting the defendant's argument that he acquired good title to the Schiele works).

¹⁶⁹ See *Reif*, 80 N.Y.S.3d at 631, 634, 636 (explaining why the defendant's argument that he purchased the Schiele works in good faith failed to persuade the Supreme Court of New York).

¹⁷⁰ See *id.* at 637 (holding for the plaintiff heirs). Though the court stressed the HEAR Act's important role in returning Nazi-looted art, the legislation is not without limits. See S. REP. NO. 114-394, at 10 (2016) (carving out narrow exceptions to the HEAR Act). In 2022, in *Reif v. Art Institute of Chicago*, the Grunbaum heirs asserted claims of conversion and replevin against the Art Institute of Chicago for the return of a different Schiele drawing that they made a demand for the return of in 2006. See 703 F. Supp. 3d 427, 430 (S.D.N.Y. 2023) (outlining the facts and the plaintiff heirs' claims). In this case, the U.S. District Court for the Southern District of New York found that the HEAR Act would not revive a cause of action where the claimant was aware of a potential cause of action after the year 1999, could have brought a timely claim, but then waited six years or more to pursue a claim. See *id.* at 436 (holding that the plaintiffs' causes of action were time-barred, because they waited over nine years to bring a claim, and the HEAR Act's legislative intent was to ensure that claimants assert their claims in a timely manner).

¹⁷¹ See *Reif*, 80 N.Y.S.3d at 324, 327 (summarizing the HEAR Act's purpose and noting that the legislation was designed to restore art and heritage that was stolen by the Nazis and plundered during the Holocaust era to the rightful heirs or owners). Other plaintiffs in Nazi-looted art claims have also benefited from the HEAR Act's increased six-year statute of limitations. See generally *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 960 (9th Cir. 2017); *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 623–24 (Sup. Ct. 2018) (holding that the plaintiffs' claims were not

2. The HEAR Act: Modern Critiques

Reif v. Nagy represented a novel application of the newly enacted HEAR Act.¹⁷² Though the Act's extended statute of limitation was designed to ensure that Nazi-looted art claims were not unfairly barred by individual state's procedural obstacles, the Act was not without limits.¹⁷³ Notably, the Act includes an exception to the uniform statute of limitations and excludes claims in situations where a claimant: (1) had "actual knowledge" of lost art or property between the years of 1999 and 2016, and (2) six or more years passed from the date the claimant acquired the knowledge, during which time, the claim was not time-barred by any state statute of limitation.¹⁷⁴

Additionally, the Act defines the term "Nazi persecution" as the oppression of a specific group due to Nazi ideology.¹⁷⁵ It defines "art" to include paintings, sculptures, prints, books, sacred objects and more, and specifies that the "covered period" began on January 1, 1933, and ended on December 31, 1945.¹⁷⁶ The Act construes "discovery" to mean the "actual knowledge" of adequate information with regard to circumstances relevant to the lost property.¹⁷⁷ Finally,

time-barred under the HEAR Act's creation of a federal statute of limitations for Nazi-looted art claims), *aff'd*, 95 N.Y.S.3d 62 (App. Div. 2019). In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, the heirs of Lilly Neubauer, a German Jew, sought recovery of a Camille Pissarro painting that the Nazis forcibly took from her in 1939 as a condition for the issuance of her exit visa. *See* 862 F.3d at 955 (explaining how the painting was appraised by the Nazis who then demanded that Neuberger sell it to them for 360 Reichsmarks, or approximately \$83, that was deposited into a blocked account). In 2000, Neubauer's heirs found out that the painting was located in the Thyssen-Bornemisza Collection, and they subsequently filed a request for its return in 2005. *See id.* at 956–57 (outlining how the plaintiff heirs gained actual knowledge of the painting's location after they had previously reasonably believed it had been destroyed or lost in the war after Neubauer unsuccessfully sought its restitution). Thus, under the HEAR Act, the U.S. Court of Appeals for the Ninth Circuit held that the plaintiff heirs' claims were timely under the six-year statute of limitations. *See id.* at 959–60 (holding that the plaintiff heirs' claims were not time-barred because they brought them within five years of their actual discovery of the painting which is within the HEAR Act's six-year statute of limitations).

¹⁷² *See Reif*, 80 N.Y.S.3d at 637 (holding for the plaintiff heirs and granting them title of the works of art that they sought title for).

¹⁷³ *See* S. REP. NO. 114-394, at 5, 10 (2016) (remarking that a purpose of the HEAR Act was to help the victims of Nazi persecution, and their heirs, to recover art that was stolen or misappropriated by the Nazi Party).

¹⁷⁴ *See* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), (e), 130 Stat. 1524, 1526–27 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (stating an exception to the uniform six-year statute of limitations).

¹⁷⁵ *See id.* § 4(5) (intending "Nazi persecution" to include the acts of allies, agents, members, and associates of the Nazi Party or of the Government of Germany).

¹⁷⁶ *See id.* § 4(2)–(3) (noting the definition of "artwork or other property" under the Act and defining the period, during which property was lost or confiscated, that would be subject to the Act's uniform statute of limitations).

¹⁷⁷ *See id.* § 4(1), (4) (discussing the facts and circumstances that must be present for a claimant to trigger the start of the federal statute of limitations).

the Act—that applies to both state and federal courts—includes a sunset provision and will “cease to have effect” on January 1, 2027, unless extended.¹⁷⁸

The Act’s definitions, as many scholars have noted, create potential deficiencies.¹⁷⁹ For example, the Act’s application of the six-year statute of limitations to art or property lost because of “Nazi persecution” has the possibility of creating a vague or uncertain standard.¹⁸⁰ Additionally, some states that dominate or play a crucial role in the art market have created rules that are more generous to a claimant than the Act’s statute of limitations.¹⁸¹ Although certain scholars have criticized that the text of the Act creates interpretive challenges for courts, many victims of Nazi persecution, and their heirs, note that their Nazi-looted art claims would not have reached the merits without the Act.¹⁸²

III. THE WHEELS OF JUSTICE TURN SLOWLY, BUT DO THEY GRIND EXCEEDINGLY FINE?

With experts estimating that over 100,000 works of Nazi-looted art are still missing, future litigation remains a distinct possibility.¹⁸³ As illustrated by the Supreme Court of New York’s trailblazing reasoning in *Reif v. Nagy*, several courts have relied heavily on the HEAR Act to enable the restitution of Nazi-looted art

¹⁷⁸ See *id.* § 5(g) (including the date on which the Act will terminate, and individual state statutes of limitations will be reenacted unless the Act is extended). A sunset provision, also known as an expiration clause, specifies the date of expiration for a certain statute. See Will Kenton, *Sunset Provision: What It Is and How It Helps Investors*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sunsetprovision.asp#toc-the-bottom-line> [<https://perma.cc/2DKY-ZN4U>] (Oct. 12, 2023) (defining sunset provisions and how they work in legislation). Sunset provisions are used in a number of circumstances, for example, when the “long-term ramifications” of a law are unknown or when government action is only required for a limited period of time. See *id.* (providing certain situations where sunset provisions are common).

¹⁷⁹ See Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157, 168 (2019) (noting that the HEAR Act’s obscurities could lead to more litigation in the future as claimants and their opposing parties work through the Act’s interpretive challenges).

¹⁸⁰ See Holocaust Expropriated Art Recovery Act § 4(5) (defining “Nazi persecution” as “persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates”); Frankel & Sharoni, *supra* note 179, at 180 (noting potential ambiguities created by broad definitions).

¹⁸¹ See *id.* at 172–73 (using New York’s demand and refusal rule, whereby the statute of limitations for replevin only starts once a claimant brings a demand for some property and is refused, as an example).

¹⁸² See *id.* at 168 (identifying some of the HEAR Act’s interpretive challenges); Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 960 (9th Cir. 2017); Gowen v. Helly Nahmad Gallery, Inc., 77 N.Y.S.3d 605, 623–24 (Sup. Ct. 2018) (holding that the claimant’s actions for Nazi-looted art claims were not time-barred under the HEAR Act’s uniform six-year federal statute of limitations), *aff’d*, 95 N.Y.S.3d 62 (App. Div. 2019).

¹⁸³ See Kevin P. Ray, *Restitution of Cultural Objects Taken During World War II (Part I)*, NAT’L L. REV. (Mar. 19, 2015), <https://www.natlawreview.com/article/restitution-cultural-objects-taken-during-world-war-ii-part-i> [<https://perma.cc/VH3N-BWWM>] (noting the massive displacement of art during the Nazi era and remarking on the amount of art, totaling over \$10 billion, that is still missing).

and broaden the scope of what is considered “confiscation” of art under the Act.¹⁸⁴ In the eight years since the HEAR Act was enacted, however, it has failed to play the prominent role that the Act’s supporters anticipated.¹⁸⁵

Additionally, the HEAR Act has a sunset provision that will cause it to expire on January 1, 2027 unless the Act is renewed.¹⁸⁶ If the Act expires, the law governing Nazi-looted art cases will revert to pre-HEAR Act state statutes of limitations.¹⁸⁷ Although sunset provisions are an important tool that allow the legislature to re-examine new legislation in light of social changes and other developments, such clauses also come with challenges.¹⁸⁸ Reviewing legislation takes time and can be difficult when the government is divided along party lines.¹⁸⁹

¹⁸⁴ See Alexandra Hull, *Shoring Up the HEAR Act: Proposed Amendments to Federal Legislation Designed to Assist Heirs and Claimants of Nazi-Looted Art*, 28 J.L. POL’Y 238, 258–59 (2019) (arguing that *Reif v. Nagy*, 80 N.Y.S.3d 629 (Sup. Ct. 2018), was surprising given a previous decision in *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010), in which the same claimants sought return of art from the same collection, but in *Bakalar*, the U.S. Court of Appeals for the Second Circuit focused on the heirs’ “lack of diligent efforts” to recover the artwork after World War II and held that the heirs had no claim of ownership to the art at issue).

¹⁸⁵ See *id.* at 273–74 (contending that because Nazi-looted art cases are fact-specific inquiries and involve complex legal issues, it is difficult for the law to provide predictable standards). Although the HEAR Act has attempted to increase opportunities for the restitution of Nazi-looted art, it has not been utilized in all the ways its proponents expected. See *id.* at 274 (observing that the HEAR Act has not been used significantly since its passage).

¹⁸⁶ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(g), 130 Stat. 1524, 1527 (codified at 22 U.S.C. § 1621 note (Holocaust Expropriated Art Recovery)) (including a sunset provision upon which the HEAR Act’s six-year uniform statute of limitations will expire).

¹⁸⁷ See *id.* (explaining what law will govern Nazi-looted art cases upon the Act’s expiration). Sunset provisions are expiration clauses included in certain legislation that terminate the law after a specified period of time. See Elizabeth I. Dorssom, *Sunsets Are Good; Sunsetting All Legislation Is a Bad Idea*, MEDIUM (Feb. 8, 2023), <https://medium.com/3streams/sunsetting-all-legislation-is-a-bad-idea-1469b3ba3143#:~:text=There%20are%20a%20number%20of,need%20to%20address%20also%20change> [<https://perma.cc/3859-9D6Q>] (defining sunset provisions and discussing their use).

¹⁸⁸ See *id.* (explaining why sunset provisions can be a positive aspect of legislation that is “less institutionalized or less professionalized” as it allows for Congress to follow the success of the legislation, consider its’ applicability to current issues, and update it with flexibility).

¹⁸⁹ See *id.* (summarizing certain challenges of sunset provisions and cautioning that such clauses could increase the legislature’s workload and ultimately result in the expiration of laws which include such provisions). The deep division of the U.S. government along party lines, and the subsequent challenge of getting enough votes to pass legislation, is not an uncommon occurrence. See William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, BROOKINGS INST. (Feb. 8, 2024), <https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed/> [<https://perma.cc/U3ET-J6B5>] (analyzing the collapse of a bipartisan border security bill). In October of 2023, a bipartisan coalition negotiated for four months to produce a bill aimed at securing the United States’ southern border. See *id.* (describing the border security bill). Ultimately, despite Democrats compromises over border closure and asylum speakers, the bill did not satisfy Republican demands for both political and substantive reasons. See *id.* (noting the lack of bipartisan support as one of the pitfalls of the bill). In May of 2024, the bill was reintroduced and failed for a second time. See Stephen Groves, Rebecca Santana & Mary Clare Jalonick, *Border Bill Fails Senate Test Vote as Democrats Seek to Underscore Republican Resistance*, ASSOCIATED PRESS, <https://apnews.com/article/border-immigration-senate-vote-924f48912eecf1dc544dc648d757c3fe> [<https://>

Although the HEAR Act was originally passed by an impressive bipartisan coalition, the high levels of political polarization in Congress raise concerns for the Act's potential renewal if Congress cannot reach an agreement.¹⁹⁰ There are a significant amount of works still missing from the Holocaust era, and the Act's looming expiration date may incentivize art collectors to conceal artwork that may have "questionable ownership" until the Act expires.¹⁹¹ This Part argues that the HEAR Act should be renewed, examines the current HEAR Act's deficiencies, and suggests improvements that should be adopted if the Act is revised and reinstated prior to its expiration in 2027.¹⁹²

A. Widening the Scope of the HEAR Act by Addressing Ambiguous Language

By creating a uniform statute of limitations, the HEAR Act, in its current construction, benefits plaintiffs who face procedural obstacles to restitution with regard to short, limited state statutes of limitations.¹⁹³ Another salient issue that arises in many Nazi-looted art cases is the lack of standards for what constitutes

perma.cc/45G7-PRC3] (May 23, 2024) (describing the political pressure and divides that led to the failure of the bill). Senator Chuck Schumer remarked that the Republicans unwillingness to negotiate and fix the emergency at the border was due, in part, to their "blind allegiance" to the party's political agenda and its leaders. *See id.* (identifying the inability to address pressing needs as a consequence of congressional polarization).

¹⁹⁰ *See* S. REP. NO. 114-394, at 6 (2016) (noting the bipartisan group of Senators who introduced the HEAR Act); Thomas B. Edsall, *America Has Split, and It's Now in 'Very Dangerous Territory,'* N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/opinion/covid-biden-trump-polarization.html> [<https://perma.cc/BG2Y-T775>] (remarking on the extremely polarized nature of the United States' electorate compared to other democracies and noting the challenges that can arise from this divide); Dorssom, *supra* note 187 (noting the consequences of the HEAR Act's sunset provision and identifying the risks of the legislation expiring).

¹⁹¹ *See* Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, 2019 U. ILL. L. REV. 363, 392 (arguing that the HEAR Act's expiration date should be extended given that authorities are continually discovering artwork from the Holocaust-era that has questionable ownership history).

¹⁹² *See infra* notes 193–213 and accompanying text. Although the HEAR Act has its shortcomings, it is also a very important piece of legislation and indicates the United States' policy commitment to recovering Nazi-looted property and art. *See* Holocaust Expropriated Art Recovery Act of 2016 § 3, 22 U.S.C. § 1621 note (outlining the purpose of the HEAR Act in aiding the victims of the Nazi-era and their families in restitution efforts). Additionally, if the HEAR Act is repassed with altered provisions, Congress can implement another sunset provision to re-examine how the statute is working after a set period of time. *See* Dorssom, *supra* note 187 (identifying that a sunset provision gives Congress the flexibility to update legislation in accordance with changing circumstances).

¹⁹³ *See* Hull, *supra* note 184, at 254 (identifying the HEAR Act's shortcomings when a plaintiff faces impediments beyond a lapsed statute of limitation). Hull argues that the Act lacks certainty and clear standards to address issues beyond statutes of limitations, resulting in unpredictability and confusion for plaintiffs, and potentially discouraging suits from being brought. *See id.* (discussing the Act's drawbacks).

confiscation.¹⁹⁴ As it is written, the HEAR Act provides a six-year statute of limitations for art and other property lost “because of Nazi persecution,” but fails to define this term further.¹⁹⁵ As evidenced in *Reif v. Nagy*, many works of art were seized by the Nazis through forced sales at depressed prices, coercive transactions to private entities or third parties, and under duress as a result of legalized persecution of Jewish people during the Holocaust.¹⁹⁶

Thus, courts could potentially apply different guidelines to determine what constitutes Nazi-looted art, undermining the HEAR Act’s intent to aid in restoring lost property of Holocaust-era victims and their heirs.¹⁹⁷ The statute’s legislative history suggests an intentionally broad interpretation of the term, emphasizing the Act’s goal of aiding in the restitution of “art lost in the Holocaust” and noting that persecution was executed by “the Nazi Party, the gov-

¹⁹⁴ See Frankel & Sharoni, *supra* note 179, at 180 (discussing challenges regarding the Act’s broad definition of confiscation); Patricia Cohen & Graham Bowley, *Dispute Over Nazi Victim’s Art*, N.Y. TIMES (Oct. 24, 2024), <https://www.nytimes.com/2014/10/25/arts/design/christies-and-sothebys-differ-on-handling-of-2-schieles.html> [<https://perma.cc/CF8L-B54R>] (explaining how the Act’s lack of standards in defining Nazi-looted art is exacerbated by the fact that, in many cases, there are significant gaps in the records and conflicting accounts). Patricia Cohen and Graham Bowley’s article compares two works of art that were auctioned off by Christie’s and Sotheby’s, both by Egon Schiele and both from Grunbaum’s art collection. See Cohen & Bowley *supra*. (comparing two similar cases to underscore the challenges that Holocaust-era victims and their heirs face because of the lack of a clear definition of Nazi-looted art). Despite the seeming similarities in the cases, in Christie’s sale of Schiele’s watercolor, *Town on the Blue River*, Grunbaum’s heirs were compensated as a part of a settlement agreement, but the court in *Bakalar v. Vavra* determined that Sotheby’s could sell *Seated Woman with Bent Left Leg* without paying the heirs, as it found insufficient evidence that the work had been looted. See *id.* (utilizing two examples involving the Grunbaum collection to show that experts disagree on how to deal with art lost during the Nazi-era and that this can result in “restitution roulette”).

¹⁹⁵ See Holocaust Expropriated Art Recovery Act of 2016 § 5(a), 22 U.S.C. § 1621 note (applying the uniform federal statute of limitations in cases where art or property was lost because of persecution by the Nazis).

¹⁹⁶ See Frankel & Sharoni, *supra* note 179 at 180 (listing a number of other ways that Jewish art and property was lost during the Nazi-era, as a result of private sales, instead of outright seizure by the Nazis); *Reif v. Nagy*, 80 N.Y.S.3d 629, 631, 634 (Sup. Ct. 2018) (noting that the Nazis forced Grunbaum to sign over his power of attorney to his wife while he was in a concentration camp so that the Nazi Party could inventory his art collection), *aff’d as modified*, 106 N.Y.S.3d 5 (App. Div. 2019).

¹⁹⁷ See Frankel & Sharoni, *supra* note 179, at 177 (arguing that the HEAR Act’s ambiguous language creates uncertainty regarding its applicability to transactions not explicitly facilitated by the Nazis that will result in litigation delays for Nazi-looted art restitution claims). Scholars Simon Frankel and Sari Sharoni also argue that the HEAR Act’s requirement in § 5(a) of “actual discovery” to trigger the statute of limitations, that is defined as both the “identity and location of the artwork” and a “possessory interest of the claimant in the artwork” is unclear. See *id.* at 177–78 (identifying the vague nature of the term “possessory interest of the claimant” in the context of the HEAR Act). The authors note that “possessory interest” usually indicates a degree of control akin to ownership, but in the context of the art, “possessory interest” seems to suggest a weaker interest, similar to a “mere caretaker.” See *id.* at 178–79 (arguing that the uncertainty of the “possessory interest” standard could result in differing applications of the HEAR Act in future litigation).

ernment of Germany at the time, governments allied with Germany, private agents, and others.”¹⁹⁸

Understandably, courts have appeared reluctant to address the difference in applying the HEAR Act to narrow claims of ownership of directly Nazi-looted art versus broader claims for art lost during the Nazi-era related to Nazi persecution.¹⁹⁹ If Congress elects to reexamine the HEAR Act prior to its expiration in 2027, which it should, it should also clarify this ambiguity and apply the statute of limitations to all art lost in the period leading up to, and during, the Holocaust, thereby encompassing art lost without the direct involvement of the Nazis, but still resulting from Nazi persecution.²⁰⁰ Though such an amendment would require courts to engage in fact-specific inquiries, it would better facilitate the restitution of property for Holocaust-era victims and their heirs.²⁰¹

B. Clarifying the Uniform Statute of Limitations by Adopting a Demand and Refusal Rule

The HEAR Act’s six-year statute of limitations is designed to be claimant friendly and to overcome the procedural obstacle presented by typically short state statutes of limitations.²⁰² New York’s replevin statute, however, has a unique demand and refusal rule for stolen chattels.²⁰³ The New York statute provides a three-year statute of limitations that only begins when a claimant states a demand to a current holder for the return of property and is refused.²⁰⁴ Compared to most other state statutes of limitations that begin to run at the time of the theft, New York’s demand and refusal rule is appealing in the con-

¹⁹⁸ See S. REP. NO. 114-394, at 3, 9 (2016) (determining under what circumstances the HEAR Act’s statute of limitations should apply to Nazi-looted art claims).

¹⁹⁹ See *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019) (holding for the museum, and finding that the HEAR Act did not prevent the museum’s defense of laches and the plaintiffs’ claims were barred, but not determining whether the sale constituted Nazi looting of art); Holocaust Expropriated Art Recovery Act § 5(a) (defining which claims are subject to the statute of limitation).

²⁰⁰ See Frankel & Sharoni, *supra* note 179, at 182 (cautioning that Congress’s imprecise language in the HEAR Act regarding what is considered Nazi-looted art will negatively affect future litigation).

²⁰¹ See Holocaust Expropriated Art Recovery Act § 3 (setting forth the purpose of the HEAR Act as a tool to aid in the restitution of Nazi-looted art by providing the victims of Nazi persecution and their heirs with a fair opportunity to assert ownership over Nazi-looted art).

²⁰² See S. REP. NO. 114-394, at 5–6 (explaining the HEAR Act’s purpose to eliminate the unfair impediments, such as state statute of limitations, that claimants face in Nazi-looted art cases).

²⁰³ See Hull, *supra* note 184, at 267 (providing that, in New York, in the context of good faith purchasers, a replevin cause of action for stolen chattel “accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it”) (quoting *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991)).

²⁰⁴ See Hull, *supra* note 184, at 267–68 (identifying New York’s distinctive demand and refusal rule).

text of Nazi-looted art, where claimants are contesting property lost nearly a century ago.²⁰⁵

In contrast, the HEAR Act's six-year statute of limitations asserts that a claimant "may" commence a claim "not later than 6 years after the actual discovery" of the work's location.²⁰⁶ Thus, as scholars Simon J. Frankel and Sari Sharoni note, the HEAR Act could possibly start the clock for New York claimants who have "actual knowledge" of their property before the state statute of limitations would begin to run.²⁰⁷ Additionally, the Act's statute of limitations excludes claims if the claimant had actual knowledge of lost property between 1999 and 2016, and six or more years passed from the date the claimant "acquired such knowledge . . . during which time" the claim was not time-barred by any applicable statute of limitations.²⁰⁸ Thus, the HEAR Act's statute of limitations could ironically disadvantage a claimant seeking to recover Nazi-looted art under New York law.²⁰⁹

Prior to the HEAR Act's expiration in 2027, Congress should consider replacing the discovery standard in the Act's statute of limitations, and its exclusions, with a New York-style demand and refusal rule.²¹⁰ This shift would more aptly fulfill the statute's purpose of providing claimants in Nazi-looted art cases with a fair opportunity to adjudicate their claims on the merits and avoid unfair procedural obstacles.²¹¹ Additionally, the HEAR Act includes the

²⁰⁵ See *id.* (comparing New York's demand and refusal rule to the HEAR Act's statute of limitations in the context of Nazi-looted art claims).

²⁰⁶ See Holocaust Expropriated Art Recovery Act of 2016 § 5(a), 22 U.S.C. § 1621 note (defining the six-year statute of limitations for Nazi-looted art claims).

²⁰⁷ See *id.* (identifying the Act's knowledge requirement). The drafters' choice of the word "may," instead of "must" or "should" is unusual for a mandatory time limitation period. See Frankel & Sharoni, *supra* note 179, at 172–74 (noting that statutes of limitations are usually defined in mandatory commands, not permissive directives). Thus, the statute's use of the word "may" indicates that courts could construe the wording liberally, allowing claims to be initiated that are timely under relevant state statutes of limitations, even if six years have passed. See *id.* (considering that the intentional use of the word "may" could resolve potential conflicts between the HEAR Act's statute of limitations and New York's demand and refusal rule).

²⁰⁸ Holocaust Expropriated Art Recovery Act § 5(e)(2); see *id.* § 5 (introducing an exception to the statute of limitations). This exclusion was designed to prevent the revival of claims where claimants had actual knowledge of lost art or property following the Washington Conference but failed to bring a timely claim in a reasonable manner. See Frankel & Sharoni, *supra* note 179, at 169 (proposing the impetus for including an exception to the HEAR Act's six-year statute of limitations).

²⁰⁹ See Hull, *supra* note 184, at 268–69 (noting that the HEAR Act would block a claimant who had actual knowledge of a claim between 1999 and 2016 and that was not time-barred during a six-year period, but that the same claimant could potentially bring a claim under New York's demand and refusal rule).

²¹⁰ See *id.* at 271 (suggesting a revision to the HEAR Act's statute of limitations that resembles New York's demand and refusal rule to better meet the Act's purpose and fix its discrepancies).

²¹¹ See Holocaust Expropriated Art Recovery Act § 3 (creating a uniform statute of limitations so that victims of Nazi persecution and their heirs have a fair opportunity to bring claims of restitution); Hull, *supra* note 184, at 271 (indicating that a demand and refusal rule would allow more Nazi-looted art era cases to be considered on their merits).

doctrine of laches as a valid defense against Nazi-looted art claims, meaning that judges may refuse to consider claims when a defendant is prejudiced by a delay caused by a claimant who waited too long to assert a claim.²¹² Thus, if Congress adopted a demand and refusal rule, laches would continue to serve as a check for claims brought in an unreasonable manner.²¹³

CONCLUSION

Between 1933 and 1945, the Nazi Party systematically executed the greatest art theft in history. Through methodical anti-Semitic legislation and ruthless persecution, the Nazis involuntarily seized hundreds of thousands of Jewish art works and other cultural property through outright looting, misappropriation, and duress. Following the end of World War II, many countries took part in significant international efforts to aid Holocaust-era victims in their endeavors to locate and restore their lost art and property. Unfortunately, complex changes in ownership made it difficult to trace many artworks, because of the loss and destruction of records and the massive volume of works lost during the Holocaust. Additionally, as cases such as *Detroit Institute of Arts v. Ullin* and *Orkin v. Taylor* highlight, restitution efforts were often fruitless in the face of procedural obstacles. These impediments motivated the United States' legislature to pass the Holocaust Expropriated Art Recovery Act in 2016, that set a federal six-year statute of limitations for Nazi-looted art cases. Although the legislature's intentions were commendable, the HEAR Act contains deficiencies. As the HEAR Act's expiration looms, Congress should review and repass the statute, and take this chance to address the Act's ambiguities and shortcomings, thereby promoting the HEAR Act's purpose to provide victims of Nazi persecution and their heirs with the opportunity to reclaim their lost art and property.

ABIGAIL GREENBERGER ROSOVSKY

²¹² See Holocaust Expropriated Art Recovery Act § 5(a) (subjecting the statute of limitations to "any other provision of Federal or State law or any defense at law relating to the passage of time"); Frankel & Sharoni, *supra* note 179, at 175 (arguing that an earlier version of the HEAR Act precluded the use of laches and that this omission from the final version suggests that the drafters wanted this remedy to be available).

²¹³ See Hull, *supra* note 184, at 270–71 (noting that laches can still apply to claimants who bring claims under a demand and refusal rule).