A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases

By Lauren F. Redman

I. INTRODUCTION

Art inspires tremendous emotion in people. It captures the spirit of the one who creates it and is a mirror to the soul of the one who gazes upon it. Indeed, Vincent van Gogh, arguably one of the best artists who ever lived, said that "paintings have a life of their own that derives from the painter's soul."[1] It is no surprise then that such a thing could be an object of desire. It should also be no surprise that those who lost their artwork during the Holocaust would search for it and upon finding it try to persuade the courts to use their power to return it.

[1] Orkin v. Taylor, 487 F.3d 734, 736 (9th Cir. 2007).

What is surprising is how recently these claims have been brought. The past decade has seen a tremendous increase in the number of art restitution cases filed.[2] There are reasons for this recent increase, not the least of these being that the cases themselves and generate public interest and precedent.[3] Greater treatment in legal scholarship and in the news is generating its own share of public interest.[4] Technological advances, such as online databases of artwork, have made it immeasurably easier for art theft victims and their heirs to locate missing art.[5] Skyrocketing prices have raised the stakes and made a costly court battle logical.[6] One of the most crucial pieces of the puzzle is the changing notion of restorative justice that brings with it the idea that societies should do what they can to correct some of the wrongs of the Holocaust.[7] Restitution of art looted during the Holocaust is an important part of this idea.

One such case, *Orkin v. Taylor*,[8] recently made its way through the federal court system. It involved a van Gogh, a movie star and the heirs of a Holocaust survivor. The controversial result rested on an issue over California's statute of limitations. The case itself concluded when the United States denied certiorari; however, the issues left unresolved are just the beginning of a story that will replay itself as victims of Holocaust art looting and their heirs seek assistance from U.S. courts.[9]

The purpose of this Article is three-fold. In Part II, this Article describes the *Orkin* case, a case that dealt a blow to Holocaust art restitution. Part III is a compendium of art restitution cases in U.S. courts that turn on the statute of limitations issue. This Part contrasts the legal approach taken in California in the *Orkin* case with the approaches of other U.S. jurisdictions, illustrating how there is no uniformity in statutes of limitation for art restitution cases. Finally, Part IV argues that uniformity in the area of art restitution is essential, and proposes a solution: amendment of the Holocaust Victims Redress Act to create a private right of action for art restitution claims and a uniform statute of limitations that would preempt the application of state statutes of limitation in art restitution cases.

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[2] *See* Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT'L L.J. 781, 782 (2008).

[3] *See id.* at 783.

[4] *See id.* at 784.

[5] *See id.*

[6] *See id.* at 785.

[7] *See id.*

[8] 487 F.3d 734.

[9] See Redman, *supra* note 2, for a discussion of how U.S. federal courts get jurisdiction over art restitution cases and why so many cases are brought in U.S. federal courts.

II. *ORKIN V. TAYLOR*

A. *Background*

In 1939, a Jewish art scholar and collector, Margarete Mauthner, was forced to flee Germany, leaving behind all of her possessions.[10] Among her possessions were several pieces of art, including Vincent van Gogh's Vue de l'Asile et de la Chapelle de Saint-Remy.[11] What happened to the painting in the years surrounding World War II is not clear.[12] The painting passed through the hands of several collectors and in 1963 was purchased at auction by Francis Taylor on behalf of his famous movie star daughter Elizabeth.[13] Mauthner's heirs learned of Elizabeth Taylor's ownership of the painting in 2002.[14] Soon thereafter, they wrote a letter to Taylor demanding that she return the van Gogh to them.[15] Taylor refused, stating that the claim was untimely.[16] She then filed suit for declaratory relief to establish her title to the painting in the United States District Court for the Central District of California.[17] Mauthner's heirs filed their own lawsuit in the same court.[18]

The Plaintiffs brought the action seeking recovery of the painting on four alternative theories of recovery under California law—replevin, constructive trust, restitution and conversion—as well as several non-traditional causes of action.[19] The non-traditional causes of action the plaintiffs requested were recovery under an implied right of action under both federal law and by the "findings and declarations of the

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[10] 487 F.3d at 737. Mauthner settled in South Africa in 1939 where she lived until she died in 1947. *Id.*

[11] Linda Greenhouse, *Elizabeth Taylor to Keep Van Gogh*, N.Y. TIMES, Oct. 30, 2007, at E2. The painting is a 44.5 by 60-centimeter oil that captures the asylum van Gogh was staying in at Saint-Remy-de-Provence and the surrounding wheat fields. Van Gogh created the painting near the end of his life, not long before his tragic suicide. *See* Lauren Fielder Redman, *Orkin v. Taylor: A Satisfying Solution to a Dispute over a Van Gogh or a Blow for Holocaust Art Restitution Claims in United States Federal Court*, 12 ART ANTIQUITY & LAW 389, 390 (2007).

[12] 487 F.3d at 737. Mauthner's heirs claimed that she sold her painting under duress, as part of the economic coercion that Jews faced under Nazi persecution. *Id.*

[13] *Id.* Taylor had long coveted a van Gogh painting. She became aware that *Vue de l'Asile et de la Chapelle de Saint-Remy* was going to be auctioned by Sotheby's but worried that if she was present at the auction she would drive the price of the painting artificially high, so she sent her father, an art dealer, to bid on her behalf. Taylor's winning bid was about 92,000 pounds. *See* Redman, *supra* note 11, at 392.

[14] 487 F.3d at 738. The heirs claim that they learned of Taylor's ownership through an internet rumor. *Id.*

[15] *Id.* The letter was sent in December 2003. *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* Brief in Opposition at 1, Orkin v. Taylor, 487 F.3d 734 (9th Cir. Sept. 18, 2007) (No. 07-216).

[19] Adler v. Taylor, No. 04-8472, 2005 U.S. Dist. LEXIS 5862 at *1 (C.D. Cal. Feb. 2, 2005).

California legislature."[20] Defendant Taylor filed a motion to dismiss, arguing that California's statute of limitations period had run and the non-traditional causes of action were invalid.[21] The plaintiffs' response to the motion to dismiss claimed that the statute did not begin to run until the heirs learned of the whereabouts of the painting.[22] In analyzing the issue, the court had to determine the appropriate statute of limitations. The court applied California's three year limitations period.[23] The major issue was whether under the pre-1983 amendment, the statute of limitations included a discovery rule.[24] The court examined California law, including *Naftzger v. American Numismatic Society*, which found an implied discovery rule in the old statute.[25] However, the court rejected this holding, explaining that the Naftzger Court failed to address California precedent that rejected the application of a discovery rule.[26] The trial court held that

> precedent establishes that the statute of limitations begins to run against a subsequent purchaser of stolen property at the time the subsequent purchaser obtains the property. Thus, in this case, the statute of limitations began to run in 1963. It has long since expired.[27]

In the alternative, the trial court stated that if it would have applied the discovery rule, the plaintiff must exercise reasonable diligence to discover who is in possession of the stolen item.[28] In the instant case, the court found that the complaint alleged no diligence by the plaintiffs.[29] The trial court also dismissed the non-traditional causes of action pled by the plaintiffs, stating "[n]o court has ever found valid the causes of action that Plaintiffs claim in their Complaint."[30] Taylor's motion to dismiss was granted in its entirety.[31]

B. *Appellate Case*

The Mauthner heirs hastily appealed the decision of the federal district court.[32] In considering whether the trial court's motion to dismiss had been proper, the Court of Appeals focused on two main is-

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[20] *Id.* at *2.
[21] *Id.* at *10, *14.
[22] *Id.* at **6-7.
[23] *Id.* at *11.
[24] *Id.*
[25] *Id. See infra* Part II.
[26] *Adler*, 2005 U.S. Dist. 5862 at *12.
[27] *Id.* (citation omitted).
[28] *Id.*
[29] *Id.* at *13.
[30] *Id.* at *14.
[31] *Id.* at *17.
[32] *See* Redman, *supra* note 11, at 396.

sues: (1) whether the statute of limitations barred the state law claims, and (2) whether the Holocaust Victims Redress Act created a federal implied right of action.[33]

C. *Statute of Limitations Issue*

The Court of Appeals decided that the trial court properly decided the statute of limitations issue, rejecting the plaintiff's argument that the court should follow the standard set forth in the *Nafzger* case, which held that the discovery rule applies to the pre-1983 statute.[34] The court explained that it is the responsibility of a federal court sitting in diversity to "approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum."[35] Because there was no California Supreme Court case on point, and because another California Court of Appeal case had criticized the *Naftzger* case, the Court of Appeals could not predict that the California Supreme Court would decide a case using the *Naftzger* approach. Thus the court declined to apply an implied discovery rule in the pre-1983 statute.[36] Despite not applying the implied discovery rule, the court speculated on how they might have ruled had they applied the rule, noting that the California Supreme Court had incorporated a constructive notice requirement in instances where it has applied the discovery rule.[37] In the instant case, the court of appeal pointed out that the Mauthner heirs could have determined the whereabouts of the painting many years earlier through an investigation of sources open to them.[38] The court disregarded the plaintiffs' contention that Elizabeth Taylor acquired the painting in a suspect manner.[39]

D. *Implied Federal Right of Action Issue*

The plaintiffs claimed that the Holocaust Victims Redress Act created an implied right of action.[40] Congress enacted the law in 1998 to

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[33] Orkin v. Taylor, 487 F.3d 734, 736 (9th Cir. 2007).

[34] *Id.* at 741. *See infra* Part II.

[35] *Id.* (citing Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 939 (9th Cir. 2001)).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 741-42 (noting that Taylor's acquisition of the painting was discoverable at least by 1990 when she put her van Gogh painting up for auction at a highly publicized international auction, and possibly as early as 1963, when she acquired the painting at another international auction).

[39] *See* Redman, *supra* note 11, at 394 (stating that Taylor may have ignored several warning signs about the painting's provenance). Francis Taylor, as an art dealer, should have recognized the warning signs.

[40] *See id.* at 400 (citing Orkin v. Taylor, 487 F.3d 734, 738 (9th Cir. 2007)).

provide justice to victims of the Holocaust.[41] In deciding this issue, the Court of Appeals analyzed whether there was congressional intent to create a private right of action under the Holocaust Victims Redress Act using the Supreme Court's four-factor *Cort* test, which asks:[42]

(1) whether the plaintiff is a member of a class that the statute especially intended is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate.[43]

The second *Cort* factor—legislative intent—was the major focus of this part of the court's analysis.[44] The plaintiffs argued that a "Sense of Congress" provision in the Act proved intent.[45] Section 202 of the Act, titled "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art" provided that

[i]t is the sense of Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.[46]

The Court of Appeals rejected this argument, explaining that "Sense of Congress" provisions are precatory, not creating any individual rights or enforceable law.[47] The court looked next at the legislative history of the Act, and commented that even the most statute's most

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[41] Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998). See *infra* Part III for an expanded explanation of the Holocaust Victims Redress Act.

[42] Orkin at 738 (citing Cort v. Ash, 422 U.S. 66 (1975)). The court stated that "congressional intent is the cornerstone of the analysis." *Id.* The *Cort* test is almost always used when determining whether a private right of action exists.

[43] *Id.* at 738-39 (citing *Cort*, 422 U.S. at 78).

[44] *See* Redman, *supra* note 11, at 402.

[45] Orkin at 739.

[46] Holocaust Victims Redress Act §202.

[47] Orkin v. Taylor, 487 F.3d 734, 739 (citing Yang v. Cal. Dep't of Soc. Servs., 183 F.3d 953, 958-59 (9th Cir. 1999)). The court acknowledged that these provisions are occasionally relevant to a court's determination of whether private rights of actions are created; however, there have to be other mandatory provisions pointing to the creation of the right. In *Orkin*, the plaintiffs could point to no such provision of the Act or its companion legislation. *Id.*

ardent supporter did not envision it to include a private right of action.[48]

Next, the Court of Appeals analyzed whether the Holocaust victims constituted a beneficiary class under the Holocaust Victims Redress Act.[49] The court explained that the focus of the legislation is on governments, not individuals.[50] In determining whether the general purpose of the Act would be served by creating a private right of action, the Court of Appeals explained that the purpose of the Act was to provide access to information—not to provide access to the courts.[51]

Finally, the Court evaluated whether the cause of action is traditionally relegated to state law such that a federal remedy would be inappropriate. The court spent little time on this factor, noting that state law provides remedies for the recovery of stolen art.[52] Since the Court determined that none of the *Cort* factors were satisfied, the plaintiffs' assertion of a federal private right of action was unsuccessful.[53]

E. *Supreme Court*

The Mauthner heirs appealed to the U.S. Supreme Court for a writ of certiorari.[54] In their petition, they stressed that it had been improper for the federal district court to dismiss the claim without an evidentiary hearing on the statute of limitations issue.[55] In addition, the plaintiffs argued that the result in the case contravened an important public policy of the United States, namely that:

> persons whose property was stolen or abandoned during the Nazi era are entitled to press claims to recover it, and that their rights to do so are absolute, regardless of the intervening rights of subsequent purchasers.[56]

How, argued the plaintiffs, can this policy be realized without a remedy for individuals?[57] Finally, the plaintiffs stressed that the Court of Appeals should have followed *Naftzger* since it was the only inter-

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[48] *Id.* (commenting that Representative Jim Leach believed that Congress had gone as far as it should in crafting the Act).

[49] *Id.* at 740.

[50] *Id.* (stating that the Act "merely expresses Congress's sense that Holocaust survivors and heirs should benefit fully from preexisting protections").

[51] *See* Redman, *supra* note 11, at 403 (citing *Orkin*, 487 F.3d at 740).

[52] Orkin at 740.

[53] *Id.* at 741.

[54] *See* Redman, *supra* note 11, at 396.

[55] *See* Petition for a Writ of Certiorari at 10, Orkin v. Taylor, 128 S. Ct. 491 (2007) (No. 07-216).

[56] *Id.* at 11 (noting that the policy has been a part of three 1998 federal statutes and the 1947 Military Government Law).

[57] *Id.*

mediate appellate decision that decided the accrual decision.[58] According to Charles A. Wright's treatise on federal practice and procedure, where there is no controlling state supreme court decision, a federal court sitting in that state should look to intermediate appellate decisions to determine what the law is.[59] Without compelling evidence that the Supreme Court of California would have decided the question differently than the way it was decided in *Naftzger*, the plaintiffs argued that the court should have followed that decision.[60] Despite the strength of these arguments, the Supreme Court denied certiorari on October 29th, 2007, finalizing the decision of the Court of Appeals.

III. STATUTE OF LIMITATIONS

A. *History*

The importance of the statute of limitations issue to the outcome of *Orkin* is a good example of how statute of limitations questions are often a central issue in art restitution cases.[61] The centrality of the issue is magnified by the fact that art can last indefinitely, is easily movable, is internationally traded, easily concealed, identifiable, non-fungible and often of high (and increasing) value.[62] Despite these unique features, most art restitution cases are governed by archaic statute of limitations principles.[63] In fact, statutes of limitation have become the primary defense in art restitution cases.[64] Art restitution cases use the personal property statute of limitations for the jurisdiction where the case is filed.[65] The statue of limitations to recover personal property is fairly short, rarely exceeding six years.[66]

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[58] *See id.* at 21.

[59] *See id. See also* Reply Brief of Appellants at 15, *Orkin*, 487 F.3d 734 (No. 05-55364) (citing CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE §4507 at 150-51 (1996)).

[60] *See* Reply Brief of Appellants, *supra* note 59, at 16.

[61] *See* Ashton Hawkins, et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 50 (1995).

[62] *Id.*

[63] *Id.*

[64] *See* Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 197 (2005).

[65] *See id.* at 191.

[66] *See* Patty Gerstenblith, *Acquisition and Deaquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409, 441, n.139 (2003) (stating that only two states provide longer statute of limitations periods—Louisiana and Rhode Island—each providing ten year accrual periods).

There are several policy reasons for employing statutes of limitations.[67] First, they facilitate the prompt filing of claims. The rationale is that those with valid claims will not hesitate to assert them.[68] Yet in art restitution cases, many victims and their heirs are only now learning that they might have a claim as government records are coming to light for the first time and victims are gaining new awareness that there is support for making these claims.[69] This has been a circular process. As governments release records, cases are filed which leads victims or their heirs to file more cases with the increasing public awareness putting pressure on governments to cooperate.[70]

A second reason for statutes of limitation and the most cited one is to protect possessors of art from bad evidence.[71] An oft-quoted article from the Harvard Law Review explains that the reason for statutes of limitation is to prohibit stale claims: [There is a] time when [the defendant] ought not to be called on to resist a claim when "evidence has been lost, memories have faded, and witnesses have disappeared."[72]

Art restitution cases usually do not involve stale claims, however, because most are initiated upon the discovery of new evidence.[73]

Finally, statutes of limitation promote commerce.[74] Quieting title increases the marketability of goods.[75] It is based on the premise that the law should always promote marketability.[76] This is a particularly

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[67] Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes,* 73 BROOK. L. REV. 155, 199 (2007) (quoting 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, 17 (1998)).

[68] *Id.* at 199.

[69] *See* Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L. J. 447, 461 (1999). *See also supra* Introduction.

[70] *See generally*, Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 24-26 (1998). Schwartz gives the example of a plaintiff who claimed title to Schiele's *Dead City III*, and was inspired to file her suit when she read about efforts to recover *Portrait of Wally*. *Id.* at 24.

[71] *See* Kreder, *supra* note 67, at 199.

[72] *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950); *see also* Brief of Appellee at 37, Orkin v. Taylor, 487 F.3d 734 (9th Cir. Aug. 30, 2005) (No. 05-55364).

[73] *See* Cuba, *supra* note 69.

[74] *See* Kreder, *supra* note 67 (explaining that statutes of limitation are effective at "making sure that those who have dealt with property in good faith can enjoy secure and peaceful possession after a certain, specific period of time").

[75] *See* Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2451 (1994).

[76] *Id.* According to Bibas, "the law's goal should not be to maximize marketability per se, but rather to achieve *optimum* marketability by inducing buyers to weigh the costs of investigation against its benefits." *Id.*

important rationale for civil law nations.[77] For example, Italy has absolute statute of limitations periods to protect *bona fide* purchasers of goods.[78] It is a rationale that is not particularly strong in the United States.[79]

This rationale is especially weak in art restitution cases in large part due to the moral element present in these cases.[80] In the case of Holocaust era looted art, many States including the U.S. have recognized the racial motivation behind Hitler's art looting policies, which resulted in "history's. . .largest robbery."[81] Indeed, Hitler used his theft of art as part of his genocide regime against Jews.[82] According to Rabbi Israel Singer of the World Jewish Congress, "Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back."[83] States have recognized an obligation to assist Holocaust victims.[84] In addition, facilitating commerce in the area of art encourages theft.[85] Where the law favors purchasers over owners, purchasers have little incentive to cautiously investigate an artwork's title.[86] Even galleries and auction houses have an incentive to ignore suspicious circumstances.[87] This is especially problematic in an area where theft is so rampant. One study estimated that art theft is the

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[77] Kreder, *supra* note 67, at 201.

[78] *See id.*

[79] *See id.* Indeed, it is an area of law where there is a stark contrast between the rule of civil and common law systems. *Id.* (citing John Henry Merryman, *American Law and the International Trade in Art*, in INTERNATIONAL SALES OF WORKS OF ART, 425, 428 (Pierre Lalive ed., 1985)).

[80] *See id.*

[81] Brief of B'Nai Brith Canada and the South African Jewish Board of Deputies as Amici Curie in Support of Petitioners at 6, Orkin v. Taylor, 128 S. Ct. 491 (U.S. Sept. 19, 2007) (No. 07-216). The brief points out that historians estimate that approximately $20.5 billion in artwork was stolen. *Id.* at 8.

[82] *See id.* at 6-7.

[83] *Id.* at 7 (explaining that "[t]he Nazis wanted to strip Jews of their human rights, their financial rights and their rights to life") (citing Michael Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INTL L. 11, 41 (2002)).

[84] For example, forty-five states states gathered in 1998 at the Washington Conference on Holocaust Era Assets to deal with the issues surrounding restitution of Holocaust looted art. The conference was followed in 2000 by the Vilnius International Forum on Holocaust Era Assets, which emphasized the need for states to develop domestic law and policy to implement principles developed at the Washington Conference. *See* Alexis Derrossett, *The Final Solution: Making Title Insurance Mandatory for Art Sold in Auction Houses and Displayed in Museums That is Likely to be Holocaust-Looted Art*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 223, 234-35 (2007).

[85] *See* Bibas, *supra* note 75, at 2451-52.

[86] *See id.* at 2451.

[87] *See id.* at 2452. This is especially troublesome considering that buyers often rely on galleries to investigate the title of artwork, yet there is evidence that "even reputable auction houses such as Sotheby's have been known not to investigate title." *Id.* (citing Grace Glueck, *Who Owns Stolen Artifact? College Confronts a Museum,* N.Y. TIMES, Apr. 30, 1991, at A1).

second most lucrative crime in the world, surpassed only by drug trafficking.[88]

B. *Current Status of the Law*

There are three distinct approaches to when the statue of limitations will begin to run in actions to recover stolen art.[89]

1. California

California has the most chaotic approach, with distinctions between pre- and post-1983, and between individuals and galleries or museums. Before 1983, California had a three year statute of limitations for actions to recover personal property, including artwork.[90] The statute did not specify when the claim accrued, causing confusion over its interpretation.[91] The California Court of Appeal attempted to clear this confusion in *Naftzger v. the American Numismatic Society*.[92]

Naftzger was an action to quiet title by an innocent purchaser of stolen coins against the museum from which the coins had been stolen.[93] The defendant, the American Numismatic Society, is the operator of a New York City museum that houses an extensive collection of coins.[94] The museum was given a valuable collection of copper coins in 1937.[95] A portion of the collection was stolen at some point prior to 1970 by substituting 129 coins of inferior quality for the original copper coins.[96] The museum did not discover the theft by substitution until 1990 when an expert that had examined the collection notified the museum of the theft.[97] The museum subsequently determined that some of the stolen coins were in the possession of plaintiff Roy E. Naftzger, who was unaware of the theft when he purchased the coins.[98] The mu-

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[88] *See* Bibas, *supra* note 75 (quoting Don L. Boroughs et al, *The Hidden Art of Theft*, U.S. NEWS & WORLD REP., Apr. 2, 1990, at 13).

[89] *See* Symposium, *Panel: Protecting the Cultural Heritage in War and Peace*, 5 SANTA CLARA J. INT'L L. 486, 492 (2007) [hereinafter "Panel"].

[90] CAL. CIV. PROC. CODE § 338(3) (West 1982).

[91] Panel, *supra* note 89, at 493, asking "[w]as it three years from the date of theft? Three years from the date the theft victim located the property, the thief, or an innocent possessor? Could the statute be tolled if the theft victim could not find the missing property, or its possessor?"

[92] 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d 784 (Ct. App. 1996).

[93] *Id.* at 426-27.

[94] *Id.* at 426.

[95] *Id.* The coins were large copper cents minted in Philadelphia by the United States Mint between 1793 and 1857. *Id.*

[96] *Id.* The thief is believed to be a coin collector who had frequented the museum and had examined the collection in dispute.

[97] *Id.*

[98] *Id.*

seum demanded the return of the coins and Naftzer refused, instead filing suit against the museum seeking declaratory relief and to quiet title.[99] The museum filed a cross complaint to recover the coins.[100]

The primary issue in the *Naftzer* decision was whether the museum's claim was barred by California's pre-1983 statute of limitations rule since the cross complaint was filed more than three years after the date of theft.[101] The court had no guidance from previous cases in determining when a cause of action accrues under section 338(c).[102] The court held that an owner's cause of action accrues when the theft occurs even if the owner is ignorant of the wrongdoing, yet they recognized an exception for fraudulent concealment.[103] Where fraudulent concealment is found to have occurred, "the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion."[104] In the instant case, the court found that fraudulent concealment had taken place and that the museum filed its cross compliant within three years of discovering the missing property in Nafzger's possession.[105] The court applied an actual discovery rule and held that diligence of a theft victim is part of the discovery rule to be used in pre-1983 cases, though a defense of laches is probably available.[106] The result is a shift in the burden of proof from the true owner to the *bona fide* purchaser.[107] The *Naftzger* case has not proved to be the tool for clarifying the law as it was intended. While it was not directly overturned, the case was criticized in dicta by a case decided just one month later.[108] In addition, it

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[99] *Id.*

[100] *Id.* at 426-27.

[101] *Id.* at 427.

[102] *Id.* at 428 (stating that the only cases involving the accrual of a cause of action under this section involved conversion of articles entrusted to a wrongdoer).

[103] *Id.* at 428-29.

[104] *Id.* at 429 (citing Bennett v. Hibernia Bank, 427 Cal. 2d 540, 561 (1956)).

[105] *Id.* at 435.

[106] Carla J. Shapreau, *California's Discovery Rule is Applied to Delay Accrual of Replevin Claims in Cases Involving Stolen Art*, 1 ART ANTIQUITY & L. 407, 408 (1996).

[107] *See id.* (noting that "[a]lthough not discussed by the court, the potential purchaser's efforts to investigate provenance prior to purchase will in all likelihood also be a factor in determining the merits of a laches defense"). To avoid a laches defense under the actual discovery standard, Shapreau points out that a theft victim should promptly report the theft, publicize the theft in trade journals, notify persons that might lead to the discovery of the art, and place the art on an appropriate registry, such as the Art Loss Register. *Id.*

[108] Soc'y of Cal. Pioneers v. Baker, 43 Cal. App. 4th 774, 783 n.10 (1996) (stating that it reached "a different conclusion as to the state of the law prior to the 1983 amendment"). Carla Shapreau points out that while it is not clear what the Baker court meant, "presumably the Court of Appeal was referring to its disagreement with application of the 'actual' discovery standard announced by the *Naftzger* court and the related issue of plaintiff's due dili-

was harshly criticized by the *Orkin* court, which refused to follow its implied discovery rule.[109]

As mentioned above, the statute was amended in 1983 to include a discovery accrual rule for actions involving the theft of art or artifact.[110] Under the new rule, a cause of action is "not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency which originally investigated the theft."[111] Despite the fact that the statute has been amended, the pre-1983 version is still important in art restitution cases, because the thefts in question frequently occurred before 1983.

Finally, California has a special statute of limitations applying to Holocaust-era art claims, but it is limited to art that is in the possession of a museum or gallery.[112] This provision extends the statue of limitations for claims to recover Holocaust art until 2010.[113]

2. New York

New York statute of limitations law favors original owners to a large degree. Case law in New York has developed a demand and refusal rule for art restitution cases.[114] The demand and refusal rule dictates that the statue of limitations does not begin to run until the true owner makes a demand for the return of the painting and the possessor refuses.[115] This is so even where the possessor is an innocent *bona fide* purchaser.[116] The demand and refusal rule is an attempt to balance the interests of the true owner and the innocent purchaser. It favors the true owner more than any other approach, yet provides protection to the good faith purchaser by allowing him to avoid being brought to court "prior to committing the knowingly wrongful act of refusing a demand for return of property from the true owner of a work of art.[117]

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gence." Shapreau, *supra* note 107, at 411. *Naftzger* was decided by the Second District Court of Appeal while *Baker* was decided by the First District Court of Appeal.

[109] *See supra* Part I.

[110] Shapreau, *supra* note 107, at 408 n.5 (citing CAL. CIV. PROC. CODE § 338(3) (West 1982, Supp. 2006)). Shapreau notes that the California legislature amended the statute two more times, first in 1988 when it renumbered section 338(3) as 338(c), and again in 1989 when it replaced the words "art or artifact" with the phrase "article of historical, interpretive, scientific, or artistic significance." *Id.* (citing CAL. CIV. PROC. CODE § 338(3) (1988) (amended 1989); CAL. CIV. PROC. CODE § 338(c) (1989) (amended 1990)).

[111] *Id.*

[112] CAL. CIV. PROC. CODE §354.3.

[113] *Id.*

[114] *See* Panel, *supra* note 89, at 493.

[115] *See* Cuba, *supra* note 69, at 456 (citing Menzel v. List, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966)).

[116] Cuba, *supra* note 69, at 456.

[117] *See* Schwartz, *supra* note 70, at 7 (citing Hawkins, *supra* note 61, at 69-70).

This doctrine is tempered by the defense of laches.[118] The doctrine of laches requires that the original owner not delay in demanding return of the stolen property.[119] It "involves a multi-factor balancing of all the equities, including the owner's diligence, the buyer's behavior and prejudice to the buyer."[120] The first New York case articulating the demand and refusal rule was *Gillet v. Roberts*.[121] The leading cases applying the demand and refusal rule in the area of art restitution claims are: *Menzel v. List*,[122] *Kunstsammlungen Zu Weimar v. Elicofon*[123] and *Solomon R. Guggenheim Found. v. Lubell*.[124]

Menzel was a replevin action to recover a Marc Chagall painting that had been relinquished by its original owners when they fled for their lives from Belgium ahead of approaching Nazis.[125] Fortunately, the owner of the painting, the Menzels, survived World War II and settled in the United States.[126] The Menzels searched for their painting to no avail until 1962 when the painting was found in the possession of Albert List, a well known art collector.[127] Mrs. Menzel demanded the return of her painting (Mr. Menzel had died in 1960) and Mr. List refused her demand.[128] Mrs. Menzel then filed her claim for replevin seeking return of the Chagall painting, or in the alternative, the painting's value.[129] The answer raised the affirmative defense that the claim was barred by the New York statute of limitations.[130] In addition, List claimed that he was a *bona fide* purchaser for value.[131] The court dismissed the defendant's argument that the statute of limitations began

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[118] The defense of laches is not satisfying to some critics of the "demand and refusal" rule. "Litigation based on a laches defense is particularly fact-specific, time-consuming, and not amenable to resolution on a motion to dismiss or for summary judgment without a trial." Gerstenblith, *supra* note 66, at 443.

[119] *See* Bibas, *supra* note 75, at 2446.

[120] *Id.* (citing Solomon R. Guggenheim Found. v. Lubell, 569 N.E. 2d 426, 431 (N.Y. 1991)).

[121] 57 N.Y. 28, 34 (1874) (stating "[a]n innocent purchaser of personal property from a wrong-doer shall first be informed of the defect in his title, and have an opportunity to deliver the property to the true owner, before he shall be made liable as a tortfeasor for a wrongful conversion"). *See also* Schwartz, *supra* note 70, at 6.

[122] 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 298 N.Y.S.2d 979 (1969).

[123] 536 F. Supp. 829 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

[124] 77 N.Y.2d 311 (1991).

[125] *Menzel*, 267 N.Y.S.2d at 806.

[126] *Id.* at 807.

[127] *Id.*

[128] *Id.*

[129] *Id.* The complaint alleged the value of the painting to be about $25,000. *Id.*

[130] *Id.*

[131] *Id.* List brought in third party defendants who also claimed that they were *bona fide* purchasers of the painting in good faith and for value. *Id.*

to run either in 1941 when the painting was taken, or in 1955 when List bought the painting.[132] Instead, the court found that the statue began to run upon the defendant's refusal to return the painting upon demand.[133]

The *Elicofon* case involved an action by a German Museum to recover two Albrecht Dürer portraits from Defendant Edward Elicofon.[134] The two Dürer portraits had disappeared from Germany during the allied occupation and eventually been purchased by Elicofon in 1946.[135] The defendant argued that the claim was barred by the statute of limitations.[136] The court held, however, that the museum's cause of action began not when the paintings were stolen from Schwarzburg Castle, but when Elicofon refused the demand to return the portraits.[137] The plaintiff's twenty year delay in making demand was excused.[138] The defendant was ordered to return the Dürer portraits to the museum.[139]

Guggenheim solidified the demand and refusal rule in New York.[140] *Guggenheim* was a replevin action to recover a Chagall gouache that had been stolen from the Guggenheim Museum by a mailroom clerk in the 1960s.[141] The painting was purchased in 1967.[142] The defendant, Lubell, publicly exhibited the Chagall painting in 1967 and 1981.[143] At some point, the museum realized that the painting was missing but took no steps to locate it.[144] The museum became aware of Lubell's possession of the Chagall in 1985 and soon thereafter demanded its return.[145] Lubell claimed that the museum had unreasonably delayed demand of the painting, triggering the statute of limitations.[146] The court held that the trial court had erred in holding

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[132] *Id.* at 809.

[133] *Id.*

[134] *Weimar*, 536 F. Supp. at 830.

[135] *Id.* (emphasizing that Elicofon had purchased the paintings from an American serviceman).

[136] *Id.* at 829.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 857.

[140] *See* Schwartz, *supra* note 70, at 8.

[141] *Guggenheim*, 77 N.Y. 2d at 314. The Chagall was estimated to be worth $200,000. *Id.*

[142] *Id.* The painting was acquired from a well known New York City art gallery. The defendant claimed that she had no idea that the painting had been stolen until demand was made of her in 1986. *Id.*

[143] *Id.* at 316.

[144] *Id.*

[145] *Id.* The museum learned about Lubell's possession from a former employee that saw a transparency of the missing painting. *Id.*

[146] *Id.* at 317.

that "delay alone can make a replevin action untimely."[147] The court found that this was a laches defense, and as such the defendant had to show that she had in some way been prejudiced by the delay in demanding the return of the painting.[148] The *Guggenheim* court found no such prejudice.[149] The court refused to craft a reasonable diligence standard because it did not want to burden true owners of stolen art.[150] The court's rationale for its decision was to avoid New York becoming a haven for stolen art.[151] The court stated that "a better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."[152] Additionally, the court noted "the inherent difficulties in declaring what conduct would be necessary for a showing of reasonable diligence."[153]

The result in *Guggenheim* and the demand and refusal rule have been sharply criticized.[154] According to one critic, "the pure demand-and-refusal requirement eviscerates limitation periods by allowing owners to postpone making a demand indefinitely. It helps thieves. . .while harming innocent buyers."[155] The fear is that non-diligent former owners would be unfairly rewarded at the expense of good faith purchasers.[156] Even when the defense of laches lessens the impact of the rule, the burden of proof is shifted to the good faith purchaser.[157] Without clearly defined guidelines for what constitutes adequate diligence, some feel that the *Guggenheim* decision was "rather draconian."[158]

A survey of art restitution law in New York would be incomplete without mention of New York's borrowing statute, which states:

An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor

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147 *Id.*

148 *Id.*

149 *See id.*

150 *Id.* at 320 (stating that "[w]e conclude that it would be difficult, if not impossible, to craft a reasonable diligence requirement that could take into account all of these variables and that would not unduly burden the true owner").

151 *Id.*

152 *Id.*

153 *See* Schwartz, *supra* note 70, at 9 (citing *Guggenheim*, 569 N.E.2d at 431).

154 *See* Schwartz, *supra* note 70, at 10 (citing Distribution of Unclaimed or Heirless Property Left Over After the Holocaust, Comm. on Int. Relations, 105th Cong. (1998) (statement of Stuart Eizenstat, Undersecretary of State for Economic, Business, and Agriculture)).

155 *See* Bibas, *supra* note 75, at 2445-46.

156 *See* Schwartz, *supra* note 70, at 10.

157 *Id.*

158 *Id.* (quoting Telephone Interview with Gilbert S. Edelson, Administrative Vice President and Counsel, Art Dealers Association of America (Mar. 19, 1998)).

of a resident of the state the time limited by the laws of the state shall apply.[159]

Though there are no reported art restitution cases utilizing the borrowing rule, if a Holocaust heir brought a case to recover art, the case could be dismissed if the borrowing statute were applied and the foreign jurisdiction has a shorter statute of limitations period than New York.[160]

3. Other Jurisdictions

Outside of California and New York, the constructive discovery rule has been applied by courts ruling on what triggers the running of the statute of limitations.[161] The constructive discovery rule requires the statute of limitations to begin to run when the true owner actually discovers or should have discovered through the use of reasonable diligence the location or possessor of the stolen art.[162] It is highly fact specific and great discretion is left to judges to determine when to apply it.[163] The burden is on the owner of the painting to show why the limitation period should be extended.[164] The major reported art restitution cases outside of New York and California employing the constructive

[159] *See* Schwartz, *supra* note 70, at 14 (quoting N.Y. C.P.L.R. 202 (McKinney 1990)).

[160] *See* Schwartz, *supra* note 70, at 15.

[161] *See* Panel, *supra* note 89, at 492. There is some evidence that Oklahoma would not follow the discovery rule. A reported exception seems to be *Reynolds v. Bagwell*, 198 P.2d 215 (Okla. Sup. Ct. 1948). Though not an art or antiquities case in a strict sense, it may provide an indication on how an art restitution case using Oklahoma statute of limitations rules might be decided. *Reynolds* was a replevin action for the recovery of an allegedly stolen violin, bow and case. Oklahoma's two-year statute of limitations was applied, and it began to run from the time a good faith buyer acquired possession, rather than from the time the owner first had knowledge of the buyer's possession absent fraud or concealment. According to the court:

> Where buyer in good faith of stolen violin did not remove original varnish from violin with result that appearance of violin was changed, until three or four years after buyer bought the violin, and violin was openly used by buyer's daughter in taking violin lessons, removal of varnish did not toll two year limitation statute that had already run.

198 P.2d at 215.

[162] *See* Panel, *supra* note 89, at 493.

[163] *See* Bibas, *supra* note 75, at 2447-48. A slightly different type of art restitution case involving a bailment noted that courts will not apply the discovery rule "if problems of proof created by the passage of time outweigh the hardship to a plaintiff who could not as a practical matter have sued any earlier than he did." *Id.* at n.70 (quoting Mucha v. King, 792 F.2d 602, 611 (7th Cir. 1986)). The *Mucha* case involved a dispute over ownership of a famous Art Nouveau painting by Alphonse Mucha. The painting had been consigned to an art gallery decades before it was eventually given away. The son of the artist sued seeking return of the painting that he had believed to be lost, while the defendant argued that Mucha should have demanded the painting sooner. The court, applying Indiana law, rejected the defendant's argument and ordered the return of the painting to the plaintiff.

[164] *Id.* at 2447.

discovery rule are *O'Keeffe v. Snyder*[165] and *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*[166]

O'Keeffe was a replevin action brought by the artist to recover possession of three stolen paintings.[167] Georgia O'Keeffe filed her petition in 1976 to recover the paintings which had been stolen from an art gallery in 1946. The defendant, Snyder, claimed that he was a *bona fide* purchaser, and further argued that O'Keeffe's claim was barred by New Jersey's six year statute of limitations.[168] The trial court dismissed the case, relying on the six year statute of limitations and the appellate court reversed and entered judgment for O'Keeffe relying on the law of adverse possession.[169] The New Jersey Supreme Court decided the case in favor of O'Keeffe as well, relying not on the law of adverse possession, but on the discovery rule pertaining to statutes of limitation.[170] The court considered the "equitable claims of all parties."[171] However, the *O'Keeffe* court neglected to establish a clear standard of diligence.[172] The result is that courts following this approach evaluate the level of diligence necessary on a case-by-case basis.[173]

A federal court case applying Indiana law, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,[174] involved a claim for the return of stolen mosaics. The plaintiffs sought possession of four Byzantine mosaics created in the sixth century.[175] The mosaics were stolen from the Authocephalous Greek-Orthodox church when Turkish troops occupied the northern portion of Cyprus.[176] The defendants claimed that the mosaics where purchased in good faith without notice that they were stolen and that the six year Indiana statute of limitations barred their return.[177] The court dis-

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[165] 416 A.2d 862 (N.J. Sup. Ct. 1980).

[166] 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd.* 917 F.2d 278 (7th Cir. 1990).

[167] 416 A.2d at 862. Georgia O'Keeffe sought to regain possession of three small pictures.

[168] *Id.* at 865. Snyder brought in a third-party defendant, Frank, from whom Snyder purchased the paintings only one year prior to the filing of the suit. *Id.*

[169] *Id.* Adverse possession is a system whereby the hostile possessor of property gains title to the property after a certain period of time. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 853 (3d ed. 2000).

[170] *Id.* The court refused to base its holding on adverse possession law because it "ignores an owner's actions and because the test for open and notorious use of land does not fit most chattels." *See* Bibas, *supra* note 75, at 2447. This is especially true of stolen art, which is easily and frequently hidden.

[171] O'Keeffe v. Snyder, 416 A.2d at 872.

[172] *See* Schwartz, *supra* note 70, at 5.

[173] *Id.*

[174] 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd.* 917 F.2d 278 (7th Cir. 1990).

[175] *Id.* at 1375.

[176] *Id.* at 1379.

[177] *Id.* at 1376, 1385.

agreed and held that the statute of limitations did not begin to run until the plaintiff knew or should have known using reasonable diligence the identity of the possessor of the mosaics.[178] Because the plaintiffs learned of the defendant's possession in 1988 and filed suit in 1989, the case was well within the statute of limitations period.[179] The court explained that

[t]he fact that statutes of limitations exist, however, does not mean that the timeliness of a claim is determined solely by the mechanical application of a period of months to a file-stamp date. Rather, under certain circumstances a court is required to evaluate the timeliness of a claim under rules and doctrines of law designed to ensure fairness and equity in the adjudication of claims. The facts of this case warrant that the Court evaluate the timeliness of the plaintiffs' claims.[180]

The court decided the case on the merits and awarded the mosaics to the church.[181]

IV. The Need for Uniformity

Problematic outcomes such as that seen in *Orkin* are disturbing to many legal scholars, yet they are inherent in the current system of allowing federal courts to decide the statute of limitations situations on a case by case basis. Even though the federal courts, including the *Supreme Court in Republic of Austria v. Altmann*,[182] have taken great strides in facilitating the return of looted works of art, the U.S. Supreme Court's refusal to act illustrates how leaving the situation to federal courts is problematic.[183] While there have been numerous proposals for reform, there has been little agreement on any one solution, even though a uniform rule is needed.[184]

A. *Possible Solutions*

The proposals for change have been both domestic and international. For example, several scholars have argued for the necessity of a

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[178] *Id.* at 1393.

[179] *Id.* at 1385.

[180] *Id.*

[181] *Id.* at 1376.

[182] Republic of Austria v. Altmann, 541 U.S. 677 (2004).

[183] *See, e.g.*, Choi, *supra* note 64, at 191 (claiming that "the legal system's inconsistent and unpredictable resolutions often fail to adequately protect their rights in seeking or retain[ing] ownership of [victims'] artwork"). Choi also points out that as parties become more distant to the original owners, courts will feel less compelled to return artwork to the heirs of the victims. *Id.* at 198.

[184] *See id.* at 192 (calling for a "prompt and uniform rule of law to address claims of Nazi-looted art").

domestic legal system that always prefers original owners over *bona fide* purchasers as long as the owners promptly report the thefts to a database created for that purpose.[185] Others argue for the outright suspension of statutes of limitation in art restitution cases.[186] A proposal for change at the international level calls for an international agreement encompassing a binding agreement to determine ownership of art looted by Nazis, which would preempt local statutes of limitation and set up a uniform rule.[187] Still others call for negotiation instead of litigation in art restitution cases.[188]

B. *The Best Option—Amendment of the Holocaust Victims Redress Act*

The Holocaust Victims Redress Act was a part of many worldwide actions that were born in a time of increased awareness that concrete steps were needed to reunite Holocaust victims or their heirs with their lost possessions. At the Washington Conference on Holocaust Era Assets, a group of states and NGOs met to hammer out principles that should be followed in Holocaust art restitution cases.[189] A non-binding agreement was reached enumerating eleven such principles.[190] This conference was followed by the Vilnius International Forum on Holocaust Era Looted Cultural Assets, with the purpose of calling on states to develop domestic programs to implement the Washington Conference Principles.[191]

At around the same time these international efforts were being made, the United States Congress created a very important piece of legislation called the Holocaust Victims Redress Act.[192] The act called on states to make good faith efforts to return art looted by the Nazis.[193] The act authorized the President to commit millions of dollars for re-

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[185] *See* Hawkins, *supra* note 61, at 54; Bibas, *supra* note 75, at 2461.

[186] *See* Cuba, *supra* note 69, at 450.

[187] *See* Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 384-85 (2000).

[188] *See* Schwartz, *supra* note 70, at 22. While this is a lofty goal, it is highly impractical. Though more than 2000 works of art have been returned to victims or their heirs through some type of dispute resolution besides litigation, most people seeking restitution of looted art are left with no choice other than the judicial system. *See* Choi, *supra* note 64, at 191.

[189] *See* Derrossett, *supra* note 84, at 234. The Conference took place on December 3, 1998 and was sponsored by the U.S. State Department and the U.S. Holocaust Memorial Museum. *Id.* at 223.

[190] *See id.*

[191] *See id.* (noting that the agreement reached at Vilnius was non-binding as well).

[192] Pub. L. No. 105-158, 112 Stat. 15 (1998).

[193] *See* Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 205.

search and established the Presidential Advisory Commission on Holocaust Assets in the United States.[194] The final report of this commission made six recommendations, which included: the establishment of a foundation to promote research and education; a requirement that federal institutions search their records; and the adoption of legislation to remove impediments to restitution.[195]

While none of these recommendations have been followed, it is this author's opinion that the solution to the need for uniformity can be found in the recommendation that legislation should be adopted to remove impediments to restitution and the appropriate vehicle for this is amendment of the Holocaust Victims Redress Act to provide a private right of action and a statute of limitations for art restitution cases. The amendment would specify what rule to apply in determining when the statute accrues, and might go so far as to suspend the statute of limitations in Holocaust art restitution cases.[196] This statute of limitations would preempt all contrary statutes of limitation on the books in the numerous jurisdictions in the United States called on to decide these cases. This is the most appropriate solution for several reasons.

As the law now stands, the Holocaust Victims Redress Act commits the United States to making a good faith effort to reunite victims of the Holocaust or their heirs with their lost art, and provides five million dollars for researching who really owns art, yet allows state statutes of limitation to foreclose the victims from being able to assert their claims after the artwork is discovered. This is precisely what happened in *Orkin*, with the family learning of the whereabouts of their missing van Gogh after the publicity from the Holocaust Victims Redress Act caused the family to hire a lawyer to help them piece together what happened to their grandmother's paintings during the Holocaust.[197] Without some provision in the Holocaust Victims Redress Act for a private right of action, Congress appears "to be taunting Holocaust victims by providing them with information to help them locate Nazi-confiscated assets, while denying them a judicial remedy to reclaim their property if they can find it."[198]

As explained above, the courts are an inappropriate place for setting statute of limitations rules because the case by case analysis of the

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[194] *See id.*

[195] *Id.* at 206.

[196] *See* Cuba, *supra* note 69, at 488 (advocating suspending the statute of limitations which would be reinstated upon the determination by the State Department that "the unique circumstances surrounding Nazi-looted art have subsided").

[197] Orkin v. Taylor, 487 F.3d 734. *See also supra* Part I.

[198] Reply Brief of the Appellants, *supra* note 59, at 11.

issue has resulted in widely varying results around the country.[199] With the Supreme Court unwilling to resolve the issue in *Orkin v. Taylor*, the state of the law remains uncertain and confusing.

There are features of Congress that make it a logical place for this issue to be resolved. Congress is well equipped to deal with an issue that is very complex, with claims that are over fifty years old and thousands of pieces of art that have entered the international art market.[200] To consider a solution to the problem, vast amounts of data must be gathered and analyzed.[201] First of all, Congress has the power to investigate issues related to proposed legislation.[202] Hand and hand with this power are the resources necessary to carry out the investigation.[203] In addition, Congress is the proper forum for making difficult policy determinations that favor one innocent party above another (the victim of art expropriation versus the innocent purchaser) since it is a branch of government that must answer politically to the people of the United States.[204]

V. Conclusion

Orkin should serve as a wake-up call that a uniform approach to statues of limitation in art restitution cases is needed. Amendment of the Holocaust Victims Redress Act is the best way to accomplish this. Amendment of the Act to include a private right of action with a statute of limitations that preempts state statutes of limitation comports with one of the purposes of the Act, which is to "provide a measure of justice to survivors of the Holocaust while they are still alive."[205]

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[199] *See supra* Part II.

[200] *See* Cuba, *supra* note 69, at 450.

[201] *See id.* at 451 (citing United States v. Gainey, 380 U.S. 63, 67 (1965)).

[202] *See* Cuba, *supra* note 69, at 451.

[203] *See id.* (stating that "this capacity derives from the significant resources available to the legislatures, namely their special committees, personal staff members, legislative hearings, the General Accounting Office, the Library of Congress Congressional Research Center, the Congressional Budget Office, and the Office of Technology Assessment").

[204] *Id. See generally* McCulloch v. Maryland, 17 U.S. 316 (1819). Cuba points out that the constitutionality of the amendment should not be a problem for several reasons. For one, Congress has tremendous power to act in areas that affect interstate commerce, and the art trade is commerce. In addition, Congress has the power to prohibit the sale of stolen goods. Holocaust looted art certainly fits into this category. Finally, Congress has the authority through the commerce clause to regulate activities that have a real and substantial relation to the national interest. Restitution of Holocaust looted art is part of the national interest, as evidenced by the Holocaust Victims Redress Act as it now stands. *See* Cuba, *supra* note 69, at 480-81 (citing U.S. Const. art. I, §8, cl. 3; Bernard Schwartz, Constitutional Law: A Textbook 100 (1972)).

[205] Cuba, *supra* note 69, at 488 (quoting Pub. L. No. 105-158, 112 Stat. 15 § 101(b)(1) (1998)).