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INTRODUCTION

Historians estimate that between $230 and $320 billion in assets were stolen, including an estimated $20.5 billion in artwork, as a result of Adolph Hitler's regime during the Second World War.[1] The unprecedented theft of Europe's art collections included more than 240,000 artworks from museums and private collections being displaced, transported and stolen by 1944.[2] It is estimated that the scale of looted European art during the Nazi period exceeded that of all the Napoleonic Wars combined.[3]

Interestingly enough, the primary difference between the looting and confiscation of art during the Second World War and prior wars was that for the first time in history, armed forces consisted of "highly trained art specialists in their ranks, whose duty it was to secure and preserve movable works of art, and whose professionalism" saved most of the artworks from complete destruction.[4] This act of professionalism, however, did not stem

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[1] Emily A. Maples, Comment, *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look at Art Stolen During the Third Reich*, 9 TULSA J. COMP. & INT'L L. 355, 356 (2001).

[2] Alexander Minkovich, Note, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM.-VLA J.L. & ARTS 349, 352 (2004); Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 558 (1999).

[3] HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 23 (1997).

[4] Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and A Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 92 (1999); Lynn H. Nicholas, *World War II and the Displacement of Art and Cultural Property*, *in* THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 39 (Elizabeth Simpson ed., 1997).

from philanthropic ideology, but rather it reflected the sophistication of Hitler's art campaign. The purpose was two-fold: the Nazis looted art to "promote (and return to Germany) what in their view were examples of superior art and culture" and to eradicate the Jewish race by annihilating its culture as a part of their "Final Solution."[5] For this task, Hitler ordered the removal of 16,000 pieces of art from state collections.[6] Finding them insufficient, Hitler turned his focus towards the looting of private art collections following the occupation of Austria.[7]

The Nazis designated the Galerie Nationale du Jeu de Paume as its central repository, where more than 400 crates of confiscated artwork were deposited, unpacked and marked for inventory.[8] Of the more than 400 crates of confiscated artwork, an estimated three-fourths of the artworks were confiscated by the middle of 1941, less than one year after the German invasion.[9] At the Jeu de Paume, the confiscated works "were divided up and, depending on their quality and desirability, either transported to Germany or put up for sale."[10]

As a result, Hitler systematically acquired the most desirable art in Europe.[11] Similar to Napoleon's looting of Egypt, Hitler sought to capture the best European art from the 1500s to the 1930s in order to establish a great museum in his hometown of Linz, Austria.[12] In doing so, Hitler sought to repatriate works of his "German heritage" and to house works by those artists "whom Hitler found most culturally valuable."[13] The Nazis targeted "pure Northern European art of the highest order."[14] Artists that reflected this Nazi aesthetic ideology included, "Vermeer, Pieter Bruegel the Elder, Rembrandt, Hals, Fragonard, Van Eyck and Dürer."[15]

In the German war of conquest, Hitler and his officials also targeted modern degenerate art. "Degenerate art" referred to art that either depicted Jewish subjects, was critical of Germany, or contradicted the Nazi ideology. Hitler also viewed artworks by modern masters such as Van Gogh, Chagall and Picasso to be as inferior as the Jews themselves due to their

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[5] Minkovich, *supra* note 2, at 352.

[6] Maples, *supra* note 1, at 358.

[7] *Id.*

[8] FELICIANO, *supra* note 3, at 105–07.

[9] JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 131 (1996).

[10] FELICIANO, *supra* note 3, at 108.

[11] Schlegelmilch, *supra* note 4, at 93.

[12] John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriations Movement Respecting Cultural Property (Part Two)*, 28 ENVIRONS ENVTL. L. & POL'Y J. 1, 81 (2004); Schlegelmilch, *supra* note 4, at 93–94.

[13] Schlegelmilch, *supra* note 4, at 93–94.

[14] *Id.*

[15] *Id.*

exaggerated and revolutionary depictions of the human figure.[16] Modern or abstract works by Pissarro and Matisse, as well as works displaying forms of Dadaism, Futurism and Cubism were also included in this targeted group.[17] Despite his personal distaste of "degenerate art," Hitler did not destroy these pieces, but rather intended to use them as bargaining pieces once a peace treaty was signed with conquered countries, such as France, Belgium and Holland.[18]

Although Hitler never ended up using these artworks as he intended, the displacement of Europe's art treasures continued well after Hitler's demise and the end of the Second World War. Two days after the liberation of Paris, the Allied forces tried to recover the looted artworks that they discovered in "mines, hidden vaults, monasteries, office buildings, homes and even medieval castles."[19] In the midst of the confusion surrounding the German collapse, much of the systematic nature of Hitler's looting was undone.[20] Despite the Allied forces' attempts to salvage, catalogue and repatriate the "huge caches of art treasures," looting by members of the Allied forces occurred as well.[21]

More than fifty years after the fall of Hitler's regime, Europe's cultural treasures have gradually resurfaced in private collections, galleries, art catalogues, auctions and museums all over the world. The murky provenance of some of these artworks and their association with the Holocaust did not deter art collectors from purchasing an impressive collection of European art, never before available in this scale.[22] Since the initial theft of the artwork by the Nazis and the artworks' subsequent displacement, some of these works of art have crossed international borders and changed hands numerous times.[23] "The sheer number of pieces stolen during the war, the extent of their subsequent distribution, and the length of time that has since passed" make the possibility of an individual nation addressing the problem within its own borders all the more impractical.[24]

Immediately after the Second World War, European countries passed laws that aimed to return works of art to their original owners.[25] But

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[16] *Id.*

[17] Maples, *supra* note 1, at 358.

[18] Schlegelmilch, *supra* note 4, at 93–94.

[19] *Id.* at 95.

[20] *Id.*

[21] *Id.*

[22] Ian Traynor, *Precious Plunder*, THE GUARDIAN, Dec. 8, 2001, at 56.

[23] *Id.* at 118; Paulina McCarter Collins, Comment, *Has "The Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 118 (2002).

[24] Schlegelmilch, *supra* note 4, at 91.

[25] Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations*

despite these efforts, many works went unclaimed and were later deposited with national museums.[26] Only about half of the looted art has been returned to the owners or their heirs.[27] According to Ronald Lauder, former U.S. Ambassador to Austria and now Chairman of the Museum of Modern Art in New York, "more than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era."[28] The *Republic of Austria v. Altmann* case has became one in a growing series of claims of Nazi-looted art that, although previously centered in Europe for decades, has now been transported to the United States. To date, Nazi-looted works have been found in major as well as mid-sized U.S. museums, art galleries and private collections, triggering domestic and international claims.[29]

Plaintiffs, nevertheless, face enormous legal barriers, such as choice of law, sovereign immunity and statute of limitations, in establishing ownership over Nazi-looted art.[30] Most cases follow this fact pattern. The whereabouts of the looted artwork remains unknown for decades. When it is discovered, the artwork is often in the hands of a good faith purchaser who claims to have valid title to the artwork. Furthermore, the artwork is likely to have appreciated in value in the past seventy years to further complicate any possible resolution between the original owner and the good faith purchaser.[31] With the Supreme Court's recent decision in *Republic of Austria v. Altmann* to extend subject matter jurisdiction over Nazi-looted art against a foreign sovereign, Holocaust victims will now, more than ever, seek redress in U.S. courts for the return of their stolen property.[32] As the restitution of Nazi-looted art is left for courts to decide on a case by case scenario, the number and complexity of original owner versus good-faith purchaser disputes over stolen art will only continue.

In this note, I will show how *Republic of Austria v. Altmann*, while seemingly advancing the reparation of Nazi-looted art claims, undermines the stability of the international art market and the ultimate ability of future claimants to successfully recover their artwork due to inconsistent

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on Claims for Nazi-Looted Art, 17 CARDOZO ARTS & ENT. L.J 447, 475 (1999).

[26] THE INTERNATIONAL COUNCIL OF MUSEUMS, *Spoliation of Jewish Cultural Property*, *at* http://icom.museum/spoliation.html (last visited Oct. 22, 2005).

[27] STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 194 (2003).

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

[29] Ronen Sarraf, *The Value of Borrowed Art*, 25 BROOKLYN J. INT'L L. 729, 748 (1999).

[30] Cohan, *supra* note 12, at 69.

[31] Lori J. Parker, *Proof of a Claim Involving Stolen Art or Antiquities*, 77 AM. JUR. PROOF OF FACTS 3d § 259 (2005).

[32] *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005) (Holocaust survivors' lost-property claims against the Vatican Bank and others for profits from looted assets and slave labor).

application of state and federal statutes. Part I will summarize the recent Supreme Court decision of *Republic of Austria v. Altmann* and its claim against a foreign country for the return of Nazi-looted art. Part II will examine what current legal protections exist to buffer the threat of litigation over Nazi-looted artwork that is on loan to museums. Part III will then focus on how these laws are applied in recent cases that have arisen after *Republic of Austria v. Altmann* and analyze their implications for potential claimants and future defendants. Lastly, Part IV will advocate for a uniform and transparent set of rules that will encourage resolution of art title claims between the original owners, its heirs or assigns, and the good faith purchaser without fear of being subject to outcome determinative jurisdictions, inconsistent judicial processes, and undesired seizures of artworks.

I. *REPUBLIC OF AUSTRIA V. ALTMANN*

At issue in *Republic of Austria v. Altmann* was a Holocaust victim's longstanding effort to reclaim six paintings looted by the Nazis in the 1930's.[33] One of the disputed paintings, "Adele Bloch-Bauer I" is arguably the most famous Gustav Klimt portrait apart from "The Kiss." A prime example of the so-called "golden style," the painting's intricate ornamentation, particularly of the subject's dress, dissolves behind the golden surface. Only the most attentive eye will detect a silhouette of a chair upon which the subject mysteriously floats. As with Byzantine idols, only the face and the hands of the subject's body are depicted, while the mere outline of her cascading dress and coat hints at the figure's body.[34] The thin, delicate dress straps belie the weight of her richly adorned dress, thus adding to the painting's ethereal quality. Meanwhile, strangely flat and iconic images of Egyptian god's-eye motifs and other stylized geometric shapes and designs float over the fabric of her dress. The juxtaposition of the flat, ornamental design with Klimt's delicate modeling of the subject's face and hands contributes to the painting's compositional ambiguity.[35]

This portrait with its "mosaics of unprecedented splendor," as referred to by Klimt himself, evidently held a special significance for him, as evidenced by the more than 100 preparatory drawings he made of the subject over a period of several years.[36] As one commentator notes, Klimt's treatment of gold in the paintings is "reminiscent of Egyptian [evocations]

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[33] Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002), *aff'g* 142 F. Supp. 2d 1187 (C.D. Cal. 2001).

[34] GUSTAV KLIMT, KLIMT'S WOMEN 115 (Tobias G. Natter & Gerbert Frodl eds., 2000).

[35] *Id.*

[36] *Id.*; GERBERT FRODL, GUSTAV KLIMT IN THE AUSTRIAN GALLERY BELVEDERE IN VIENNA 54 (Nicholas T. Parsons trans., The Austrian Gallery ed., 1995).

to eternity, the profanity of medieval gold-ground panel painting, but also the exoticism of Japanese lacquer painting."[37] Viewed as "an universally valid celebration of a beautiful woman," the painting graced the subject with all the sumptuousness and ornamentation befitting an empress.[38] The subject in the portrait however is not an empress but rather Maria Altmann's aunt, Adele Bloch-Bauer.

Maria Altmann is the 89-year old niece and heir of Ferdinand Bloch-Bauer, a Czechoslovakian Jew, art patron and wealthy sugar magnate.[39] As the sole living heir to the estate of her Jewish uncle, Maria Altmann brought suit against the Austrian Gallery to recover six Gustav Klimt paintings that the Nazis took from her uncle's house during the Second World War.[40] Ferdinand Bloch-Bauer and his wife, Adele, were great patrons of the arts. Ferdinand had commissioned Klimt to paint two portraits of his wife, Adele, as well as four landscape paintings. After Adele's death from meningitis at the age of 43 in 1925, the six paintings adorned the walls of Adele's memorial room.[41] In her will, Adele asked her husband to consider donating the six paintings to the Austrian Gallery upon his death.[42] She, however, would not witness all the events that would transpire and ultimately impact her husband's final decision. In his last will, written in 1945 a month before he died while in exile in Switzerland, Ferdinand left his entire estate, including the six Gustav Klimt paintings, to Altmann and two of her siblings.[43] Dr. Erich Fuerher, the Nazi lawyer responsible for liquidating Ferdinand's collection during the Holocaust, gave two of the paintings, "Adele Bloch-Bauer I" and the "Apple Tree I," to the Austrian Gallery in 1941 in exchange for the "Schloss Kammer am Atersee III," a painting that Ferdinand had previously donated to the museum in 1936.[44] This purported gift was accompanied by a note, signed "Heil Hitler," in which Dr. Fuerher claimed to be making the donation in fulfillment of Ferdinand's wife, Adele Bloch-Bauer's last will and testament.[45]

In 1948, Altmann asked Austria to return a large number of artworks previously owned by her uncle. Austria agreed to export some items to Altmann but only in exchange for ceding ownership of five Klimt paintings to the Gallery. Fifty years later, Austria enacted postwar restitution laws to

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[37] KLIMT, *supra* note 34, at 116.

[38] FRODL, *supra* note 36, at 54.

[39] *Altmann*, 317 F.3d at 958.

[40] *Id.*

[41] Meryl Conant, *Whose Art Thou? A Woman's or a Nation's?*, MEDILL NEWS SERV., May 10, 2004, *at* http://docket.medill.northwestern.edu/archives/000163.php.

[42] *Id.*

[43] *Id.*

[44] *Altmann*, 317 F.3d at 959.

[45] *Id.*

facilitate the return of expropriated artwork and effectively voided any illegitimate transactions that were disguised as donations in exchange for export permits. While the restitution committee ordered the return of some items, they voted against the return of the Klimt paintings to Altmann. They claimed that the five paintings belonged to the Austrian National Gallery because the paintings were rightfully donated to the gallery by Ferdinand who had a legal obligation to fulfill his wife's promise.[46]

In 1999, Altmann filed suit against the Republic of Austria in an Austrian court to reclaim the paintings, but voluntarily dismissed the case due to prohibitive court filing fees, a common practice in most European courts.[47] Unable to bring suit in Austria, she then refiled her lawsuit in the U.S. District Court for the Central District of California alleging expropriation of property in violation of international law against Austria and the Austrian Gallery, an instrumentality of the Republic.[48]

A. Foreign Sovereign Immunity Act[49]

Foreign sovereigns and their instrumentalities are generally immune from suit in U.S. courts under the Foreign Sovereign Immunities Act ("FSIA"). Altmann, however, relied on the Act's "expropriation exception," which expressly exempts from immunity all cases involving "rights in property taken in violation of international law, provided the property has a commercial connection to the United States or the agency or instrumentality that owns the property is engaged in commercial activity [in the United States.]"[50] Altmann argued that the Austrian Gallery's present day publishing and advertising activities of the Klimt paintings in the United States satisfied the commercial activity condition.[51] The Republic of Austria, on the other hand, argued that it was immune from the jurisdiction of U.S. federal and state courts under the FSIA because the alleged misappropriation in 1948 occurred prior to the FSIA's enactment in 1952.[52] Up until the *Altman* case, most courts interpreted the FSIA to have no retroactive applicability to lawsuits involving acts conducted prior to 1952.[53]

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[46] Dana Goodyear, *Family Portrait*, NEW YORKER, Oct. 25, 2004, at 34.

[47] Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal. 2000); Conant, *supra* note 41.

[48] *Altmann*, 142 F. Supp. 2d at 1187.

[49] 28 U.S.C. §§ 1602–1611 (2005).

[50] Republic of Austria v. Altmann, 541 U.S. 677, 685 (2004), *aff'g* 327 F.3d 1246 (9th Cir. 2003), *on remand* 377 F.3d 1105 (9th Cir. 2004), *dismissed by* 335 F. Supp. 2d 1066 (C.D. Cal. Sept. 8, 2004).

[51] *Id.* at 707.

[52] *Altmann*, 317 F.3d at 954.

[53] 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3662 (3d ed. 1998).

Prior to 1952, the United States adhered to an absolute theory of sovereign immunity, whereby foreign sovereigns were absolutely immune from suit in U.S. courts.[54] As a result, the U.S. federal courts generally deferred to the request of the State Department and granted immunity "in *all* actions against friendly foreign sovereigns" as a matter of "grace and comity on the part of the United States."[55] This changed in 1952 when the acting legal advisor for the State Department, Jack Tate, wrote a letter to acting Attorney General Philip Perlman announcing a new approach to sovereign immunity that permitted foreign sovereigns to remain immune from suit regarding their public or sovereign acts, but not their private or strictly commercial acts.[56]

The United States' switch from an absolute theory to the "restrictive theory" of narrowed the protection afforded by the doctrine of sovereign immunity to suits involving a foreign sovereign.[57] Without a formal rule applying the new restrictive approach to sovereign immunity, however, foreign nations continued to place diplomatic pressure on the State Department. The State Department was left with the task of "trying to apply a legal standard without the benefit of judicial procedure."[58] Political and diplomatic considerations also "led to suggestions of immunity where it was not available under the restrictive theory."[59] What resulted was an unworkable, *de facto* division of authority between the State Department and the judiciary branch in granting sovereign immunity.

In response to the lack of clarity concerning the granting of sovereign immunity, Congress enacted the FSIA in 1976.[60] The FSIA's enactment formally adopted the "restrictive theory" of sovereign immunity and placed the discretion of granting sovereign immunity squarely with the courts.[61] The FSIA was more than simply a jurisdictional statute; rather, it became the "codification of the standards governing foreign sovereign immunity as an aspect of *substantive* federal law."[62] As a result, the FSIA is currently "the sole basis for obtaining subject matter jurisdiction over a foreign state,

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[54] Rodney M. Zerbe, *Immunity from Seizure for Artworks on Loan to United States Museum*, 6 NW. J. INT'L L. & BUS. 1121, 1127 (1984–85).

[55] Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983) (emphasis added).

[56] *Id.*

[57] *See* H.R. REP. No. 94-1487, at 8–9 (1976) (citing 26 DEP'T ST. BULL. 984–85 (1952)), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606–08.

[58] Jeremy Ledger Ross, Note, *Escaping the Hourglass of Statutory Retroactivity Analysis in Republic of Austria v. Altmann*, 79 TUL. L. REV. 1113, 1115 (2005).

[59] Danielle Ducaine, *Expectations of Immunity: Removing the Barriers to Retroactive Application of the Foreign Sovereign Immunities Act to Pre-1952 Events*, 25 LOY. L.A. INT'L & COMP. L. REV. 697, 723, n. 51 (2003).

[60] Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602–1611 (2005).

[61] *Republic of Aus.*, 541 U.S. at 690.

[62] *Id.* at 695 (emphasis in original).

its agencies, or its instrumentalities."[63] Thus, in *Republic of Austria v. Altmann*, U.S. courts would have subject matter jurisdiction over the case if the FSIA applied retroactively to conduct preceding its enactment and to conduct preceding the adoption of the "restrictive theory" of sovereign immunity by the United States in 1952.

B. The Court's Decision

In 2004, by a vote of six to three, the U.S. Supreme Court held that the FSIA did in fact apply to pre-1952 conduct.[64] As a result, the Court changed the face of the FSIA and reversed years of precedent to the contrary.[65] The Court in *Altmann* decided that the Austrian government could not expect immunity in light of its complicity in and perpetuation of the expropriation of the Klimt paintings.[66] The Supreme Court allowed subject matter jurisdiction under the FSIA and held that the statute applies to preenactment conduct and that "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles [herein]."[67]

The *Altmann* case attracted much attention from not only the art community, but also from the State Department and other foreign nations. The U.S. government submitted a friend-of-the-court brief and participated in oral arguments on behalf of Austria to express its concerns over the potential for the *Altmann* decision to open the door to other suits against foreign nations in U.S. courts.[68] Deputy Solicitor General Thomas G. Hungar stressed to the Court the need for resolution through "diplomatic negotiations and foreign claims processes, and not in U.S. courts."[69] Contrary to popular belief of the decision's potential detrimental effects on foreign policy, *Altmann* has become a purely statutory holding that is both narrow and case specific. The case does not rule against the specific defenses that can be used by foreign sovereigns, nor prohibit the State

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[63] WRIGHT ET AL., *supra* note 53.

[64] *Republic of Aus.*, 541 U.S. at 677.

[65] *See* Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988); Jackson v. P.R.C., 794 F.2d 1490 (11th Cir. 1986); Djordjevich v. Bundesminister Der Finanzen, F.R.G., 827 F. Supp. 814 (D.D.C. 1993).

[66] *Republic of Aus.*, 541 U.S. at 677.

[67] *Id*; Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602 (2005).

[68] Mexico, Japan, and France also submitted briefs to the Supreme Court. *See* Brief of Amici Curiae Japan in Support of Petitioners, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13); Brief of Amici Curiae, Societe Nationale Des Chemins de fer Francais in Support of Neither Party, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13); Brief of Amici Curiae in Support of Petitioner (Mexico), Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13).

[69] Brief for the United States as Amicus Curiae Supporting Petitioners, at 15, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13).

Department from filing statements of interest urging the court to decline jurisdiction. Lastly, the Court also left open the possibility of courts deferring to the Executive branch under the Act of State doctrine. The Act of State doctrine prevents U.S. courts from sitting "in judgment on the acts of the government of another done within its own territory."[70] Under this doctrine, every sovereign state is bound to respect the independence of every other sovereign state and any redress of grievances arising from acts should be obtained through diplomatic channels.[71]

In the aftermath of the *Altmann* decision, the Supreme Court remanded for reconsideration two pending cases involving pre-1952 conduct.[72] Despite these cases' survival on jurisdictional questions, the Court dismissed the cases upon reconsideration under the political question doctrine and reasons of comity.[73] Thus, substantial obstacles remain and must be overcome in order to bring a claim against foreign sovereigns in federal court even after the *Altmann* decision.

The Supreme Court remanded *Republic of Austria v. Altmann* to a California district court. Despite Austria's attempts to dismiss the case, District Court Judge Florence-Marie Cooper denied the motion to dismiss on September 8, 2004 and the trial was tentatively set to begin in the fall of 2005.[74] In May 2005, the parties reached an agreement to arbitrate the claim in Austria.[75] The parties have agreed to accept the decision of a three person arbitration panel in Austria as final without any right of appeal.[76] Although the case did not proceed to trial for final adjudication, the implications of this case are far-reaching.

II. EXISTING LEGAL PROTECTIONS OF ART LOANS

Many share Professor Michael Bazyler's sentiment that the availability of U.S. courts to Holocaust victims in their claim for lost artwork is a "positive development," particularly in light of the fact that it may be the "last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law."[77] However, if multijurisdictional art

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[70] *Republic of Aus.*, 541 U.S. at 677.

[71] *Id.*

[72] Joo v. Japan, No., 01-7169, 2005 U.S. App. LEXIS 12755 (D.C. Cir. June 28, 2005); Abrams v. Société Nationale des Chemins de Fer Francais, 389 F.3d 61, 64–65 (2d Cir. 2004).

[73] *Id.*

[74] Altmann v. Republic of Austria, 335 F. Supp. 2d 1066 (C.D. Cal. Sept. 8, 2004).

[75] Tom Tugend, *Artful Solution to Nazi Looting*, JEWISH J. OF GREATER L.A., May 27, 2005.

[76] *Republic of Austria, Maria Altmann Agree to Arbitrate Klimt Paintings Dispute*, BURRIS & SCHENBERG, LLP (May 18, 2005), *at* http://www.bslaw.net/news/050518.html.

[77] *See* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 8 (2000).

claims like *Altmann* continue, it may have an adverse affect on the art market and, in particular, the loaning and exchanging of art.

Private owners of art are encouraged to loan portions of their collections to museums and galleries for public viewing. Title claim disputes, however, can be detrimental to the common practice of loaning works of art.[78] If there is a dispute over title of the artwork, the owner is not likely to want to lend the artwork in the event a claimant seizes the opportunity to file a lawsuit while the painting is in a foreign jurisdiction.[79] The threat of litigation over Nazi looted artwork can therefore have a chilling effect on the art loans among various museums and nations.

Even more detrimental to the owner is the possibility of their artwork being seized in a foreign jurisdiction while on loan in that jurisdiction. The seizure of artwork can occur through various means: "(1) seizure pending resolution of an ownership dispute; (2) pre- or post-judgment attachment to secure satisfaction of a judgment; (3) withholding due to a claim against the lender or lending government by the museum itself; (4) seizure by the government due to political controversy; and (5) seizure by customs on various grounds."[80] As the number of adverse claims rises, the threat of the seizure of artwork based on ownership disputes will only worsen.

Congress and various states have had the foresight to institute legal protections that have up to now permitted organizations and institutions engaged in nonprofit activities to import, on a temporary basis, works of art and objects of cultural significance from foreign countries for exhibit and display, without the risk of the seizure or attachment of the artwork in the United States.[81]

A. Immunity From Seizure Act[82]

In response to potential diplomatic conflicts over the seizure of artwork, Congress enacted the Mutual Educational and Cultural Exchange Program of 1961. The relevant language of the Federal Immunity From Seizure Act ("IFSA") provides that no U.S. or state court "may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural

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[78] *Id.*

[79] Christine Boggis, *Going for Gold*, BURRIS & SCHENBERG, LLP, at 23 (Dec. 2003/Jan. 2003), *at* http://www.bslaw.net/news/031222.pdf.

[80] Laura Popp, *Arresting Art Loan Seizures*, 24 COLUM.-VLA J.L. & ARTS 213, 213–14 (2001).

[81] Sarraf, *supra* note 29, at 729.

[82] 22 U.S.C. § 2459 (2005).

significance."[83] Pursuant to the IFSA, imported artworks and cultural objects are immune from seizure and other forms of judicial process.[84] The legislative history suggests that although there were no real opponents to the enactment of IFSA, there was "some debate in Congress as to whether [the Act] was necessary at all."[85] In the end, Congress approved the IFSA in 1965 on the basis that the implementation of the IFSA could not cause any harm.[86] In effect, the statute provided lenders assurances that the works they loan for temporary nonprofit exhibition would not be subject to attachment or seizure while on display in the United States.[87]

In order to qualify for the IFSA, certain requirements must be met. The work must (1) come from a foreign country; (2) the work must be on temporary exhibit; (3) the loan must be noncommercial; (4) a specific grant of immunity must be sought and received from the State Department; and (5) the loan must be of cultural significance and in the national interest.[88] In the past ten years alone, the State Department has published immunity notices under the IFSA for more than 600 exhibits.[89]

B. State Legislation

Other states and countries have also enacted similar legislation to fill any gaps in the IFSA's protection.[90] In 1968, the state of New York became the first jurisdiction to implement laws specific to loans of artworks by nonresidents to cultural institutions, three years after IFSA's enactment.[91] Unlike the IFSA, a civil lawsuit was the impetus underlying the enactment of the New York Arts and Cultural Affairs Law ("ACAL").[92]

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[83] *Id.*

[84] *Id.*

[85] Popp, *supra* note 80, at 218.

[86] Zerbe, *supra* note 54, at n.30 (quoting S. 2273, 89th Cong., 1st Sess., 111 CONG. REC. 25, 928–29 (1965)).

[87] *Id.*

[88] *Id.*

[89] Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 310 (D.C. Cir. 2005).

[90] Texas also enacted legislation to prohibit a court from seizing any work of art "while it is (1) en route to an exhibition; or (2) in the possession of the exhibitor or on display as part of the exhibition." *See* Tex. Civ. Prac. & Rem. Code Ann. § 61.081(a) (2005). However, the exemption from seizure does not apply if "theft of the work of art from its owner is alleged and found proven by the court." *Id.* § 61.081(d); *see* NORMAN PALMER, ART LOANS 111–12 (1997); Sarraf, *supra* note 29, at 737. A number of Canadian provinces and France have also adopted similar anti-seizure statutes to protect temporarily displayed artwork. *See* Collins, *supra* note 23, at 155.

[91] N.Y. ARTS & CULT. AFF. LAW § 12.03 (2005).

[92] People v. Museum of Modern Art, 93 N.Y.2d 729, 746 (1999). In 1968, a well-known international artist loaned his artwork to a Buffalo museum for exhibition. His work was seized under an order of attachment in a lawsuit brought against him by a domestic corporation.

The New York legislature promptly responded by enacting a bill that served to "allay the fears of potential [fine art] exhibitors and enable the State of New York to maintain its pre-eminent position in the arts."[93] Despite the fact that the protections of the IFSA existed prior to the ACAL, the ACAL was enacted to provide broader protection than the IFSA. First of all, immunity under the ACAL is automatic so long as the loan is from a nonresident and the exhibition is noncommercial. In other words, there is no special application process and the artwork need not be of "cultural significance" or in the "national interest" to receive protection.[94] Furthermore, while the IFSA protects against seizures of artwork on loan from abroad, the ACAL applies to interstate as well as transnational loans. Lastly, the IFSA grants immunity to the exhibiting museum, while the ACAL provides immunity to the artwork itself. Together, the statutes preclude the temporary exhibition of the artwork to serve as a means to seize it. The implementation of the ACAL by the state of New York symbolized its desire to further and protect the welfare of the art world and to reinforce its preeminent place in it.[95]

For thirty years, both statutes have escaped wide attention from judicial opinions or legal scholarship.[96] However, in January 1998, the ACAL for the first time in its history, became the subject of judicial inquiry over an "Egon Schiele, The Leopold Collection" exhibition that was held at the Museum of Modern Art ("MoMA") from October 12, 1997 to January 4, 1998. The collection of paintings was on a three-month loan to the Museum of Modern Art from the Leopold Museum of Austria as part of a three-year world-wide tour.[97] A New York resident claimed ownership of two of the paintings, "Portrait of Wally" and "Dead City III," both loaned by the Leopold Foundation in Austria for the exhibition.[98] Three days after the exhibition ended, the New York County District Attorney sought to exercise subpoena power over the painting pursuant to a grand jury investigation into the theft of the paintings during the Nazi period.[99] Having allegedly failed to seek IFSA protection over the paintings, the

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[93] *Id.*

[94] Sarraf, *supra* note 29, at 737.

[95] *Id.*

[96] *Id.* at 729.

[97] *Museum of Modern Art*, 93 N.Y.2d at 732.

[98] United States v. Portrait of Wally, a Painting by Egon Shiele, No. 99 Civ. 9940-MBM, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

[99] *In re* Application to Quash Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 677 N.Y.S.2d 872 (N.Y. 1998), *rev'd*, 719 N.E.2d 897 (N.Y. 1999) (subpoena quashed where American citizens claimed ownership of paintings allegedly stolen or misappropriated by the Nazis from their respective families during the annexation of Austria).

MoMA filed a motion to quash based on the ACAL protections.[100] The "Portrait of Wally" was placed in federal custody until the claims were later dismissed. The court determined that the subpoena violated the ACAL and interfered with the lender's possessory interests in the paintings by compelling their indefinite detention in New York.[101] Although the judge acknowledged that the District Attorney had a competing interest to identify and prosecute criminal activity as "a result of Nazi atrocities," the legislative intent of the ACAL in prohibiting the seizure of artwork prevailed.[102]

Shortly thereafter, New York Governor George Pataki announced his plan to fight for a change in the ACAL that would permit prosecutors to seize stolen artwork in criminal investigations.[103] The statute was finally amended on May 24, 2000 to include the word "civil" in two places, effectively ending the protection ACAL once afforded to loaned artworks when the seizure was undertaken in connection with a criminal case.[104] Therefore, the ACAL now only protects against civil seizures.

While the fine art trade is one of the largest and most lucrative international industries, the present state of the law regarding stolen art is in turmoil. The viability and welfare of the art market depends on a high dose of faith and assurance in the title and ownership interests of the acquisitions and loaned artworks by museums and individual purchasers. The mere potential for adverse claims disrupts the art market by putting at risk the title of thousands of pieces of extremely valuable art, thereby making them worthless in the public market.[105]

III. CASES POST-*REPUBLIC OF AUSTRIA V. ALTMANN*

Although it may be too early to tell what the implications of *Altmann* are on Holocaust victims and their claims to recover stolen property, recent art restitution cases following the *Altmann* decision have shed some light on the complex procedural pitfalls that plaintiffs and defendants may continue to face in litigating these claims.

There has been a significant rise in the number of Nazi-looted art claims being litigated in U.S. courts and abroad. The declassification of government documents from the Second World War, along with an increase

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[100] Popp, *supra* note 80, at 221.

[101] People v. Museum of Modern Art, 93 N.Y.2d 729, 730 (N.Y. 1999).

[102] *Id.* at 742.

[103] Barbara Ross & Tracy Tully, *Nazi Loot Law May Change*, N.Y. DAILY NEWS, Sept. 24, 1999, at 12.

[104] 75A N.Y. JUR. 2D, *Literary & Artistic Property* § 36 (2003).

[105] Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 1028 (2001).

in scholarly and journalistic interest in the restitution of Nazi-looted art, have led to an explosion of claims and restitution efforts.[106] These lawsuits often pit good faith purchasers against original owners and their heirs, and many times involve the local, national and international art community.[107] As the seizure of the two paintings by Egon Schiele at the Museum of Modern Art in New York demonstrates, provenance issues will not only involve private lawsuits between owners and good-faith purchasers but will strain relations between museums and, possibly, between nations.[108]

The cross-border aspect of the art trade also breeds complex jurisdictional issues. "One difficulty with the study of stolen art stems from the fact that so much of the stolen art is transported across state and national boundaries and, as a result, presents difficult questions of international and domestic choice of law."[109] Even after the parties find themselves litigating in one forum, the resulting judgment may be difficult to enforce if the present location of the artwork is not in the same jurisdiction rendering the judgment.[110]

Disputes over Nazi-looted artwork have generated discussion and debate amongst legislators, courts and the international art community ranging from granting immunity to determining the proper statute of limitations for stolen or looted works of art. The assortment of jurisdictional discrepancies, such as differing statute of limitations periods, can lead to incongruent outcomes and ultimately cause instability in the art market.

A. FSIA v. IFSA: *Malewicz v. City of Amsterdam*[111]

In the recent case of *Malewicz v. City of Amsterdam*, immunity under IFSA did not prevent subject matter jurisdiction over a painting that was held by an Amsterdam museum.[112] Heirs of Kazimir Malewicz, a Russian avant-garde artist, sued the city of Amsterdam in an attempt to recover fourteen artworks, valued at $150 million, that they claimed were rightfully theirs.[113] The suit was filed in the U.S. District Court in the District of

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[106] Minkovich, *supra* note 2, at 353; *see* David Wissbroecker, *Six Klimts, a Picasso & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39 (2004).

[107] Collins, *supra* note 23, at 119.

[108] *See, e.g.*, Reyhan, *supra* note 105, at 959.

[109] Schlegelmilch, *supra* note 4, at 102–03.

[110] Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 239–40 (2004).

[111] Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298 (D.C. Cir. 2005).

[112] *Id.*

[113] *Id.*

Columbia in January of 2004.[114] The paintings were the subject of an exhibition last year at the Solomon R. Guggenheim Museum in New York and the Menil Collection in Houston. Lisa Dennison, deputy director of the Guggenheim, said that at the time of the show the museum had received immunity from seizure from the U.S. government.[115] The plaintiffs claim that the 14 artworks were a part of a larger group of more than 100 works that Kazimir Malewicz took to Berlin in 1927 for display at the Great Berlin Art Exhibition.[116] The court found that the heirs satisfied the "present in U.S." factor of FSIA by filing a complaint while the works were on loan to museums in the United States even though the painting had long left the country by the time the complaint was served.[117]

Although Judge Rosemary M. Collyer acknowledged that even though a court order to return the works to the Malewicz heirs would only be "as valuable as their ability to persuade a Dutch court to enforce it," it should not preclude the U.S. court from litigating the issue.[118] Judge Collyer noted that the "presence or absence of the property makes no difference during the litigation" process.[119] The court found that even "happenstantial presence" of these artworks in display at a U.S. museum fulfills the requirement for jurisdiction.[120]

Another interesting issue decided by the court was the court's determination of whether the City of Amsterdam had engaged in "commercial activity carried on in the United States."[121] The court relied on *Republic of Argentina v. Weltover, Inc.* to determine the commercial character of the loan. The standard used by the court was whether the particular actions that the foreign government performed were similar to the types of activity engaged in by a private party for "trade and traffic or commerce."[122] Under this reasoning, the court in *Malewicz* found that loaning artwork to museums in the United States constitutes typical "commercial activities" engaged in by private parties.[123]

Although not explicitly discussed in the opinion, classifying the art loan as commercial activity under the FSIA, by its definition, would preclude immunity from seizure under the IFSA. The IFSA is clear in

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[114] *Id.*

[115] Carol Vogel, *Artist's Heirs Sue Amsterdam Over 14 Works,* N.Y. TIMES, Feb. 3, 2004, at E3.

[116] *Id.*

[117] *Malewicz*, 362 F. Supp. 2d at 311–12.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 311.

[121] *Id.* at 313.

[122] *Id.* (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992)).

[123] *Malewicz*, 362 F. Supp. 2d at 313–14.

limiting immunity to art loans within the United States that are "administered, operated, or sponsored without profit."[124] It is not clear what the threshold of commercial activity is in order to determine when the art loan loses its protection.[125] Art loans undoubtedly have the earmarks of commercial acts because their very nature consists of lending property in exchange for compensation.[126] Furthermore, the widespread occurrence of "blockbuster" exhibitions frequently involve the sale of admission tickets and memorabilia that also may profit the lender.[127] As for now, the State Department has not strictly construed the "non-commercial" criterion of the IFSA, but it may be problematic in the future if art loans lose their non-commercial nature and along with it, their protection from seizures.[128]

In the future, however, without a firm pronouncement from the U.S. Supreme Court or Congress of the priority of the FSIA over the IFSA or vice versa, foreign lenders are at the mercy of the particular court's interpretation of these statutes. Presently, the requirements of the IFSA do not adequately protect the interest of a foreign lender against seizure or from being subject to litigation in the United States. The vast number of art institutions, private holders and individuals who lend works of art for nonprofit display, assert that a "firm guarantee against judicial seizure is an 'essential factor' in [their] decision to lend" artwork to foreign countries.[129] As the United States correctly pointed out in *Malewicz*, "[t]he possibility that such a minimal level of contact will necessarily suffice to provide jurisdiction threatens to chill" the international art exchange program.[130] The loaning of artwork provides educational and historic value to the recipient museum and nation. Thus, notwithstanding the commercial nature of art loans, clarification is needed on the scope of immunity available under the IFSA in light of the *Malewicz* and *Altmann* decisions. The regulation of the art industry needs to balance the public's interest in the protection of the loaned artwork with the industry's legitimate interest in

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[124] Federal Immunity From Seizure Act, 22 U.S.C. § 2459(a) (2000).

[125] Zerbe, *supra* note 54, at 1140.

[126] Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602 (2005). The Act provides that "[a] 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

[127] A 1998 Monet exhibit at the Museum of Fine Arts in Boston resulted in over $2 million in gift item sales. Joy Hakanson Colby, *Van Gogh Exhibit Could Set DIA Sales Records*, DETROIT NEWS, Jan. 18, 2000, at A1. The Monet show had secured an IFSA grant of immunity for its stay in the United States. Brian MacQuarrie & Walter V. Robinson, *MFA Moves to Verify that Monet Was Looted*, BOSTON GLOBE, Dec. 1, 1998, at A1.

[128] Zerbe, *supra* note 54, at 1140.

[129] Sarraf, *supra* note 29, at 740; *see also* Anglim, *supra* note 110, at 300.

[130] Anglim, *supra* note 110, at 312.

resolving claims of Nazi-looted art.[131]

The *Malewicz* case, however, is far from over. Although the City of Amsterdam's motion to dismiss was denied, the court left open the possibility of deferring to the Dutch courts if the courts in the Netherlands waive the statute of limitations defense, which is also one of the reasons for plaintiff's choice of venue in the United States.[132] Of keen importance here is the potential for lenders of artwork to be subject to litigation in the United States despite the presence of a federal immunity statute. Although under the statute, the Malewicz heirs could not seek to seize the artwork while it was in this country under a grant of IFSA, they were able to use "the window of opportunity afforded by the Malewicz exhibition[s] as the jurisdictional hook for their claims."[133] While a loan from a foreign sovereign received additional protection from the FSIA by restricting subject matter jurisdiction over foreign sovereigns to *in personam*, as opposed to strictly *in rem* or *quasi in rem*, *Malewicz* now permits *in rem* jurisdiction in the United States for the temporary display of artwork, while on loan to a U.S. museum.[134] For heirs of stolen artwork, the *Malewicz* decision, along with *Altmann*, opens up the door for claimants to bring their suit in the United States even if *in rem* or *quasi in rem* jurisdiction is not available. A short term presence of an artwork during an exhibition in the United States or even a foreign sovereign's publication or advertisement of the artwork-related merchandise for sale in the United States can suffice.

B. No Uniformity of Protection for International and Domestic Exhibitions: *Alsdorf v. Bennigson*[135]

Lenders of artwork should not only be concerned with the potential for seizure of artwork on loan to other museums in foreign countries, but also in any domestic exhibition of their artwork. The IFSA currently only protects loans from foreign countries; however, not all states have their own individual statutes prohibiting seizures when artwork comes into their jurisdiction. While the IFSA is limited to international loans, the majority of loans to museums in the United States are interstate and are not all subject to protection.[136] Therefore, the happenstantial presence of an artwork in an unfavorable jurisdiction can mean jeopardizing possession and ultimate title to the artwork.

In the case of *United States v. One Oil Painting Entitled "Femme En*

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[131] Predita Rostomian, Comment, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 295 (2002).

[132] *Id.*

[133] *Id.* at 310.

[134] Zerbe, *supra* note 54, at 1130.

[135] Alsdorf v. Bennigson, No. 04-C5953, 2004 WL 2806301 (N.D. Ill. 2004).

[136] Popp, *supra* note at 80, at 218.

Blanc,"[137] the U.S. government filed a forfeiture action against Alsdorf's painting, the "Femme en Blanc," on October 6, 2004.[138] "Femme en Blanc," valued at over $10 million, is a portrait from Picasso's classic period after World War I that depicts a contemplative woman wearing a white gown.[139] Under seizure, the government permitted the painting to remain in Alsdorf's possession until the courts could resolve the legal ownership dispute.[140] Multiple cases were filed in state and federal courts that included the plaintiff, defendant, art dealer, gallery owner and the U.S. government as parties to the claim.[141]

The painting originally belonged to art collectors Robert and Carlota Landsberg, who bought the painting in the mid-1920s.[142] In anticipation of Hitler's regime, they sent the painting for safekeeping to a Parisian art dealer, Justin Thannhauser, from whom the Nazis stole the painting in 1940.[143] After the Second World War, Mrs. Landsberg searched for the painting to no avail. In 1947, the painting was included, with a small photo, in an inventory of looted paintings compiled by the Allied forces.[144] The painting subsequently changed hands among art dealers and was last purchased by a New York art dealer in Paris in 1975. That same year, he sold the piece to Chicago resident Marilynn Alsdorf and her late husband, James, for $357,000.[145]

In 2001, Alsdorf began circulating the painting for exhibition and possible sale.[146] Alsdorf first allowed the painting to be displayed at a gallery in Los Angeles for about a month in the fall of 2001.[147] In early 2002, Alsdorf also shipped the painting from Chicago to Geneva, where a potential buyer was to view the painting.[148] As part of his due diligence, the buyer contacted the Art Loss Register ("ALR"), an international clearinghouse of historical information concerning Nazi-looted art to

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[137] United States v. One Oil Painting Entitled "Femme En Blanc" by Pablo Picasso, 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

[138] Howard Reich, *U.S. Acts to Protect a Picasso*, CHICAGO TRIBUNE, Oct. 27, 2004, at 1.

[139] Reich, *supra* note 138, at 1.

[140] *Id.*

[141] Alsdorf v. Bennigson, No. 04-C5953, 2004 WL 2806301, at *4 (N.D. Ill. 2004).

[142] Press Release, FBI LOS ANGELES FIELD OFFICE, *$10 Million Picasso Painting Stolen by Nazis During World War II Seized by U.S.* (Oct. 26, 2004), *available at* http://www.usdoj.gov/usao/cac/pr2004/135a.html.

[143] *Alsdorf*, 2004 WL 2806301, at *2; *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1178.

[144] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1178.

[145] *Id.*

[146] *Alsdorf*, 2004 WL 2806301, at *1.

[147] *Id.*

[148] *Id.*

investigate the provenance of the painting.[149] Meanwhile, another potential buyer's interest in the painting prompted the transfer of the painting back to Los Angeles while the ALR investigation continued. On May 2, 2002, the ALR informed Alsdorf that the painting had been looted by the Nazis from its Jewish owner during the Second World War.[150] In June 2002, the ALR located Mrs. Landsberg's sole heir, claimant Thomas C. Bennigson, her grandson, in Berkeley, California.[151]

Bennigson initially attempted to settle his claims with Alsdorf, but those settlement negotiations were unsuccessful.[152] On December 13, 2002, Alsdorf instructed the gallery owner to arrange for the transport of the painting from Los Angeles back to Chicago. Six days later, unaware of Alsdorf's plans to send the painting back to Chicago, Bennigson filed suit in the California Superior Court for the County of Los Angeles against Alsdorf seeking replevin, injunctive relief and a temporary restraining order to keep the painting in Los Angeles.[153] Hours before the temporary restraining order hearing was scheduled to begin, the painting left Los Angeles for Chicago.[154]

On June 16, 2003, the California Superior Court granted Alsdorf's motion to quash for lack of personal jurisdiction over Alsdorf, who was a resident of Illinois.[155] Bennigson appealed the grant of Alsdorf's motion; however, the California Court of Appeal affirmed the lower court's decision.[156] The California Supreme Court subsequently accepted the case for review on July 28, 2004.[157] On September 10, 2004, Alsdorf began a separate federal lawsuit in Chicago, seeking a declaration of good title to the painting. She alleged that she acquired valid title from a dealer who had a superior right of ownership against all others under French law.[158] She argued that French law governed her purchase because her dealer, Stephen Hahn, bought the painting in Paris.[159] The district court judge issued a temporary stay pending the resolution of Bennigson's appeal before the California Supreme Court.[160]

In a strange turn of events, with the case pending review by the

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[149] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1179.

[150] Lufkin, *supra* note 138.

[151] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1179.

[152] *Alsdorf*, 2004 WL 2806301, at *3.

[153] *Id.*

[154] *Id.*

[155] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1179.

[156] Bennigson v. Alsdorf, No. BC 287294, 2004 WL 803616 (Cal. 2004).

[157] Tina Spee, *State Justices Agree to Review Case of Picasso Stolen by Nazis*, L.A. DAILY J., July 29, 2004.

[158] Lufkin, *supra* note 138; *Alsdorf*, 2004 WL 2806301, at *8.

[159] *Alsdorf*, 2004 WL 2806301, at *8.

[160] *Alsdorf*, 2004 WL 2806301, at *10–11; Spee, *supra* note 157.

California Supreme Court and a temporary stay issued in a district court in Illinois, the U.S. Attorney's Office in Los Angeles filed a complaint for civil forfeiture in the U.S. District Court for the Central District of California on October 6, 2004. The U.S. government alleged that Alsdorf knowingly transported stolen property in interstate commerce.[161] The move by federal prosecutors was the first time the U.S. government had invoked the National Stolen Property Act ("NSPA") against an individual collector in an attempt to seize Nazi-looted art on the theory that the property was a stolen good which crossed state lines.[162]

On December 13, 2004, Alsdorf brought a motion to dismiss for lack of subject matter jurisdiction, or alternatively, to transfer the case to the Northern District of Illinois.[163] U.S. District Judge Florence-Marie Cooper denied her motion and stated that even though Alsdorf filed the Illinois action one month before the Government brought its forfeiture action, the Illinois court had yet to assert jurisdiction over the painting, whereas the seizure by the U.S. marshal under process issued by the California district court established the jurisdiction of that court.[164] Furthermore, the Illinois court had neither ordered a stay in the Illinois action nor made any attempts to seize the painting or deposit the painting with the court.[165]

The California district court reaffirmed the view that the filing of a complaint alone does not provide *in rem* jurisdiction in that particular court to the exclusion of other courts. The court abided by a three-part test to determine whether the court could exercise specific personal jurisdiction, weighing the issues of purposeful availment, relatedness of claims, and reasonableness.[166] First of all, the requirement of purposeful availment ensures that a defendant will not be hauled into a jurisdiction solely as a result of "random, fortuitous, or attenuated contacts or of the unilateral activity of another party or third person."[167] The court determined that Mrs. Aldorf's contacts in California were not "random, fortuitous or attenuated" because she chose the particular art dealer in California and made an agreement with the dealer to exhibit and later sell her painting.[168] It is also undisputed that she authorized her painting to be displayed and held in California for eight months.[169] The court found that these actions were not

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[161] Reich, *supra* note 138, at 1.

[162] Lufkin, *supra* note 138.

[163] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1180.

[164] Kenneth Ofgang, *Judge Declines to Toss Suit Over Painting Allegedly Stolen by Nazis*, METROPOLITAN NEWS-ENTERPRISE (Apr. 4, 2005), *at* http://www.metnews.com/articles/2005/benn040405.htm.

[165] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1181.

[166] *Id.* at 1187 (citing Roth v. Marquez, 942 F.2d 617 (9th Cir. 1991)).

[167] *Id.* (citing McGlinchy v. Shell Chemical Co., 845 F.2d 802, 816 (9th Cir. 1988)).

[168] *Id.*

[169] *Id.*

fortuitous or attenuated to prohibit jurisdiction.

Secondly, the district court also established that Alsdorf's "claim of ownership gave rise to and is related to Bennigson's replevin and [larceny] claims" of Alsdorf's retention and removal of the painting from California after she was aware that her ownership was in dispute.[170] Lastly, the court also established that the exercise of jurisdiction was reasonable and the burden was "no greater than what any litigant faces in a foreign forum."[171] The court acknowledged that California had an expressed interest in protecting its resident's ownership interests in artwork stolen by the Nazis as evidenced by its enactment of Section 354 of the California Civil Procedures, which extends the statute of limitations to file claims against museums and galleries until 2010.[172] Illinois, on the other hand, lacks a clear statute of limitations for such cases.[173] The California Court of Appeal previously ruled that Alsdorf, an individual art collector, was not one of the specific "entities" against whom the state chose to extend the statute of limitations. Nevertheless, the district court stated that it did not "lessen California's interest in the subject matter of the suit" and thus, permitted the suit to continue.[174]

While maintaining that the painting had been purchased in good faith with proper legal title, Marilynn Alsdorf agreed to a $6.5 million settlement citing her advanced age and the need to resolve financial claims to facilitate the completion of her commitments to her family and charitable organizations. The parties consented to granting Mrs. Alsdorf incontestable title to the painting.[175] Bennigson would also receive the profit that the New York art dealer Hahn had realized on the initial sale.[176] In addition, Los Angeles art dealer David Tunkl agreed to pay an undisclosed percentage of his commission to Bennigson if Alsdorf sold the painting within the next three years.[177]

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[170] *Id.* at 1188.

[171] *One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1188.

[172] *See* CAL. CIV. PROC. CODE § 354.3 (West 2004) (extending the statute of limitations for filing suit against galleries and museums).

[173] *Id.*; *see also* Spee, *supra* note 157, at 1.

[174] *Compare* Bennigson, 2004 WL 803616, *with One Oil Painting Entitled "Femme En Blanc,"* 362 F. Supp. 2d at 1188.

[175] Howard Reich, *$6.5 Million Will End Picasso Fight*, CHICAGO TRIBUNE, Aug. 10, 2005, at 16.

[176] Diane Haithman, *Deal Reached for Art with Nazi Ties*, L.A. TIMES, Aug. 10, 2005, at 3; *see* Blair Clarkson, *Judge OKs Pursuit of Stolen Art*, L.A. DAILY J., Jan. 21, 2005, at 2 (settlement made after a Santa Barbara Superior Court judge ruled on Jan. 20, 2005 that under the state's three-year statute of limitations for detained goods, Bennigson can sue the New York art dealer who sold the Picasso under a constructive trust theory). The judge permitted a "constructive trust" on the sale proceeds as a remedy when a person earns compensation from the sale of property belonging to another. *Id.*

[177] Kenneth Ofgang, *Dispute Over Painting Allegedly Stolen by Nazis Settled*,

In this case, neither California nor Illinois had statutes in place to protect against the government's seizure of the artwork. Thus, lenders or even good faith purchasers who circulate their artwork for possible sale may be susceptible to potential seizure of artwork. As a result, there are not only discrepancies in the protections granted to foreign and domestic loans, but also discrepancies within the different states. As a result, the interstate movement of art can have severe repercussions for the owner.

C. Inconsistent Application of the Statute of Limitations: *Adler v. Taylor*

Around the same time as the *Bennigson* litigation, the California district court also ruled on another case involving Nazi-looted art. At issue in this case was a Van Gogh painting held by Elizabeth Taylor, who bought the painting at an auction in England in 1963. The heirs and descendants of an art collector who owned the painting before it was stolen by the Nazis brought this claim against Ms. Taylor. In this case, the court held that Section 354.3 of the California Civil Procedure, which extends the statute of limitations until 2010 for galleries and museums, did not apply because the purchaser of the painting, which had been taken from the heirs' relative by the Nazis, was an individual, not a gallery or a museum.[178] Whereas, the court in *Alsdorf v. Bennigson* was willing to extend the statute of limitations period for public policy reasons, the court in *Adler v. Taylor* strictly construed the relevant statutory provisions.

Furthermore, the *Adler* court declined to apply the discovery rule as set forth in Section 338(c) of the California Civil Procedure because Taylor bought the painting in 1963, well before the statute was enacted.[179] Under the old rule, the statute of limitations ran against the good faith purchaser of stolen property at the time he or she acquired the property. Accordingly, the statute of limitations would have expired in 1963.[180] The judge reasoned that even if the discovery rule was applied in this case, the claim

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METROPOLITAN NEWS, (Aug. 10, 2005, at 1, *available at* http://www.metnews.com/articles/2005/benn081005.htm.

[178] The California Civil Procedure Code provides:

> (b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, or Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity . . .
> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

CAL. CIV. PROC. CODE § 354.3 (West 2005) ("Entity" is defined in § 354.3(a)(1) as: "Any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.")

[179] Adler v. Taylor, 2005 U.S. Dist. LEXIS 5862, at *11 (C.D.Cal. 2005).

[180] *Id.* at 12.

would be barred because plaintiffs "by exercise of reasonable diligence," should have discovered the painting's whereabouts given Ms. Taylor's notoriety.[181] Thus, the same district court entered divergent views on the proper application of statute of limitations for Nazi-looted art.

D. Art Dealers and Galleries are Susceptible to Liability

Another case involving litigation against a Spanish museum is also pending in the California district court. The case involves a painting by impressionist Camille Pissarro, currently in Madrid's Thyssen-Bornemisza Museum.[182] The 1897 Pissarro known as "Rue de Saint honor Après Midi, Effect de Pluie," originally belonged to claimant Claude Cassirer's grandmother, Lilly Neubauer-Cassirer. Neubauer-Cassirer's father had purchased the painting from an art dealer in 1900. Fleeing Germany in the face of the Nazi invasion, Neubauer-Cassirer was forced to give up the artwork to a German art dealer. The painting passed through several dealers' hands before being seized by the Nazis in Holland and sold to an anonymous buyer in 1943. After the war ended, the German government voided the initial sales transaction under restitution laws and declared Neubauer-Cassirer the legal owner of the painting. The painting, however, was never found. Cassirer only recently learned of the painting's location after seeing it in a catalogue of the Thyssen collection.[183] On the other hand, the museum claims that the late Baron Hans Heinrich Thyssen-Bornemisza bought the painting in 1975 from a New York gallery and from the same dealer that allegedly sold Mrs. Alsdorf the Picasso painting.[184]

The case has caused great interest in the legal and art worlds because of a Superior Court ruling that an art dealer or gallery owner can be sued for the proceeds he gained by selling Nazi-looted paintings. In her ruling, Superior Court Judge Denise deBellefeuille found that the use of a "constructive trust" on the sale proceeds of the two paintings was a proper remedy when a person earns compensation from the sale of property belonging to another. This appears to be the first time that someone has tried to sue downstream to recover the profit earned from a dealer who sold Nazi-looted paintings.[185] Litigation of these claims have brought about unanticipated results and resolutions by the courts. However, how these

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[181] *Id.* at 13.

[182] Tom Tugend, *In Two Cases, Families of Victims Ask Court for Return of Nazi-looted Art*, GLOBAL NEWS SERV. OF JEWISH PEOPLE (Feb. 10, 2005), *available at* http://www.jta.org/page_print_story.asp?intarticleid=15023.

[183] Blair Clarkson, *Judge OKs Pursuit of Stolen Art*, L.A. DAILY J., Jan. 21, 2005, at 2.

[184] Mar Roman, *Thyssen Museum Says it is Legal Owner of Alleged Nazi-looted Masterpiece*, ASSOCIATED PRESS (Feb. 11, 2003), *available at* http://www.museum-security.org/03/020.html.

[185] Tugend, *supra* note 182.

decisions will affect the various participants in the art market, including art dealers and galleries is still unclear.

IV. PROPOPOSED RULES

As one author notes, the *Altmann* case seems to reflect the Court's sentiment to "effect legislative change and stretch the limits of legal interpretation to create an environment that provides substantially greater opportunities to recover the works of art taken from their families during the Nazi occupation."[186] As has been noted, "[s]ince the Holocaust restitution campaign began in the mid-1990s, more than two thousand works of art have been returned to their rightful owners worldwide without litigation."[187] While international treaties have tried to create harmony going forward, many claims have gone unanswered and have left the claimants no choice but to resort to the judicial system for remedies. Many cases, however, have shown that art restitution claims do not have to be winner-take-all propositions, which produce prolonged struggles in the courts, often times draining the resources of the parties involved. In a gesture of good will, many parties have voluntarily settled their claims.[188] These parties have found that the legal system's inconsistent and unpredictable resolutions often fail to adequately protect their rights in seeking or retain ownership of their artwork.[189]

Given the diversity of standards under U.S. state law, where the art is found or loaned will usually determine the standard of proof, the statute of limitations and any rights available to the original owners or the goof faith purchasers. As we have seen, Nazi-looted art cases often turn on the sheer happenstance of where the art has come to rest, with certain jurisdictions completely precluding recovery. To the extent that a private or public owner desires to avoid that uncertainty, the art "stays put" to the detriment of the broader public audience.[190] The uncertainty of title therefore will frighten owners into keep these treasures safely in their possession, thereby effectively losing these pieces a second time for the world to enjoy.[191] This

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[186] Wissbroecker, *supra* note 106, at 71.

[187] Michael J. Bazyler and Kearston G. Everitt, *Holocaust Restitution Litigation in the United States: An Update, International Civil Liberties Report*, 2004 ACLU INT'L CIV. LIBERTIES REP., Dec. 10, 2004, at 11, *available at* http://www.aclu.org/iclr/bazyler.pdf (last visited Nov. 6, 2005).

[188] Karin Hanta, *Looted Art: A Morality Tale*, 9 AUS. KULTUR 1 (1999), *available at* http://www.adele.at/Press%20Clippings%20Zusammenfassung%20Presse/Press_Clippings_1999_English/Article_by_Karin_Hanta_/article_january_1999_austria_k.html.

[189] Owen C. Pell, *1999 Symposium Theft of Art During World War II: The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 27, 44 (1999).

[190] Reyhan, *supra* note 105, at 1028.

[191] Schlegelmilch, *supra* note 4, at 101–02.

would make the discovery of these artworks by the original owners even more difficult and the resolution of adverse claims nearly impossible.

This seems particularly unfair to victims of genocide or their heirs who, of course, had no control over the disposition or movement of their artworks. The *Altmann* case brings the world's attention to the need for a prompt and uniform rule of law to address claims of Nazi-looted art.[192] Countries should establish means by which claimants and purchasers, both victimized by this situation, can deal with the complex multi-jurisdictional issues raised by looted art cases without resorting to a seemingly adversarial and unpredictable forum.

The unique circumstances of the Holocaust necessitate a change in legal rules and an implementation of special considerations given to Holocaust victims and their heirs to recover their stolen works of art.[193] A lack of consensus and even opposition by international legislative bodies and courts have hindered the adoption of uniform resolution mechanisms to deal with the current problem.[194] In light of this current resistance, rule-making should begin in the individual legislature, which is best suited to address the delicate balance between the competing interests of both the good faith purchasers and the unfortunate victims of the Second World War.[195] Although the U.S. courts have done much to provide redress to certain Holocaust victims, the resolution needs to be equally applied and implemented. The U.S. legislature should adopt specific rules with regard to determining proper title, setting proper statute of limitations periods, and providing adequate reparation to the good faith purchaser in the event he or she returns the painting to the original owner.[196] Only with these specific resolution mechanisms will prompt and consistent decisions arise.

A. Title Registration

The U.S. government should adopt a title registration system that encourages the flow of information between buyers, sellers, and lenders of artwork. In any unregulated market, sellers have an incentive to conceal information to the buyer. For example, "each participant in the illicit antiquities market has an incentive to strip as much information as possible from an artifact before it enters the safe anonymity of the legitimate art

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[192] Maples, *supra* note 1, at 369.

[193] Patty Gerstenblith, *Traditional Knowledge, Intellectual Property and Indigenous Culture: Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 444 (2003).

[194] Teresa Giovannini, *The Holocaust and Looted Art*, 7 ART ANTIQUITY & L. 263, 279 (2002).

[195] Schlegelmilch, *supra* note 4, at 112.

[196] Giovannini, *supra* note 194.

market."[197] Thus, sellers are apt to conceal information rather than be forthcoming about the artwork's provenance. This unfortunate circumstance results in artwork that offers no guarantee of valid title to the potential owner and more tragically, in artwork that is often "divorced from its cultural roots."[198] When there are certain types of market deficiencies, an economic theory supports the need for government intervention.

The solution to this problem is a title registration system with legal effect. "For a competitive market to function well, buyers must have sufficient information to evaluate competing products."[199] Disclosure through a title registration system that has binding legal effect is critical to the creation of a viable art market; it provides "an obvious remedy to problems of inadequate information" when the art market is unable to provide all of the information a purchaser of the artwork would be willing to pay for.[200] The proposed system would provide a uniform method for the disclosure and dissemination of information regarding title to the buyer and seller of the artwork.[201] As organizations like the ALR become more widespread, additional inquiries into the provenance of the artworks should be statutorily required. Only then will title be valid and art circulate more freely.

B. Discovery Rule

Currently, the United States operates under a due diligence standard.[202] Under this standard, the statute of limitations begins to run when the plaintiff discovers or should have discovered the location of the artwork and the identity of the possessor from reasonable due diligence.[203] Several jurisdictions have modified their rules concerning the accrual of claims so that the statutory period does not begin to run until the original owner discovers the work's location or the identity of its possessor (the Discovery Rule) or until the original owner demands return of the work and is refused (the Demand and Refusal Rule). California currently employs the Discovery Rule pursuant to Section 338(3) of the California Code of Civil Procedure, which provides that an action must be brought within three years of "the discovery of the whereabouts" of the work by the aggrieved party. This rule applies even in the case of an innocent third-party purchaser of

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[197] Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 410 (1995).

[198] STEPHEN BREYER, REGULATION AND ITS REFORMS 26 (1982).

[199] Pell, *supra* note 189, at 51.

[200] *Id.* at 52.

[201] *Id.* at 53.

[202] Rebecca L. Garrett, *Time for a Change? Restoring Nazi-Looted Artwork to its Rightful Owners*, 12 PACE INT'L L. REV. 367, 375 (2000).

[203] O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

stolen property.[204] This means that an original owner may still not be time-barred from bringing suit, so long as the action is brought within three years of his discovery of the artwork or the possessor.[205] Thus, the original owner may often times end up bringing a claim decades after the date of the appropriation.

According to the Demand and Refusal Rule in New York, the statute of limitations does not start to run until the original owner makes a demand upon the current good faith possessor for return of the stolen property and the current possessor refuses.[206] This rule necessitates that the original owner ascertain where the property is located, who the identity of the current possessor is, and make an affirmative demand before the statutory time period starts, thus giving the owner ample opportunity to find the property.[207] At the same time, New York courts permit the equitable defense of laches, which will bar plaintiff's claims if the plaintiff has unreasonably delayed bringing suit and thereby prejudices the defendant.[208]

Because of the great length of time and huge potential for inequitable treatment of these possessors, the United States should modify the Discovery Rule such that it will "encourage public display of the works while giving victims adequate notice of their potential claims" to bring about efficient settlements of claims."[209] The rationale behind the Discovery Rule is that plaintiffs must proactively search for the artwork and defendants must not only show that they purchased the artwork in good faith, but must also make their possession known to the general public.[210]

To clarify, the revised discovery rule should only apply to good faith purchasers. Thus, this rule will allow the good faith purchaser to recognize full title over the artwork only after certain due diligence requirements have been met.[211] First of all, the good faith purchaser must register title to their artwork, thus providing ample opportunity for the original owner to locate the artwork's whereabouts. By requiring the good faith purchaser to register the artwork, the good faith purchaser will be required to learn of the artwork's provenance and will prevent the type of "willful blindness" typically relied on by purchasers of fine art who acquired these pieces in an age when much less investigation and research was feasible. Thus, it serves two purposes in incentivizing the good faith purchaser to make reasonable

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[204] Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784 (1996).

[205] Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 20 (1998).

[206] *See* Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982).

[207] *See* Republic of Turkey v. Metro. Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990).

[208] Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430–31 (N.Y. 1991).

[209] Schlegelmilch, *supra* note 4, at 122.

[210] O'Keeffe v. Snyder, 416 A.2d 862, 870, 872 (N.J. 1980).

[211] Schlegelmilch, *supra* note 4, at 113.

efforts to investigate the provenance of his or her artwork and in putting the "would-be claimant on notice" of the purchaser's possession of the artwork.[212]

Secondly, the new discovery rule would require that the good faith purchaser's possession be "notorious," meaning that a would-be claimant would be able to gather some idea of its location and the identity of the possessor through reasonable due diligence, aside from just the title registration alone. This rule encourages good faith purchasers to publicly display their pieces, as opposed to the demand and refusal rule, which prompts possessors of illicit artwork to hide the artwork until sufficient time has lapsed. Public display of the artwork not only serves to put the claimant on notice, but is sufficient to start the statute of limitations period.[213]

This rule also would also encourage the exchange of artwork to museum and other non-profit entities. Public display of the artwork in museums or publications of the artwork in catalogues will only strengthen the possessor's argument that his or her possession was "notorious" and precludes lenders from removing a work from exhibition when the artwork's title is contested.[214] Moreover, "the benefit enjoyed by the public museums and exhibiting collectors will also accrue to the public as more pieces, especially never before seen works, are publicly exhibited."[215] Loans have dual benefits for the owner as well, since the artwork's value and sale price can increase when the artwork is placed on loan.[216] Although the federal government indemnifies museums for works brought to the United States from foreign countries, indemnification for domestic loans and traveling exhibitions should also be put into place.[217]

The existence of immunity statutes like the IFSA and ACAL are critical because permitting seizures would be "counter-productive to the open display of works of art that is so critical for learning about where works of art are located for potential claimants.[218] Opponents to anti-seizure laws argue that the inability to seize artwork while on loan will impede restitution attempts by potential claimants.[219] As evidenced by *Malewicz*, the IFSA does not bar U.S. courts from gaining jurisdiction over the artwork. For the time being, under the discovery rule, to encourage the

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[212] *Id.* at 115.
[213] *See O'Keeffe*, 416 A.2d at 868.
[214] Schlegelmilch, *supra* note 4, at 116.
[215] *Id.* at 118–19.
[216] Nicole Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 203 (2001).
[217] *Id.* at 204.
[218] Popp, *supra* note 80, at 227.
[219] *Id.* at 228.

exhibition and display of artwork, protection over interstate or domestic loans should be added to the IFSA.[220] With the threat of seizure of artwork minimized, parties may be willing to negotiate a mutually beneficial settlement.

C. Statute of Limitations

The U.S. government should adopt a limited statute of limitations for a good faith purchaser who follows the requirements under the Discovery Rule. Many countries have considered their own legislative change in terms of extending or removing statutory limitations periods or annulling later acquired titles.[221] For example, France allows a three-year statute of limitations period, while Switzerland permits five years for a claim for restitution to be filed.[222] Germany, on the other hand, provides for a 30-year limitation period, which runs anew each time the artwork changes ownership.[223] However, other countries like England provide that time will not run in favor of a thief or a person who acquires property through a thief. A good faith purchase, however, will allow for a six-year limitation period.[224]

The United States should create similar statute of limitation adjustments to address the need for restitution of artwork that has been displaced by the Nazis. While a thief or one who receives possession of stolen property from a thief can never gain title in the United States, a Holocaust victim's claims for recovery of the artworks are often subject to the affirmative defense of the statute of limitations. In most states, the statute of limitations for the recovery of stolen personal property is at the longest, six years, thus barring most of these claims.[225]

Some legal commentators advocate the suspension of the statute of

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[220] *Id.* at 231.

[221] The Council of Europe's Parliamentary Assembly expressly provides that "it may be necessary to facilitate restitution by providing for legislative change with particular regard being paid to . . . extending or removing statutory limitations periods." Commission Resolution 1205 on Looted Jewish Cultural Property of the Council of Europe, Res. 1205, Looted Jewish Cultural Property, EUR. PARL. ASS., Doc. No. 8563 (Nov. 4, 1999). Good faith is generally presumed and the law in civil law countries protects the good faith possessor's title. Resolution No. 1205 of the Council of Europe indirectly recommends the cancellation of the good faith owner's title in providing that consideration should also be given to "annulling later acquired titles, that is, subsequent to the divestment." *See also* Giovannini, *supra* note 194.

[222] Giovannini, *supra* note 194; *see also* Code Civil Suisse [Cc], art. 934 (Switz.).

[223] Giovannini, *supra* note 194; *see also* Burgerliches Gesetzbuch [Civil Code] Art. 195.

[224] Giovannini, *supra* note 194; *see also* Limitations Act, 1980, §§ 3–4 (Eng.).

[225] *See* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF L. REV. 119, 121–22 & n.10 (1988).

limitations in all cases involving recovery of Holocaust-looted art works.[226] In most cases, the original owners are not able to locate the stolen artwork until the statue of limitations has run on their claim for recovery of their artwork. Thus, the statute of limitations historically serves as their primary defense against liability for replevin of stolen artwork.[227]

The primary purpose of a statute limitations period, however, is fairness to the defendant. A defendant should reasonably expect that "the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the 'evidence has been lost, memories have faded, and witnesses have disappeared.'"[228] Furthermore, the burden on the courts to adjudicate stale and groundless claims is another public policy argument for having a limitations period.[229] Eventually, statute of limitations and other policy concerns for balancing the equities inherent in a laches defense will grow over the course of time. Currently, claimants in these cases are Holocaust survivors, their children, or their grandchildren. The defendants are frequently the initial good-faith purchasers who purchased the artworks shortly after the war. "As both parties become more remotely connected to the original parties to the dispute (both the actual theft victim and the Nazis or the thief), the policy of reuniting Holocaust victims with their stolen property becomes weaker and the interest in quieting title becomes stronger."[230] Courts may find the policy of returning property stolen by the Nazis to its original owners less compelling when the claimant is several generations removed from the original owner. The argument that good-faith purchasers who currently possess the artwork are just as entitled to the artwork than the original owner's distant relatives becomes more plausible. While this scenario has not yet come to be the case, the argument for it will become more persuasive over the next few decades. In the meantime, Congressional action is needed to remove the bar on claims for restitution based on divergent statute of limitations provisions.

The implementation and adoption of a limited statute of limitations period, for example, five years may "quiet title in museums and private collectors that display work publicly, provided that they purchased the work in good faith."[231] The public policy objective for having a statute of limitations also promotes the free trade of goods, ensuring that "those who have dealt with the property in good faith can enjoy secure and peaceful

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[226] *See, e.g.*, Cuba, *supra* note 25, at 480–89.

[227] Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337, 340 (1993).

[228] Duffy v. Horton Mem'l Hosp., 488 N.E.2d 820, 893 (N.Y. 1985).

[229] *Id.*

[230] Minkovich, *supra* note 2, at 381.

[231] Schlegelmilch, *supra* note 4, at 115.

possession after a certain, specified time period has passed."[232] In conjunction with the Discovery Rule, it will allow claimants and original owners to discover the whereabouts of the artwork and at the same time prevent them from sitting on their claim in order to toll the statute of limitations. If such claims are not discovered and made within the five-year statute of limitations period, they will be barred and both legal and marketable title will be vested with the good faith purchaser. At the same time, should the good faith purchaser not abide by the requirements of the new discovery rule, he will not receive full title to the artwork.

V. TAX INCENTIVES FOR VOLUNTARY RESOLUTIONS

In order to induce parties to come to a quick resolution, the United States should also consider implementing tax incentives within the five-year statute of limitations period for those who return Nazi-looted art to their original owner. Tax breaks for art loans could further encourage good faith purchasers to display their artwork for potential discovery by original owners by having their works "curated, registered, or catalogued."[233]

"Currently, the United States Tax Code allows tax deductions for the value of gifts of art to public museums" but it trails European countries in their implementation of tax benefits in promoting the arts.[234] Some European countries provide tax incentives for private owners who loan their works to public institutions for public display. For instance, England grants relief from certain capital taxes if an owner makes the work available for public display. Both Germany and Austria also provide some form of tax relief for cost-free loans to public museums.[235]

The United States should consider the availability of tax deductions to address both the gain to the original owner and the loss to the good faith purchaser of the Nazi-looted artwork should they decide to voluntarily settle their claim. Pursuant to the Holocaust Survivor Tax Relief Act, the United States does not impose federal income tax on amounts received by Holocaust victims or their heirs.[236] Reparation payments made to survivors of the Holocaust who have been persecuted and suffered damages in some manner are exempt from the recipient's gross income. The reparation payments constitute a reimbursement or recompense for the deprivation of certain civil or personal rights that the victims suffered.[237] In California, property specific payments for the restitution of money in lost bank accounts, real estate, or other personal property like art, are also exempt

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[232] Lerner, *supra* note 205, at 17.
[233] *Id.* at 204.
[234] Wilkes, *supra* note 216, at 203.
[235] Joseph L. Sax, PLAYING DARTS WITH A REMBRANDT 66 (1999).
[236] Holocaust Survivor Tax Relief Act, H.R. 1292, 106th Cong. § 1 (1999).
[237] Rev. Rul. 56-518, 1956-2 C.B. 25 (1956).

through the Holocaust Reparations Act, which makes tax exemptions for Holocaust victims or their heirs for income derived from Holocaust claims settlements against any entity or individual.[238] Many other states have also implemented statutes that exempt state taxation income from Holocaust reparations.[239]

A property reparation payment, where the original property is restored to the Holocaust victim, clearly does not trigger realization or recognition of gains because the victim is merely being made whole. The U.S. tax system is based on a horizontal tax equity structure, whereby taxpayers in similar circumstances are taxed or not taxed in equitable ways.[240] Although the nature of the injury of the Holocaust victim is incomparable to the loss incurred by the good faith purchaser of the stolen artwork, a subsequent loss to the good faith purchaser is also realized when he or she loses title to the artwork. The good faith purchaser is in essence a victim of fraud. The tax code should allow the good faith purchaser to claim a loss deduction in the year of the disposition of the artwork should the good faith purchaser return the artwork to the original owner. Providing these "stronger incentives to the wealthy owners of these works, who are consistently seeking mechanisms by which to offset their tax liability," may encourage more mutually beneficial settlements as opposed to reliance on the court system.[241]

VI. CONCLUSION

Particularly with individual countries limiting the ability of claimants to recover their artwork and the fact that the generation, typically making these claims, are getting older, individual lawsuits have provided the only means by which some claimants are able to recover their artwork. While there have been individual successes like *Altmann* and *Bennigson*, the overall welfare of the art market is in jeopardy. The lack of a binding, consistent rule of law has resulted in incongruent court decisions, uncertainty in the potential seizure of artworks loaned to museums internationally and domestically in the United States, and potential liability to art dealers and art galleries. To renew confidence in the art market and to cultivate the exchange of art among different countries, the international community must first address the tragedy perpetrated by the Holocaust and

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[238] Holocaust Reparations Act, Cal. Rev. & Tax. Code §17155 (1998); *see also* Harold S. Peckron, *Reparation Payments – An Exclusion Revisited*, 34 U.S.F. L. REV. 705 (2000).

[239] Georgia, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Washington, and Wisconsin all have statutes in place. Michael Bayzler, *Federal and State Laws Regarding Holocaust Restitution*, *at* http://www.pcha.gov/lawsinfo.htm (last visited Oct. 22, 2005).

[240] Peckron, *supra* note 238, at 714–15.

[241] Wilkes, *supra* note 216, at 204.

should do everything possible to come to a harmonized resolution. In the meantime, the United States should adopt the proposals set forth in the article to bring about prompt and equitable results to victims of the Holocaust as well as the victims who in good faith purchased illicit artworks.

Although these suggestions may seem inconsequential without international support and uniform adoption, particularly given the international and multi-jurisdictional nature of the art market, we must remember that international law is an outgrowth of accepted customs and practices between nations. Innovations and revisions in international law are brought about by the action of governments to meet a need and propose adequate change to an established problem.[242] The *Altmann* decision will hopefully initiate the necessary dialogue and action among these nations to press for a prompt and uniform approach as a means to secure and strengthen the international art market for generations to come.

[242] Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, *reprinted in* 39 AM. J. INT'L L. 178, 187 (Supp. 1945).