

NOTE

THE ROLE OF THE DOCTRINE OF LACHES IN UNDERMINING THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT

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From 1933 to 1945, the Nazi regime looted art on a scale with few historical competitors. The Nazis used this state-sanctioned theft to dehumanize the Jewish population and carry out the “Aryanization” of German society.

To provide redress for the victims of Nazi looting, the United States and the international community adopted the Washington Principles in 1998—a set of guidelines intended to promote a “just and fair” solution for claims over Nazi-looted art. Unfortunately, despite this commitment, lawsuits to recover stolen artwork are often barred by time-based defenses.

In 2016, Congress passed the Holocaust Expropriated Art Recovery Act (“HEAR Act”) to promote resolution on the merits by effectively removing the statute of limitations as an affirmative defense. Surprisingly, however, Congress left the doctrine of laches available, thereby frustrating the effectiveness and stated purpose of the HEAR Act. The doctrine of laches bars a claim upon a showing that the claimant unreasonably delayed in bringing suit, and that the delay caused the artwork’s possessor to suffer prejudice. Yet because lawsuits for restitution of Nazi-looted artwork have only recently become viable, delay and the resulting prejudice—taking the form of lost evidence—are inherent in these claims. The doctrine of laches thereby undermines resolution on the merits, which is antithetical to the HEAR Act’s putative goals.

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This Note argues that for the HEAR Act to provide the relief it ostensibly envisions, the doctrine of laches should be precluded as an available defense. Alternatively, the ability to assert the defense should be restricted to those parties who acquired contested artwork in true good faith. By revising the HEAR Act accordingly, a “just and fair” solution can be achieved.

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INTRODUCTION

The destruction of Jewish cultural and economic identity was an integral component of the Nazi regime’s genocidal campaign.¹ The Nazis partly carried out this aim through the systematic looting of artwork, stripping the Jewish population of their possessions and casting them as outsiders.² The scale of the theft highlights its importance to the Nazis—in 1948, the United States estimated that it had found approximately 10.7 million looted art and cultural objects.³ The United States and European governments set up restitution programs,⁴ though these efforts soon gave way to a focus on the Cold War.⁵ After the Soviet Union fell, however, interest re-emerged in the Holocaust, as Allied governments declassified archives and scholars devoted attention to the unresolved problem of Nazi-looted art.⁶ In 1998, at the Washington Conference on Holocaust-Era Assets, the representatives of forty-four countries, including the United States, agreed to a set of guidelines known as the Washington

¹ Ori Z. Soltes, Cultural Plunder and Restitution and Human Identity, 15 J. Marshall Rev. Intell. Prop. L. 460, 461–62 (2016).

² See Jonathan Petropoulos, Art as Politics in the Third Reich 14, 92–94 (1996); discussion *infra* Part I.

³ Presidential Advisory Comm’n on Holocaust Assets in the U.S., Plunder and Restitution: The U.S. and Holocaust Victims’ Assets (2000), at SR–97 [hereinafter Commission Report].

⁴ *Id.* at SR–137 to SR–139.

⁵ See Nicholas M. O’Donnell, A Tragic Fate: Law and Ethics in the Battle Over Nazi-Looted Art, at xi (2017).

⁶ See Commission Report, *supra* note 3, at 4–5; O’Donnell, *supra* note 5, at 29, 46; Phillippe de Montebello, Dir., Metro. Museum of Art, Panel at National Press Club Luncheon: Art Plundered During the Holocaust (July 14, 1998), transcript available at <https://www.metmuseum.org/-/media/files/about-the-met/provenance-research/philippe-de-montebello-transcript.pdf> [https://perma.cc/7V4W-57G9] (commenting that “the fall of the Iron Curtain” led to “the declassification of a host of national archives”).

Principles.⁷ This document set forth the parameters for countries to work within their own legal systems to promote the “just and fair” resolution of claims for Nazi-looted art.⁸ Since the adoption of the Washington Principles, United States courts have heard a growing number of cases seeking the restitution of artwork stolen by the Nazis.⁹

Despite the United States’ commitment to the Washington Principles, time-based defenses like the statute of limitations and its equitable counterpart, the doctrine of laches, have been used to bar many of these claims.¹⁰ A laches defense is intended to prevent a claimant from delaying in asserting her rights in a way that—in the context of this Note—harms the party in possession of disputed artwork.¹¹ Recognizing the obstacles posed by time-based defenses, Congress acted in 2016 to reduce the difficulties descendants face in obtaining restitution.¹² The resulting legislation, the Holocaust Expropriated Art Recovery Act (“HEAR Act”), set a federal statute of limitations for actions seeking the recovery of Nazi-looted art.¹³ This six-year limitations period starts running when a claimant gains knowledge of the “identity and location of the artwork” and “a possessory interest” in the artwork.¹⁴ However, the HEAR Act’s final text did not address laches.¹⁵ Legislative history suggests that Congress intended for the defense to remain available. The initial draft

⁷ See U.S. Dep’t of State & U.S. Holocaust Memorial Museum, Proceedings of the Washington Conference on Holocaust-Era Assets, app. G., at 791–92 (1998) [hereinafter Washington Principles]; Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, at 196–99 (2003).

⁸ Washington Principles, *supra* note 7, at 972 (Principles VIII & IX).

⁹ See *infra* Part II.

¹⁰ See *id.*

¹¹ The doctrine is an application of equity’s maxim that its jurisdiction is meant to “aid[] the vigilant.” See Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 *Buff. L. Rev.* 621, 627 n.28 (2011) (citing *Stone v. Williams*, 873 F.2d 620, 623 (2d Cir. 1989)).

¹² See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 3(2), 130 Stat. 1524, 1526.

¹³ *Id.* § 5(a). The most common claims are for replevin and conversion. See, e.g., *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 315 (S.D.N.Y. 2018), *aff’d* on other grounds, 928 F.3d 186 (2d Cir. 2019), cert. denied, 140 S. Ct. 1269 (2020) (mem.). For a summary of these causes of action, see Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated Into Legal Duties?*, 51 *DePaul L. Rev.* 1103, 1137–41 (2002).

¹⁴ Holocaust Expropriated Art Recovery Act § 5(a).

¹⁵ See *id.* Compared to the initial draft discussed *infra* Section I.C, there is no mention of equitable defenses or the doctrine of laches in the Act’s operative provision.

explicitly precluded the doctrine of laches,¹⁶ but the enacted bill removed this language.¹⁷ Congress knew that the change would restrict the HEAR Act's impact and allow laches to frustrate the efforts of the very families the Act purported to help.¹⁸

This Note focuses on Congress's decision to leave laches intact—along with its consequences for claimants—and two possible revisions to the HEAR Act. By making the statute of limitations a non-issue in many disputes, Congress sought to ensure that these cases would be decided on the merits, thereby increasing the availability of restitution. Leaving laches intact, however, undermines that goal. A successful laches defense requires the party in possession¹⁹ of the artwork to show: (1) that the claimant unreasonably delayed in bringing suit against the possessor, and (2) that the delay caused prejudice to the possessor.²⁰ This defense is frequently easy for possessors of Nazi-looted art to demonstrate. These claims are inevitably delayed because the world largely treated art restitution as “a closed chapter” for half a century after World War II.²¹

¹⁶ S. 2763, 114th Cong. § 5(a) (2016).

¹⁷ Holocaust Expropriated Art Recovery Act § 5(a).

¹⁸ S. 2763, the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. & Fed. Cts., 114th Cong. 2–3 (2016) (statement of Agnes Peresztegi, President, Comm'n for Art Recovery), https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage [<https://perma.cc/ETQ7-S8AQ>] [hereinafter Peresztegi Testimony] (To access the hearing transcript, click on the first hyperlink and scroll down to the various witnesses. Under each witness is a link to the transcript of that individual's hearing testimony. The second “permanent” hyperlink links directly to the cited hearing testimony transcript.).

¹⁹ The labels for the party seeking restitution and the party currently in possession of the artwork will occasionally change throughout the text. For the party in possession, this Note will generally use “possessor” and, in certain contexts, “purchaser.” For the party seeking restitution, this Note will use “claimant,” “victim,” or “descendant.” “Plaintiff” and “defendant,” while simple, do not always reflect the claimant and possessor, as some current possessors will bring declaratory suits as the plaintiff. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 294 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

²⁰ *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (citing *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994); *Saratoga Vichy Spring Co. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980)).

²¹ S. 2763, the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 1 (2016) (statement of Monica Dugot, Int'l Dir. of Restitution, Senior Vice President, Christie's Inc.), https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage [<https://perma.cc/2TY6-KZY4>] (To access the hearing transcript, click on the first hyperlink and scroll down to the various witnesses. Under

Moreover, possessors can show prejudice based on lost evidence, as potential witnesses have passed away in the intervening decades. Even though such circumstances are inherent to these claims, courts have held that the doctrine of laches should prevent resolution on the merits.

Since passage of the HEAR Act, the tension between the legislation's purpose to grant relief and the availability of laches has played out in two cases. The first, *Zuckerman v. Metropolitan Museum of Art*, in the Second Circuit, demonstrates how a laches defense can decide a dispute otherwise capable of resolution on the merits.²² The second, *Reif v. Nagy*, in New York state courts, shows how an expansive, albeit incorrect, purposive reading of the HEAR Act can sidestep laches and facilitate relief on the merits.²³ Recently, the appellants in *Zuckerman* had their petition for certiorari to the Supreme Court denied,²⁴ meaning that the availability of laches under the HEAR Act is now binding precedent in the Second Circuit. *Reif*, on the other hand, signals that the New York state courts may prove to be a more hospitable forum for claimants going forward.

It is not too late to aid survivors and their families in their quest for justice. Over a year after passing the HEAR Act, Congress enacted the Justice for Uncompensated Survivors Today (JUST) Act of 2017.²⁵ The JUST Act directs the State Department to report on the steps taken by countries that, like the United States, have themselves committed to promoting restitution for Holocaust survivors.²⁶ And in early 2020, New York Governor Andrew Cuomo announced a conference “aimed at improving the State’s ability to help recover works of art and other property lost due to Nazi persecution.”²⁷ Congress should build on the

each witness is a link to the transcript of that individual’s hearing testimony. The second “permanent” hyperlink links directly to the quoted hearing testimony transcript.)

²² 928 F.3d 186, 193–94 (2d Cir. 2019).

²³ 80 N.Y.S.3d 629, 634–35 (N.Y. Sup. Ct. 2018) (taking note of the guidance provided by the HEAR Act’s purpose and holding that laches is unavailable); see also Simon J. Frankel & Sari Sharoni, Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016, 42 Colum. J.L. & Arts 157, 176–77 (2019) (concluding that *Reif* held laches unavailable under the HEAR Act).

²⁴ *Zuckerman v. Metro. Museum of Art*, 140 S. Ct. 1269 (2020) (mem.).

²⁵ Pub. L. No. 115-171, 132 Stat. 1288 (2018).

²⁶ *Id.* § 2(b).

²⁷ Press Release, Governor Andrew M. Cuomo, On Holocaust Remembrance Day, Governor Cuomo Announces International Conference Aimed at Helping Victims of Nazi Crimes Recover Stolen Property (Jan. 27, 2020), <https://www.governor.ny.gov/news/holocaust-remembrance-day-governor-cuomo-announces-international-conference-aimed-helping> [<https://perma.cc/ZR3S-TM86>].

political will in this area of bipartisan consensus²⁸ and modify the HEAR Act to ensure that claimants are able to resolve their claims on the merits.

Part I of this Note provides a brief history of Nazi looting as well as a history of the Washington Principles and other international and domestic initiatives prior to the HEAR Act. This background illustrates the moral and legal issues that Congress designed the Act to address. The remainder of Part I traces the HEAR Act's legislative history and the explanations Congress did and did not offer for setting a statute of limitations while leaving laches untouched.

Part II then discusses a sample of the case law in the state and federal courts of New York, the international art capital of the world. Courts in New York have had frequent occasion to consider the application of laches to claims for artwork looted during World War II due to the state's "demand and refusal" rule.²⁹

Part III presents the argument briefly described above—that application of the doctrine of laches to claims for restitution of Nazi-looted art is irreconcilable with the HEAR Act and the Washington Principles. Part III then proposes two solutions. The first, and preferable, solution is to preclude a laches defense entirely, faithful to the first draft of the HEAR Act. This would guarantee that the Act fulfills the Washington Principles' call to promote "a just and fair" solution.³⁰ As a more moderate solution, courts should be directed to inquire into whether a possessor sufficiently investigated title to contested artwork. This will allow courts to determine whether current possessors acquired artwork in true good faith, or whether they have dealt in Nazi-looted art when problems with a piece's provenance³¹ should have been apparent. Only

²⁸ Press Release, Senator Ted Cruz, Sens. Cruz, Cornyn Praise Unanimous Passage of the Bipartisan HEAR Act, (Dec. 10, 2016), https://www.cruz.senate.gov/?p=press_release&id=2916 [https://perma.cc/3326-7EVS].

²⁹ See discussion *infra* Section II.A. Under this rule, the statute of limitations does not begin to run until the claimant demands that the possessor return the artwork, and the possessor refuses that demand. See *Menzel v. List*, 267 N.Y.S.2d 804, 809 (N.Y. Sup. Ct. 1966). As a result, laches has been invoked to reduce the potential unfairness that results from such a generous limitations period. *Demarsin*, *supra* note 11, at 621–22, 658.

³⁰ Washington Principles, *supra* note 7, at 792 (Principles XIII & IX).

³¹ "Provenance is a technical art world term meaning documentation of origin or history of ownership." 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, 551–52 (1999). Provenance as used in this Note is therefore distinct from the actual ownership history of a work.

when a possessor exercised appropriate diligence would a laches defense be available.

I. HISTORICAL BACKGROUND

A. Nazi Looting from 1933 to 1945

The Nazi regime began its persecution campaign against Germany's Jewish population as soon as the party took power in 1933, aiming to paint Jews as outsiders and remove them from cultural and economic life in Germany.³² Perhaps the most infamous of the over four hundred anti-Jewish legal restrictions imposed by the Nazis were the Nuremberg Laws.³³ Passed in 1935, these laws stripped Jews of citizenship and provided a basis for further persecution.³⁴

Throughout the 1930s, the Nazis undertook the "Aryanization" of German society by coercing Jews to transfer business holdings to non-Jews at prices far below market value.³⁵ "Aryanization" affected the art market, as Jews with interests in art dealerships sold their businesses and turned over their artwork to new "suitable" owners or consigned them to auction.³⁶ The Germans also imposed a severe "flight tax" on Jews fleeing persecution, requiring a large portion of their assets be paid to the State in return for exit visas.³⁷ Selling possessions, including artwork, "which in normal times they would never have let go," allowed families to raise the funds needed to escape.³⁸ By 1938, the Nazis had raised the price of

³² See Commission Report, *supra* note 3, at SR-14 to SR-15; Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* 9 (1994); O'Donnell, *supra* note 5, at 3-5; Nazis To Control All Cultural Life, *N.Y. Times*, Apr. 9, 1933, at E1.

³³ See Commission Report, *supra* note 3, at SR-15; Petropoulos, *supra* note 2, at 92.

³⁴ See Commission Report, *supra* note 3, at SR-15.

³⁵ See *id.*; Otto D. Tolischus, *Reich Gain Large from Flight Tax*, *N.Y. Times*, May 19, 1937, at 5.

³⁶ *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008); *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 302-03 (D.R.I. 2007); Nicholas, *supra* note 32, at 30-31.

³⁷ *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 309 (S.D.N.Y. 2018), *aff'd* on other grounds, 928 F.3d 186 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020) (*mem.*); Jennifer Anglim Kreder & Virginia Leigh Schell, *The Constitutionality of the HEAR Act: Empowering American Courts To Return Holocaust-Era Artwork and Honor History*, 30 *DePaul J. Art Tech. & Intell. Prop. L.* 1, 5-6 (2020); Tolischus, *supra* note 35, at 5.

³⁸ Nicholas, *supra* note 32, at 31.

exit for Austrian Jews, requiring that a would-be émigré “liquidate his property and possessions, and proceed abroad penniless.”³⁹

Outright confiscation of privately-owned artwork started in Austria following the *Anschluss* in March 1938, where Vienna served as the “crucial testing ground” for the Nazis’ looting program.⁴⁰ In the wake of the anti-Semitic violence of *Kristallnacht* in November 1938, “Aryanization” intensified and confiscation started in Germany.⁴¹ The earlier decrees that required Jews to register their personal property with the government supplied the Nazis with lists of artwork to expropriate.⁴²

The looting of art in Nazi Germany was itself an expression of Nazi ideology—the regime viewed art as the prime expression of racial groups,⁴³ and it associated “degenerate” art with the Jewish population.⁴⁴ The Nazis considered “degenerate” art to include works by prominent Jewish artists like Marc Chagall and paintings depicting Jewish subjects.⁴⁵ The category also broadly captured modern styles—Cubism, Futurism, and Dadaism, which Hitler attacked in *Mein Kampf*—that the Nazis claimed Jews promoted for financial gain.⁴⁶ The Nazis removed this art from museums and private collections en masse, attempting to “purif[y]” the German art world.⁴⁷ Ultimately, acceptable art was

³⁹ See *id.* at 39 (quoting NA, RG 59, SD Cable 862.4016/2103, Geist, Berlin, to Secretary of State, April 11, 1939).

⁴⁰ Petropoulos, *supra* note 2, at 83–85. *Anschluss* refers to the union of Germany and Austria, accomplished by German annexation of Austria in March 1938. See Melissa Jane Taylor, *Diplomats in Turmoil: Creating a Middle Ground in Post-Anschluss Austria*, 32 *Diplomatic Hist.* 811 (2008). By early 1939, the Nazis had stolen sixty to seventy million *Reichsmarks* worth of art from the Austrian capital. Petropoulos, *supra* note 2, at 84–85.

⁴¹ Petropoulos, *supra* note 2, at 92–93; Associated Press, *Reich Seizes Control of All Jewish Wealth*, *Wash. Post*, Dec. 6, 1938, at 8.

⁴² O’Donnell, *supra* note 5, at 6; Petropoulos, *supra* note 2, at 92–93.

⁴³ Nicholas, *supra* note 32, at 6–8; Petropoulos, *supra* note 2, at 14, 24; see also *Vineberg v. Bissonette*, 548 F.3d 50, 53 (1st Cir. 2008) (noting that the Nazis justified seizure of the disputed artwork because the owner “lacked the requisite personal qualities to be a suitable exponent of German culture”).

⁴⁴ See Henson, *supra* note 13, at 1105–06; Petropoulos, *supra* note 2, at 54 (noting that the Nazis argued that “Jews had intentionally duped the German people into embracing nontraditional aesthetic styles”); Soltes, *supra* note 1, at 462 (explaining that “*anything* having to do with Jews was deemed degenerate”).

⁴⁵ Petropoulos, *supra* note 2, at 54; Soltes, *supra* note 1, at 462.

⁴⁶ Hector Feliciano, *The Lost Museum: The Nazi Conspiracy To Steal the World’s Greatest Works of Art* 20–21 (1997); Petropoulos, *supra* note 2, at 54.

⁴⁷ See Nicholas, *supra* note 32, at 20 (quoting P.O. Rave, *Kunstdiktatur im Dritten Reich* 55–56 (1949)); Walton, *supra* note 31, at 555–56 (noting crowds’ approval of “degenerate art” at the 1937 “Exhibit of Degenerate Art,” leading Hitler to legalize removal of such art from state collections).

“whatever Hitler liked, and whatever was most useful to the government from the point of view of propaganda.”⁴⁸

The Nazis also confiscated artwork that the party thought glorified German culture, focusing on pieces ostensibly promoting Aryan values.⁴⁹ By reclaiming cultural objects that they linked to German history, the Nazis sought to control their own “cultural legacy.”⁵⁰ One Nazi newspaper praised Albrecht Dürer and Lucas Cranach the Elder as artists who “created . . . works of art for the German people.”⁵¹ Hitler found his ideal Aryan expression in the works of the Dutch master Rembrandt.⁵² And as the grand “showpiece of Nazism,” Hitler made plans for a *Führermuseum* in his hometown of Linz, Austria.⁵³ Over eight thousand works had been collected for the museum by the end of 1944.⁵⁴

The theft of cultural property took place on a scale with few historical competitors, and was the first instance in which the looting of cultural property led to a war crimes conviction.⁵⁵ In wartime France, the Nazis looted an estimated one-third of art previously held in private collections,⁵⁶ and after the war, the Allies recorded 249,683 looted works of art at the Central Collecting Point in Munich.⁵⁷ The Office of Military Government for Germany (United States) estimated that, in total, it had discovered looted art and other cultural property valued at five billion dollars.⁵⁸ In only twelve years in power, the Nazi government’s ruthless

⁴⁸ Nicholas, *supra* note 32, at 10.

⁴⁹ See Eizenstat, *supra* note 7, at 187–88; Feliciano, *supra* note 46, at 19–22; see also Guido Enderis, *Nazis Glorify Art That Is ‘Germanic,’* N.Y. Times, Oct. 15, 1933, at E2 (providing a contemporary explanation of the Nazi government’s attitudes on the “Germanic” art that should be praised and displayed in the country, including at the “House of German Art” in Munich).

⁵⁰ See Petropoulos, *supra* note 2, at 11–15.

⁵¹ Nicholas, *supra* note 32, at 19 (internal quotations omitted).

⁵² Feliciano, *supra* note 46, at 18–20. Hitler’s deep appreciation for Rembrandt is ironic, given the artist’s close ties to Amsterdam’s Jewish community. *Id.* at 20.

⁵³ Eizenstat, *supra* note 7, at 187; Feliciano, *supra* note 46, at 21.

⁵⁴ Feliciano, *supra* note 46, at 23; see also Nicholas, *supra* note 32, at 44 (noting that by December 1944 the total appropriations for Linz had reached seventy million *Reichsmarks*, up from ten million *Reichsmarks* five years earlier).

⁵⁵ See Rachel Dubin, Note, *Museums and Self-Regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Property*, 18 U. Miami Bus. L. Rev. 101, 109–10 (2010).

⁵⁶ Feliciano, *supra* note 46, at 4.

⁵⁷ Petropoulos, *supra* note 2, at 9.

⁵⁸ Commission Report, *supra* note 3, at SR–97.

campaign had “displaced, transported, and stolen” as much art as “during the entire Thirty Years War or all the Napoleonic Wars.”⁵⁹

B. The Washington Principles and the United States’ Commitment to Resolving Disputes over Nazi-Looted Art

When the Cold War ended, Allied governments declassified troves of records dating back to World War II,⁶⁰ providing new sources of information about the extent of Nazi looting and igniting interest in these issues.⁶¹ In 1998, the United States took two legislative steps to promote restitution. First, Congress passed the Holocaust Victims Redress Act.⁶² The legislation appropriated funds for research to “assist in the restitution of assets looted or extorted from victims of the Holocaust.”⁶³ Congress also passed the U.S. Holocaust Assets Commission Act of 1998.⁶⁴ The Act created a Presidential Commission to review how assets and property looted by the Nazis were dealt with before, during, and after the War to determine the scope of the problem and to make recommendations.⁶⁵

Later that year, the United States hosted representatives of forty-four countries in Washington, D.C., to discuss the treatment of property looted by the Nazis.⁶⁶ The Washington Conference on Holocaust Era Assets resulted in the unanimous adoption of a series of non-binding principles to aid in “resolving issues relating to Nazi-confiscated art.”⁶⁷ Referred to as the Washington Principles, these eleven statements intended to make

⁵⁹ Feliciano, *supra* note 46, at 23.

⁶⁰ See *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 105th Cong. 17 (1998) [hereinafter *Restitution Hearing*] (statement of James N. Wood, Dir., Art Inst. of Chi.) (describing the “vast archives that have become available in the post-Cold War period”); Eizenstat, *supra* note 7, at 189–90.

⁶¹ See *Restitution Hearing*, *supra* note 60, at 9 (testimony of Phillippe de Montebello, Dir., Metro. Museum of Art) (explaining that renewed interest in Nazi-looted art could be attributed to “[t]he downfall of communism” that “brought with it the opening of records whose existence was hitherto unknown,” and noting that alongside the declassification of known records, these archives “encouraged new research by scholars and journalists”); Eizenstat, *supra* note 7, at 188–90; O’Donnell, *supra* note 5, at 29–30; Dubin, *supra* note 55, at 111–12 (citing Commission Report, *supra* note 3, at 4, 53–54).

⁶² Pub. L. No. 105-158, 112 Stat. 15.

⁶³ *Id.* § 103(b).

⁶⁴ Pub. L. No. 105-186, 112 Stat. 611.

⁶⁵ *Id.*

⁶⁶ Eizenstat, *supra* note 7, at 190–99.

⁶⁷ Washington Principles, *supra* note 7, at 971; Eizenstat, *supra* note 7, at 196–99.

the restitution of Nazi-looted art a “moral matter.”⁶⁸ In doing so, the Principles asked participating nations to de-emphasize the “rules designed for commercial transactions of societies that operate under the rule of law.”⁶⁹

Over the last two decades, the Washington Principles have provided the aspirational guidelines for the United States and the international community to achieve a “just and fair” solution.⁷⁰ Three of the statements are particularly important to note in evaluating congressional action, as they contain the Principles’ call to action and highlight the attendant difficulties of resolving claims decades after the Nazis’ thefts took place. These principles state:

(IV) In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

. . . .

(VII) Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

(VIII) If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.⁷¹

A little over a decade after adopting the Principles, the international community gathered again to reaffirm their respective nations’ moral commitments,⁷² resulting in the Terezin Declaration.⁷³ After Terezin,

⁶⁸ Under Secretary of State Stuart E. Eizenstat, Explanation of the Washington Conference Principles on Nazi-Confiscated Art, *in* U.S. Dep’t of State & U.S. Holocaust Memorial Museum, Proceedings of the Washington Conference on Holocaust-Era Assets 415, 418 (1998) [hereinafter Eizenstat, Explanation of the Washington Principles].

⁶⁹ *Id.*

⁷⁰ Washington Principles, *supra* note 7, at 972 (Principles VIII & IX).

⁷¹ *Id.* at 971–72.

⁷² U.S. Dep’t of State, Bureau of Eur. & Eurasian Affs., Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), <https://2009-2017.state.gov/p/eur/rls/or/-126162.htm> [<https://perma.cc/G3NJ-BNA7>].

⁷³ *Id.*

Stuart Eizenstat, the former U.S. Ambassador to the European Union and the driving force behind the Washington Conference in 1998, testified before Congress.⁷⁴ Eizenstat noted that attempts to fulfill the goals of the Washington Principles had been tied up by “costly litigation in which the holders of art increasingly use technical defenses like statutes of limitation rather than making a decision on the merits.”⁷⁵

Despite the international commitments made in the Washington Principles and the Terezin Declaration, time-based defenses and insufficient action by the United States frustrated progress on this “moral matter.” In 2016, Congress finally took action and passed the HEAR Act to try and grant relief consistent with the Washington Principles.⁷⁶

C. The Holocaust Expropriated Art Recovery Act

A bipartisan group of senators introduced the HEAR Act in April of 2016.⁷⁷ The testimony given during the Senate committee hearing on the bill demonstrates the Act’s importance in furthering the Washington Principles.⁷⁸ Witnesses at the hearing identified how time-based defenses

⁷⁴ Holocaust Era Assets—After the Prague Conference: Hearing Before the Comm’n on Sec. & Cooperation in Eur.: U.S. Helsinki Comm’n, 111th Cong. 7 (2010) [hereinafter Prague Conference Hearing] (statement of Stuart Eizenstat, Partner, Covington & Burling LLP, former U.S. Ambassador to the European Union); Eizenstat, *supra* note 7, at 191–96.

⁷⁵ Prague Conference Hearing, *supra* note 74, at 7 (statement of Stuart Eizenstat, Partner, Covington & Burling LLP, former U.S. Ambassador to the European Union).

⁷⁶ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 3(1), 130 Stat. 1524, 1525–26.

⁷⁷ Jason Barnes, Note, Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims, 56 Colum. J. Transnat’l L. 593, 611 (2018) (citing Press Release, Senator Ted Cruz, Cruz, Senators Introduce Bill To Help Return Art Stolen by Nazis (Apr. 7, 2016), https://www.cruz.senate.gov/?p=press_release&id=2624 [<https://perma.cc/PWD3-ABMK>]).

⁷⁸ S. 2763, the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 2–3 (2016) (statement of Ambassador Ronald S. Lauder, Chairman of the Council, World Jewish Restitution Org.), <https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act-reuniting-victims-with-their-lost-heritage> [<https://perma.cc/3HRF-FNNW>] (To access the hearing transcript, click on the first hyperlink and scroll down to the various witnesses. Under each witness is a link to the transcript of that individual’s hearing testimony. The second “permanent” hyperlink links directly to the cited hearing testimony transcript.).

provide current possessors and museums the option of “waiting out the clock,”⁷⁹ clashing with the Principles’ aim of a “just and fair” solution.⁸⁰

Congress therefore intended the HEAR Act to ease at least some of the hurdles preventing recovery of artwork looted during the Holocaust.⁸¹ Congress was motivated by the belief that the “unique and horrific circumstances of World War II and the Holocaust make time-based defenses especially burdensome to the victims and their heirs.”⁸² The HEAR Act’s stated purpose also notes that the Act is designed to “ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the [Washington Principles], the Holocaust Victims Redress Act, and the Terezin Declaration.”⁸³

The HEAR Act sets a federal statute of limitations allowing claimants six years from actual discovery of “the identity and location” of artwork and the claimant’s “possessory interest” in the artwork to bring suit.⁸⁴ This statute of limitations—scheduled to sunset at the end of 2026—covers “artwork or other property that was lost . . . because of Nazi persecution.”⁸⁵ “Nazi persecution” is defined broadly,⁸⁶ and the level of involvement by the Nazis required for a claim to fall under the definition is unclear.⁸⁷ Notably, the HEAR Act did not create a federal cause of action.⁸⁸

But the HEAR Act did not remove obstacles posed by the statute of limitations’ equitable counterpart, the doctrine of laches. Legislative history demonstrates that the Senate initially intended to remove laches.⁸⁹ The initial draft of the bill included language precluding *any* time-based defenses and specifically referenced the doctrine of laches.⁹⁰ However,

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* (“Sadly, there are museums that feel no need to uphold the Washington Principles. Many other institutions do the very least that is required and not much more.”); Washington Principles, *supra* note 7, at 972 (quoting Principles VIII & IX).

⁸¹ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 3(2), 130 Stat. 1524, 1525–26.

⁸² S. Rep. No. 114-394, at 8 (2016).

⁸³ Holocaust Expropriated Art Recovery Act § 3(1).

⁸⁴ *Id.* § 5(a).

⁸⁵ *Id.* §§ 5(a), (g).

⁸⁶ *Id.* § 4(5) (“The term ‘Nazi persecution’ means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.”).

⁸⁷ See Frankel & Sharoni, *supra* note 23, at 179–82.

⁸⁸ Peresztegi Testimony, *supra* note 18, at 3.

⁸⁹ S. Rep. No. 114-394, at 7 (2016).

⁹⁰ S. 2763, 114th Cong. § 5(a) (2016).

the enacted bill removed this reference.⁹¹ The remaining language includes a narrower prohibition, limited to precluding time-based defenses *at law*.⁹² This removal, referenced in the Senate Report, demonstrates that Congress meant for the doctrine of laches to remain available.⁹³ Congress did not provide an explanation for its decision.

II. THE GROWING USE OF LACHES IN DISPUTES OVER NAZI-LOOTED ART

A. Establishing the Laches Defense in Claims To Recover Stolen Art

The doctrine of laches is distinct from a statute of limitations. Both defenses relate to the passage of time and are designed to determine the point at which a claimant should no longer be allowed to commence suit.⁹⁴ A statute of limitations promotes certainty and repose for potential defendants that translates into maximum marketability of title.⁹⁵ While statutes of limitations are criticized for their rigid operation and potential to produce unwanted outcomes,⁹⁶ strict cut-offs also reflect a legislative judgment about fairness to potential defendants.⁹⁷

Laches—the statute of limitations’ equitable counterpart⁹⁸—is intended to prevent a claimant from sleeping on her rights and delaying

⁹¹ S. Rep. No. 114-394, at 6–7 (2016).

⁹² Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526.

⁹³ See *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196–97 (2d Cir. 2019); S. Rep. No. 114-394, at 6–7 (2016). But see Kreder & Schell, *supra* note 37, at 62–65 (arguing that Congress preempted the doctrine of laches by setting a statute of limitations, because the use of laches “defeats the intent of Congress to create a uniform statute of limitations for these claims”).

⁹⁴ Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 *BYU L. Rev.* 917, 920–21.

⁹⁵ See *Developments in the Law: Statutes of Limitations*, 63 *Harv. L. Rev.* 1177, 1185–86 (1950); Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *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, 60 (1995).

⁹⁶ Heriot, *supra* note 94, at 917, 954.

⁹⁷ See Charles Cronin, *Ethical Quandaries: The Holocaust Expropriated Art Recovery Act and Claims for Works in Public Museums*, 92 *St. John’s L. Rev.* 509, 537–38 (2018). However, the lack of a strict cut-off under both the “demand and refusal” rule and “discovery” rule can mitigate this harshness. See *Grosz v. Museum of Mod. Art*, 772 F. Supp. 2d 473, 476, 487–88 (S.D.N.Y. 2010) (holding that a plaintiff’s claim to Nazi appropriated art was time-barred by the “demand and refusal rule” despite a disagreement over when the museum refused and whether discussions were ongoing).

⁹⁸ Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 *Seattle U. L. Rev.* 631, 697 (2000).

in bringing a claim.⁹⁹ The doctrine of laches is a subjective standard,¹⁰⁰ meant to be applied flexibly to balance factors relevant to the parties' competing interests.¹⁰¹ To prevail on laches, the party asserting the defense must demonstrate: (1) that the claimant unreasonably delayed in bringing suit against the possessor, and (2) that the delay caused prejudice to the possessor.¹⁰² Because under American law, a thief cannot pass title,¹⁰³ the victim still owns the work.¹⁰⁴ However, the searching factual examination in a laches defense presents the possibility that a successful defense will bar the victim from recovering her property.¹⁰⁵

The role of laches in actions to recover stolen art in New York began with *Solomon R. Guggenheim Foundation v. Lubell*.¹⁰⁶ In that case, the New York Court of Appeals refused to place a requirement of reasonable diligence in searching for missing art on the original owner when considering whether or not the statute of limitations had run.¹⁰⁷ Instead, the *Guggenheim* court instructed that a possessor could argue that the claimant failed to diligently search for artwork and had delayed in suing for its recovery as part of a laches defense.¹⁰⁸ Since *Guggenheim*, the doctrine of laches has become an increasingly common defense in stolen art cases heard by courts in New York, and a few of those cases are discussed below.

⁹⁹ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019) (citing *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003)).

¹⁰⁰ Demarsin, *supra* note 11, at 629.

¹⁰¹ Stephanos Bibas, Note, The Case Against Statutes of Limitations for Stolen Art, 103 *Yale L.J.* 2437, 2446–48 (1994); see also Ashraf Ray Ibrahim, Note, The Doctrine of Laches in International Law, 83 *Va. L. Rev.* 647, 647 (1997) (describing laches as a doctrine based on a “rich history of justice, fairness, and the equitable balancing of rights”).

¹⁰² E.g., *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (citing *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d Cir. 1994)).

¹⁰³ E.g., *Menzel v. List*, 267 N.Y.S.2d 804, 819 (N.Y. Sup. Ct. 1966) (citing *Silsbury v. McCoon*, 3 N.Y. 379, 383–84 (N.Y. 1850)); 2 James Kent, *Commentaries on American Law* 324–25 (John M. Gould ed., 14th ed. 1896); Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 *J. Legal Stud.* 43, 57–58 (1987).

¹⁰⁴ See Michelle I. Turner, Note, The Innocent Buyer of Art Looted During World War II, 32 *Vand. J. Transnat'l L.* 1511, 1534 (1999).

¹⁰⁵ See Phelan, *supra* note 98, at 700–01.

¹⁰⁶ 569 N.E.2d 426 (N.Y. 1991).

¹⁰⁷ *Id.* at 428–30.

¹⁰⁸ *Id.* at 431.

B. After Guggenheim to the Passage of the HEAR Act

After *Guggenheim*, and up until Congress passed the HEAR Act in 2016, possessors asserted a laches defense in a number of suits brought to recover works lost during the Nazi era.¹⁰⁹ In the two cases briefly discussed below, *Wertheimer v. Cirker's Hayes Storage Warehouse* and *Bakalar v. Vavra*, courts held for the possessors on that ground.¹¹⁰ In *Wertheimer*, the court signaled that the claimant needed to have continually searched for disputed artwork throughout the decades following World War II in order to defeat the defense and rebut allegations of unreasonable delay.¹¹¹ The *Bakalar* court indicated that the claimant or their predecessors should have, at the least, searched periodically.¹¹² These requirements are out of touch with the realities that victims and their families faced after the war, as discussed further in Section III.B. As a result of the “unreasonable delay,” the courts pointed

¹⁰⁹ This Note does not discuss all such cases during this time period. Other possessors of looted art asserted a laches defense in New York between *Guggenheim* and the HEAR Act's passage. The first case, *DeWeerth v. Baldinger*, was reversed on appeal on grounds unrelated to its holding on laches. 38 F.3d 1266, 1276 (2d Cir. 1994). The court's approach to a laches analysis went ignored in subsequent case law. See, e.g., *Wertheimer v. Cirker's Hayes Storage Warehouse*, No. 105575/00, 2001 WL 1657237, at *3–4, *7–8 (N.Y. Sup. Ct. Sept. 28, 2001) (granting summary judgment to the possessor on the basis of a laches defense despite questions about the possessor's own pre-acquisition behavior), *aff'd*, 752 N.Y.S.2d 295 (N.Y. App. Div. 2002). The second case, *United States v. Portrait of Wally*, is not discussed because the court concluded with little discussion that there was no factual basis for a laches defense. No. 99 Civ. 9940, 2002 WL 553532, at *19, *22 (S.D.N.Y. Apr. 12, 2002). *In re Peters* contains a laches analysis imposed on a fact pattern in which the painting was sold by the owner's brother without his permission. 821 N.Y.S.2d 61, 63–64, 68–69 (N.Y. App. Div. 2006). The fifth, *In re Flamenbaum*, does not substantially aid in illustrating this discussion because the decedent-possessor had known he held property stolen from a German museum. 1 N.E.3d 782, 784 (N.Y. 2013). The sixth, *Schoeps v. Museum of Modern Art*, would not consider the fact-intensive laches defense at the summary judgment stage. 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009). The parties settled before trial, and therefore the court never addressed the merits of the defense. *Schoeps v. Museum of Mod. Art*, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009). The court in *Sotheby's, Inc. v. Shene* would not grant the possessor summary judgment on the laches defense because the claimant had believed until 2004 that the missing book had been destroyed and had therefore not delayed. No. 04 Civ. 10067, 2009 WL 762697, at *4–5 (S.D.N.Y. Mar. 23, 2009).

¹¹⁰ *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306–07 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012); *Wertheimer*, 2001 WL 1657237, at *7.

¹¹¹ *Wertheimer*, 2001 WL 1657237, at *7. The court in *In re Peters* imposed a similar requirement. 821 N.Y.S.2d at 68–69. One scholar argues that *Sotheby's, Inc. v. Shene* represents the only “clear exception” to the continuous search requirement. Demarsin, *supra* note 11, at 681–82. In *Shene*, the claimant believed up until 2004 that the missing book no longer existed. 2009 WL 762697, at *4.

¹¹² 819 F. Supp. 2d at 306.

to evidence lost during the intervening years that prejudiced the possessor.¹¹³ At the same time, in both *Wertheimer* and *Bakalar*, the possessors' decision not to investigate title had no effect on the outcome of these disputes,¹¹⁴ highlighting another deficiency of the doctrine of laches as applied to disputes over artwork stolen during the Nazi-era. The second solution proposed in Section III.C would enable courts to better consider a possessor's own actions.

In *Wertheimer v. Cirker's Hayes Storage Warehouse*, a court held for the first time that the elements of laches were met in a case about artwork displaced during the Nazi-era.¹¹⁵ The court did not credit the original owner's post-war efforts in considering whether the claimant unreasonably delayed in bringing suit, and it held that the death of the parties to the original transaction proved that the possessor suffered prejudice.¹¹⁶ Furthermore, despite noting that there was a question of fact as to the possessor's behavior, the court did not engage in any analysis suggesting that it considered this evidence with respect to the possessor's laches defense.¹¹⁷

¹¹³ Id. at 305–06; *Wertheimer*, 2001 WL 1657237, at *7.

¹¹⁴ *Bakalar*, 819 F. Supp. 2d at 306; *Wertheimer*, 2001 WL 1657237, at *7.

¹¹⁵ *Wertheimer*, 2001 WL 1657237, at *7. If this case were brought today, it is unlikely that the HEAR Act would cover the litigation, as the statute requires a causal connection between the lost artwork and “Nazi persecution.” See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526. “Nazi persecution” under the Act is “any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.” Id. § 4(5). Although the original owner entrusted his painting to someone for safety while facing persecution, there is no suggestion that the thief had a connection to the Nazis. *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, 752 N.Y.S.2d 295, 296 (N.Y. App. Div. 2002); *Wertheimer*, 2001 WL 1657237, at *1–2. Therefore, the case would not meet the HEAR Act's definition of “Nazi persecution.” However, the case features prominently in legal scholarship discussing laches, and its analysis of the doctrine is fundamental in analyzing the problems that a laches defense poses to the HEAR Act's putative goals. See, e.g., Demarsin, *supra* note 11, at 679.

¹¹⁶ *Wertheimer*, 2001 WL 1657237, at *7; see also *Wertheimer*, 752 N.Y.S.2d at 296–97 (affirming the lower court's judgment in favor of the possessor on the grounds of laches).

¹¹⁷ *Wertheimer*, 2001 WL 1657237, at *3 (describing the “question of fact” about claimant's assertions that the possessor should have been on notice of the work's history since the painting's presence in “the same house, that of a well-known lawyer of Geneva . . . for 55 years . . . should have sounded a klaxon for any reputable dealer.”). It is not clear if the issue was argued in relation to the laches defense, though on appeal the New York Supreme Court, Appellate Division summarily dismissed the argument that the possessor's failure to investigate should preclude his laches defense because his failure to investigate caused the claimant no prejudice. *Wertheimer*, 752 N.Y.S.2d at 297.

The facts of the case are as follows: Pierre Wertheimer had been swindled out of a Pissarro painting after fleeing the Nazi invasion of France.¹¹⁸ Wertheimer took a number of ultimately unsuccessful steps to recover the painting, although Wertheimer did receive some compensation from a source close to the individual who deceived him.¹¹⁹ From 1960 until the lawsuit in 2000, neither Wertheimer nor any of his descendants took any further action to recover the painting.¹²⁰ As a result, the court found that there had been an unreasonable delay, and held that the possessor would suffer prejudice because of an “inability to gather definitive evidence on the legitimacy of these prior purchases.”¹²¹ The trial court also noted the claimant’s argument that an abundance of warning signs should have led the possessor to suspect the painting’s troubled history.¹²² On appeal, the possessor’s lack of investigation posed no obstacle to affirming the judgment, because the “alleged failure to make reasonable inquiry” did not prejudice the claimant.¹²³

In *Bakalar v. Vavra*, an action in which Nazi seizure was explicitly argued, the court disposed of the action through the doctrine of laches when the merits were uncertain.¹²⁴ Fritz Grunbaum—a prominent Viennese cabaret performer—owned a series of drawings by Egon Schiele.¹²⁵ The Nazis arrested Grunbaum in 1938, inventoried his art collection, and forced him to transfer power of attorney to his wife.¹²⁶ Grunbaum died at the Dachau concentration camp in 1941.¹²⁷ His wife, Elisabeth, was arrested in 1942, and she too died in a concentration camp shortly after her arrest.¹²⁸

¹¹⁸ *Wertheimer*, 2001 WL 1657237, at *1–2.

¹¹⁹ *Id.* at *2.

¹²⁰ *Id.* at *7; see also *Wertheimer*, 752 N.Y.S.2d at 297 (“[F]or nearly half a century prior to the commencement of this action . . . the Wertheimers failed to take any steps to recover the painting.”).

¹²¹ *Wertheimer*, 2001 WL 1657237, at *7.

¹²² *Id.* at *3–4.

¹²³ *Wertheimer*, 752 N.Y.S.2d at 297.

¹²⁴ *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 307 (S.D.N.Y. 2011), *aff’d*, 500 F. App’x 6 (2d Cir. 2012); Defendant/Counterclaimants Milos Vavra & Leon Fischer’s Memorandum of Law in Opposition to Plaintiff/Counterclaim-Defendant David Bakalar’s Motion for Post-Trial Declaratory Judgment at 4–6, *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011) (No. 05 Civ. 3037), 2011 WL 13349341.

¹²⁵ *Bakalar v. Vavra*, No. 05 Civ. 3037, 2008 WL 4067335, at *1, *3 (S.D.N.Y. Sept. 2, 2008), vacated, 619 F.3d 136 (2d Cir. 2010).

¹²⁶ *Id.* at *3.

¹²⁷ *Id.*

¹²⁸ *Id.*

The next recorded possessor of the drawing was Mathilde Lukacs—Grunbaum’s sister-in-law¹²⁹—though it is uncertain when and how Lukacs came into possession of the drawing.¹³⁰ After Grunbaum’s arrest, his wife signed his death certificate and indicated that there was no estate.¹³¹ This suggests either that the Nazis seized the drawing or that Elisabeth had earlier transferred the painting to Lukacs, though the court thought the latter theory was a more plausible explanation.¹³² Lukacs sold the drawing in 1956 to the Swiss Galerie Gutekunst, after which it was sold to the Galerie St. Etienne in New York.¹³³ In 1963, Bakalar, the current possessor, purchased the drawing from the Galerie St. Etienne and held it for the next four decades.¹³⁴ When the claimants challenged Bakalar’s ownership of the drawing upon its auction in 2005, Bakalar filed a declaratory suit to quiet title.¹³⁵

The court would not infer that the drawing had been stolen by the Nazis, though Bakalar could not prove that Lukacs had received good title to the drawing.¹³⁶ As a result, the court disposed of the case through the doctrine of laches.¹³⁷ The claimants unreasonably delayed because none of Grunbaum’s descendants or their families had attempted to recover the drawing in the intervening years.¹³⁸ The court indicated that “intermittent efforts” might have been enough, but the claimants and their families had done next to nothing.¹³⁹ Such a requirement, however, as argued in Part III, does not account for the fact that the claimants may have lacked the knowledge needed for a search or the difficulty they would have faced in pursuing the work.¹⁴⁰ The court also found that Bakalar would be

¹²⁹ *Id.* at *1–3.

¹³⁰ *Bakalar v. Vavra*, 819 F. Supp. 2d 293, at 299 (S.D.N.Y. 2011), *aff’d*, 500 F. App’x 6 (2d Cir. 2012).

¹³¹ *Bakalar*, 2008 WL 4067335, at *4.

¹³² See *Bakalar*, 819 F. Supp. 2d at 298–300.

¹³³ *Id.* at 295.

¹³⁴ *Bakalar*, 2008 WL 4067335, at *1.

¹³⁵ *Id.* at *1; Brief and Special Appendix for Defendants-Counter-Claimants-Appellants at 33, *Bakalar v. Vavra*, 500 F. App’x 6 (2d Cir. 2012) (No. 11-4042-cv), 2012 WL 259916.

¹³⁶ *Bakalar*, 819 F. Supp. 2d at 298–303.

¹³⁷ *Id.* at 307; see also *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010) (instructing the court on remand that “should the district judge conclude that the Grunbaum heirs are entitled to prevail on the issue of the validity of Bakalar’s title to the Drawing, the district judge should also address the issue of laches”).

¹³⁸ *Bakalar*, 819 F. Supp. 2d at 305–06.

¹³⁹ *Id.* at 306.

¹⁴⁰ See *id.* at 304 (“[I]t is enough that they knew of—or should have known of—the circumstances giving rise to the claim, even if the current possessor could not be

prejudiced by the delay because Lukacs died in 1979, and the court held her out as the only witness who could have explained whether she received legitimate title to the drawing.¹⁴¹ Furthermore, the court rejected the claimants' argument that Bakalar caused his own prejudice by failing to investigate the drawing's provenance because the New York Uniform Commercial Code ("U.C.C.") did not require any such investigation.¹⁴²

Laches may have allowed the court to reach the right outcome, as the court did not believe that the evidence created a credible inference that the Nazis had seized the drawing.¹⁴³ However, in using the equitable doctrine of laches to reach that outcome, the opinion highlights the shortcomings of the defense. The possessor's failure to investigate should not be a non-issue, even though the law imposes no substantial duty of diligence on the possessor.¹⁴⁴ Returning to *Wertheimer*, the court there was unconcerned with the possessor's failure to investigate, since that lack of action had not prejudiced the claimant.¹⁴⁵ While there may have been a legal duty to investigate the work's background, absent prejudice suffered by the claimant, that conduct did not affect the outcome of the litigation.¹⁴⁶ Taking both of these scenarios into account, the law should be changed to create a mechanism by which courts would meaningfully consider the actions of possessors when adjudicating disputes over Nazi-looted art. After discussing the case law in the wake of the HEAR Act, Part III will address possible changes.

C. Cases Since the HEAR Act

Since the HEAR Act's passage in 2016, courts have ruled on laches in two actions. These cases demonstrate the impact of Congress's decision to codify the doctrine of laches in the Act. The Second Circuit Court of Appeals correctly interpreted the HEAR Act to provide for a laches

ascertained."); Reply Brief for Defendants-Counter-Claimants-Appellants at 13, 19–20, *Bakalar v. Vavra*, 500 F. App'x 6 (2d Cir. 2012) (No. 11-4042-cv), 2012 WL 1154471 (arguing that the claimant's predecessors did not know of the theft because records were sealed until the late 1990s, and that family members who would have pursued claims were not able to do so under Communist oppression); discussion *infra* Subsection III.B.1.

¹⁴¹ *Bakalar*, 819 F. Supp. 2d at 306.

¹⁴² *Id.*

¹⁴³ *Id.* at 298–99.

¹⁴⁴ *Id.* at 306 ("Bakalar, as an ordinary non-merchant purchaser of art, had no obligation to investigate the provenance of the Drawing . . .").

¹⁴⁵ 752 N.Y.S.2d 295, 297 (N.Y. App. Div. 2002).

¹⁴⁶ *Id.*

defense and found the elements met.¹⁴⁷ The New York Supreme Court, Appellate Division, on the other hand, evaluated the elements of a laches defense in a light more favorable to the owner's descendants, and would not bar the meritorious claim.¹⁴⁸ The appellate court's analysis came after the lower court found that the HEAR Act precluded laches.¹⁴⁹ The diverging interpretations of the Act and of the doctrine of laches in these two cases highlight the potential for the defense to lead to outcomes inconsistent with the Washington Principles. After examining the two cases at both the trial and appellate levels, this Note will turn to possible solutions that will better align the HEAR Act with the Washington Principles.

In *Zuckerman v. Metropolitan Museum of Art*, the Second Circuit held that the HEAR Act "unequivocally" allows a laches defense,¹⁵⁰ citing the legislative history discussed *supra*.¹⁵¹ The original owners in this dispute were the Leffmans—persecuted German Jews.¹⁵² Starting in 1935, the Nazis forced the Leffmans to liquidate most of their assets pursuant to "Aryanization," and in 1937, when the Leffmans' situation grew more untenable, they fled to Italy.¹⁵³ However, they managed to get the Picasso at the center of the dispute to safekeeping in Switzerland.¹⁵⁴ When forced to flee Italy in 1938 as a result of additional persecution, the Leffmans sold their masterpiece to help finance their next move, receiving \$12,000 for the sale.¹⁵⁵ The claimant alleged that the sale was made for a

¹⁴⁷ See *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196–97 (2d Cir. 2019).

¹⁴⁸ See *Reif v. Nagy*, 106 N.Y.S.3d 5, 22 (N.Y. App. Div. 2019).

¹⁴⁹ *Reif v. Nagy*, 80 N.Y.S.3d 629, 635 (N.Y. Sup. Ct. 2018), *aff'd* in part and modified in part, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

¹⁵⁰ *Zuckerman*, 928 F.3d at 196–97.

¹⁵¹ *Id.*; see discussion *supra* Section I.C. For an argument that Congress's decision to legislate on the statute of limitations precludes a laches defense, see Kreder & Schell, *supra* note 37, at 62–65.

¹⁵² *Zuckerman*, 928 F.3d at 190.

¹⁵³ *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 308–10 (S.D.N.Y. 2018), *aff'd* on other grounds, 928 F.3d 186 (2d Cir. 2019), cert. denied, 140 S. Ct. 1269 (2020) (mem.).

¹⁵⁴ *Id.* at 309 (recounting that the Leffmans "arranged for *The Actor* to be held in Switzerland by a non-Jewish German acquaintance," and that "[f]or this reason only, *The Actor* was saved from Nazi confiscation")

¹⁵⁵ *Zuckerman*, 928 F.3d at 191; *Zuckerman*, 307 F. Supp. 3d at 319 (describing *The Actor* as a "masterpiece.").

discounted price under duress, as the Picasso sold three years later for \$22,500—a seventy percent increase.¹⁵⁶

In 2016, the Leffmans' heir sued the Metropolitan Museum of Art (“the Met”) to recover the Picasso.¹⁵⁷ The lower court dismissed the action for failure to state a claim,¹⁵⁸ but the Second Circuit affirmed on other grounds.¹⁵⁹ The Second Circuit held that laches should bar the Leffmans' descendant from recovering.¹⁶⁰ Because neither the Leffmans nor their descendant took any action to recover the Picasso in the years after the war and prior to 2010—despite its display in the Met—they had unreasonably delayed in bringing suit.¹⁶¹ The witnesses who could have testified to the circumstances of the sale were no longer available, and the court therefore held that the delay prejudiced the museum.¹⁶²

In *Reif v. Nagy*, the New York state courts grappled with the same facts as those in *Bakalar*.¹⁶³ The action focused on other Egon Schiele works from Grunbaum's collection.¹⁶⁴ Unlike in *Bakalar*, however, the court held that forcing the imprisoned Grunbaum to transfer power of attorney constituted duress, so that “any subsequent transfer of the Artworks did not convey legal title.”¹⁶⁵

The lower court determined that Grunbaum's descendants prevailed on the merits and that laches posed no obstacle to their claim because the HEAR Act precluded the defense.¹⁶⁶ This ruling avoided unjustly barring

¹⁵⁶ Amended Complaint at 3, 17, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16-civ-07665); see also Brief and Special Appendix for Plaintiff-Appellant at 51, *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019) (No. 18-0634-cv) (describing circumstances by which the painting was sold).

¹⁵⁷ *Zuckerman*, 928 F.3d at 192.

¹⁵⁸ *Zuckerman*, 307 F. Supp. 3d at 318–20, 325.

¹⁵⁹ *Zuckerman*, 928 F.3d at 193, 197.

¹⁶⁰ *Id.* at 193–97.

¹⁶¹ *Id.* at 193–94; Graham Bowley, *Met Picasso Belonged to Family That Fled Nazis*, *Suit Says*, *N.Y. Times* (Sept. 30, 2016), <https://www.nytimes.com/2016/10/01/arts/design/metropolitan-museum-of-art-picasso-the-actor-lawsuit.html> [<https://perma.cc/58HE-PQTQ>].

¹⁶² *Zuckerman*, 928 F.3d at 194–95.

¹⁶³ 106 N.Y.S.3d 5, 7–10 (N.Y. App. Div. 2019); see discussion of *Bakalar* supra Section II.B.

¹⁶⁴ *Reif v. Nagy*, 80 N.Y.S.3d 629, 630–31, 633–34 (N.Y. Sup. Ct. 2018), *aff'd* in part and modified in part, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

¹⁶⁵ *Reif*, 106 N.Y.S.3d at 21. Although the *Bakalar* court would not infer duress, it also noted, *arguendo*, that it could not be sure that the drawing was “transferred pursuant to the power of attorney,” and that it was “equally possible that [the drawing was transferred] before the power of attorney was executed.” *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 300 (S.D.N.Y. 2011) (emphasis omitted), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

¹⁶⁶ *Reif*, 80 N.Y.S.3d at 635.

a meritorious claim, but it incorrectly interpreted the HEAR Act and ignored the legislative history indicating that Congress intended for laches to remain available.¹⁶⁷ A very purposive reading drove this departure from the Act's text, the judge finding that the law "compels [the court] to help return Nazi-looted art to its heirs."¹⁶⁸ By incorrectly interpreting the HEAR Act, the trial court demonstrated the potential for a laches defense to distort outcomes.

The *Reif* appellate court, on the other hand, did not address the trial court's holding that the HEAR Act precludes a laches defense.¹⁶⁹ Instead, the court analyzed the possessors' laches arguments, and held that the defense failed.¹⁷⁰ In doing so, the appellate court appears to have stealthily overruled the trial court's incorrect determination that laches is unavailable under the HEAR Act. However, the court did suggest that the Act's purpose influenced its own decision to affirm the judgment.¹⁷¹

In its discussion of the doctrine of laches, the appellate court measured prejudice only by injury that occurred while the current possessor held the artwork.¹⁷² This represented a break from the other cases discussed in this Note, which measured prejudice by loss of evidence since the theft.¹⁷³ In *Bakalar*, the court found that Lukacs' death and unavailability as a witness prejudiced the possessor.¹⁷⁴ The *Reif* appellate court was not so convinced, however, because Lukacs' death preceded Nagy's purchase.¹⁷⁵ Nagy bought the drawing in 2013, and had therefore suffered no change in position.¹⁷⁶ However, *Bakalar*'s analysis of prejudice is consistent with the case law, and the *Reif* court did not justify its departure from the usual application.¹⁷⁷ The claimants—having proved their case

¹⁶⁷ See discussion *supra* Section I.C.

¹⁶⁸ *Reif*, 80 N.Y.S.3d at 633 (citing H.R. Rep. No. 114-176, at H7332 (2016)).

¹⁶⁹ *Reif*, 106 N.Y.S.3d at 22–23 (considering the laches defense and holding that it did not bar the claimants' suit).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 23–24.

¹⁷² *Id.* at 22–23; Defendant-Appellants' Motion for Leave To Appeal at 45–46, *Reif v. Nagy*, 148 N.E.3d 540 (N.Y. 2020) (mem.) (No. 2020-142).

¹⁷³ See discussion *supra* Section II.B.

¹⁷⁴ *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

¹⁷⁵ 106 N.Y.S.3d at 23.

¹⁷⁶ *Id.* at 22.

¹⁷⁷ See *id.* at 22–23. The *Reif* court suggested that it would have arrived at the same result even if it had approached the doctrine of laches like the *Bakalar* court. See *id.* at 23. Because duress delegitimized the transfer of power of attorney, Lukacs could not have demonstrated

on the merits—therefore achieved a result consistent with the HEAR Act and the Washington Principles.¹⁷⁸

Zuckerman and *Reif* provide a meaningful look at how the HEAR Act is flawed in the scheme of the United States’ commitments to restitute Nazi-looted art. The *Reif* trial and appellate courts’ incorrect interpretations of both the HEAR Act and the doctrine of laches itself prevented laches from standing in the way of restitution.¹⁷⁹ In *Zuckerman*, the district court dismissed for failure to state a claim, and the Second Circuit affirmed, holding instead that the doctrine of laches barred the claim.¹⁸⁰ The Washington Principles do not advocate for grants of relief regardless of the merits.¹⁸¹ However, with a revised HEAR Act as proposed in Part III, the appellate panel would have had to grapple with the district court’s dismissal and decide whether the descendant had a viable claim for relief. A decision in either direction would have at least been consistent with the Washington Principles’ goal of a “just and fair” solution on the merits.¹⁸²

good title. Therefore, Lukacs’ unavailability did not cause Nagy any prejudice. See *id.* at 21–23.

¹⁷⁸ See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(5), 130 Stat. 1524, 1524–25; Washington Principles, *supra* note 7, at 971–72; Patricia Cohen, Museums Faulted on Restitution of Nazi-Looted Art, *N.Y. Times* (Jun. 30, 2013), <https://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html> [<https://perma.cc/5M2N-8TNR>] (quoting Stuart E. Eizenstat that “[t]he essence of the Washington Principles comes down to one sentence . . . [l]et decisions be made on the merits of the case rather than technical defenses”).

¹⁷⁹ See *Reif*, 106 N.Y.S.3d at 22–23; *Reif v. Nagy*, 80 N.Y.S.3d 629, 635 (N.Y. Sup. Ct. 2018), *aff’d* in part and modified in part, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

¹⁸⁰ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019); *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 325 (S.D.N.Y. 2018), *aff’d* on other grounds, 928 F.3d 186 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020) (mem.).

¹⁸¹ See Holocaust Expropriated Art Recovery Act § 2(5).

¹⁸² See *id.*; Washington Principles, *supra* note 7, at 972 (Principle VIII). Although dismissals are generally not on the merits, dismissals for failure to state a claim upon which relief can be granted represent an exception to that rule. *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits”); Bradley Scott Shannon, *A Summary Judgment Is Not a Dismissal!*, 56 *Drake L. Rev.* 1, 4 n.11 (2007) (noting that “such a motion would be more accurately termed a motion for judgment on the complaint, because that is essentially what it is”).

III. CONGRESS SHOULD AMEND THE HEAR ACT TO PRECLUDE THE
DOCTRINE OF LACHES OR TO RESTRICT THE AVAILABILITY OF THE
DEFENSE

The doctrine of laches is a means by which a current possessor can avoid litigating on the merits.¹⁸³ As a result, the defense stands in the way of the HEAR Act's first stated purpose to guarantee that "laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the [Washington Principles], the Holocaust Victims Redress Act, and the Terezin Declaration."¹⁸⁴ Congress's forceful language in presenting the HEAR Act's purpose and invoking earlier commitments demonstrates that the statute was intended to go beyond signaling support for victims of Nazi persecution. Enacting legislation to create a more generous federal statute of limitations was, in isolation, a concrete step to tilt the balance toward rightful owners. Considering that tremendously valuable works of art are sometimes at stake,¹⁸⁵ this could have been a decision with significant consequences. Yet by allowing laches to bar claims covered by the HEAR Act, Congress undermined the Act's foundation.

Congress should act to bring the HEAR Act into line with the Washington Principles. To explain how this can be accomplished, Sections III.A and III.B first demonstrate why the availability of laches undermines Congress's putative goals and the United States' international commitments. Therefore, Congress should revise the HEAR Act to make laches unavailable, as the first draft intended.

Section III.C offers a more moderate solution as an alternative. Congress could require that courts evaluate possessors' pre-acquisition investigation into artwork covered by the HEAR Act. As developed below, these purchasers have benefited from the art market's culture of

¹⁸³ See Perezstegi Testimony, *supra* note 18, at 3 ("In the United States, statute of limitations and laches are procedural bars to having the case heard on the merits . . .").

¹⁸⁴ Holocaust Expropriated Art Recovery Act § 3(1).

¹⁸⁵ See Carol Vogel, Questions Over Fixing Torn Picasso, *N.Y. Times* (Jan. 25, 2010), <https://www.nytimes.com/2010/01/26/arts/design/26picasso.html> [https://perma.cc/V27Q-DJ2D] (describing Picasso's *The Actor*, which was the subject of *Zuckerman v. Metropolitan Museum of Art*, as possibly worth over \$100 million); William D. Cohan, A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art, *N.Y. Times* (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art.html?_r=0 [https://perma.cc/M4YG-MRFT] (noting that the possessor in *Bakalar v. Vavra* sold his Egon Schiele drawing for \$1.3 million and that the Schiele drawings in *Reif v. Nagy* are jointly valued at approximately \$5 million).

secrecy when transacting in potentially-looted art. If a possessor failed to exercise diligence when provenance issues should have been apparent, laches should not be available to protect that party from litigating on the merits.

Section III.D explains why objections to continued restitution of artwork stolen by the Nazis are unconvincing. While there is some attenuation between the original injustice and the parties bringing suit, the emotional links are still intact. The relief sought—restitution of identifiable pieces of property directly connected to the injustice—provides further support.

A. Laches Clashes with the HEAR Act's Framework

The same rationale that led Congress to effectively remove a statute of limitations defense applies to precluding a laches defense—barring a claim on either ground poses a time-based hurdle to adjudication on the merits.¹⁸⁶ As one witness testified while Congress was considering the HEAR Act, neither of these defenses were “designed to deal with the greatest art theft in history.”¹⁸⁷ Accordingly, Congress should act to preclude a laches defense so long as the HEAR Act is operable.¹⁸⁸

While the HEAR Act has admirable moral aims that should be furthered, the effects of leaving laches available must have been clear to Congress at the time. From the signing of the Washington Principles up through the HEAR Act's passage, few claimants recovered artwork through litigation.¹⁸⁹ The Act is intended to give claimants access to the courts to argue on the merits,¹⁹⁰ and the successful use of the laches

¹⁸⁶ See Peresztegi Testimony, *supra* note 18, at 3.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ Congress has the authority to enact this change. The Supreme Court has held that a federal statute of limitations set by Congress can preempt a laches defense. See Kreder & Schell, *supra* note 37, at 49–51 (discussing the holdings in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 678–81 (2014), and *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960–63 (2017)). The Second Circuit, however, held that Congress did not intend for the HEAR Act to follow this rule and abrogate the doctrine of laches. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 195–97 (2d Cir. 2019).

¹⁸⁹ See Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chap. L. Rev. 1, 14–15 (2017) (describing *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008)). Another case, *In re Flamenbaum*, 1 N.E.3d 782, 783–85 (N.Y. 2013), deliberately omitted from the case law discussed *infra* Part II, also saw successful recovery, albeit by a German museum suing an American Holocaust survivor's estate.

¹⁹⁰ Press Release, Senator Ted Cruz, Sens. Cruz, Cornyn Praise Unanimous Passage of the Bipartisan HEAR Act, (Dec. 10, 2016), https://www.cruz.senate.gov/?p=press_release-

defense to bar claims could not have been lost on members of Congress. Testimony informed legislators that leaving a laches defense available would allow possessors to avoid resolution on the merits.¹⁹¹ Considering this background, the legislation purposefully unwinds the effects of a federal statute of limitations by leaving in place a barrier to cut off claims.¹⁹²

The moral framework and the desire to reunite families with long-lost art appear to conflict with the HEAR Act's statutory scheme. Laches became such an important tool for possessors in New York because of the state's "demand and refusal" rule.¹⁹³ Under this rule, the limitations period starts running only when the claimant demands the contested artwork's return and the possessor refuses that demand.¹⁹⁴ Theoretically, a claimant can sit on her claim until she has the best possible chance to win her suit.¹⁹⁵ Laches therefore helps spur the claimant to bring an action, for fear that the defense would otherwise result in the loss of that claim.

However, under the HEAR Act, the limitations period begins to run when there is knowledge of the claim and expires six years later.¹⁹⁶ Implementation of an "actual discovery" requirement to trigger the limitations period does not square as neatly with the availability of a

&id=2916 [https://perma.cc/UP9N-WBW6] (describing the HEAR Act's function to ensure "that the artwork's rightful owners or heirs get their day in court.").

¹⁹¹ See Peresztegi Testimony, *supra* note 18, at 2 ("The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another.").

¹⁹² See *id.*

¹⁹³ See Demarsin, *supra* note 11, at 657–58 ("By raising the equitable defense of laches, a bona fide purchaser can mitigate the unfairness of the 'demand and refusal' rule.").

¹⁹⁴ *Menzel v. List*, 267 N.Y.S.2d 804, 809 (N.Y. Sup. Ct. 1966).

¹⁹⁵ See Demarsin, *supra* note 11, at 641 (noting that New York courts interpreted the "demand and refusal" rule to "effectively postpone[] the time of accrual of the cause of action from the moment of the theft until the moment of refusal by the current possessor").

¹⁹⁶ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526. However, the HEAR Act may only be intended to give claimants the benefit of a more liberal statute of limitations when compared to the otherwise applicable state limitations period. Frankel & Sharoni, *supra* note 23, at 172–74. Arguably, when the statute of limitations is more generous to a claimant, as in New York, the claimant may still sue under "demand and refusal," even though the six-year limitations period has expired under the HEAR Act. *Id.* Although this interpretation may weaken this incentives argument when applied to litigation in the New York forum, it does not undermine the moral argument put forward throughout this Note. Furthermore, removing laches for litigants in the New York forum suing under the Act would still provide an additional incentive to bring the claim before the Act sunsets, with the knowledge that laches will not bar their claim, but may later bar their claim under "demand and refusal."

laches defense.¹⁹⁷ The claimant has no incentive to sit on the claim when suing under the HEAR Act. While the long six-year limitations period is unlikely to bar many claims, that is the point of the HEAR Act—removing a time-based ground on which a possessor can prevail. Laches therefore may serve a different purpose. The defense is available to hamper the effect of the generous limitations period and dash claimants' hope to recover looted art.

Unless Congress takes further action, laches is poised to further weaken the HEAR Act. The defense will become increasingly viable as time passes and Holocaust survivors continue to pass away.¹⁹⁸ As a result, the relief that the HEAR Act ostensibly promotes risks going unfulfilled.

B. The Use of Laches in Nazi-Looted Art Disputes Is Irreconcilable with Furthering Restitution in Light of the United States' Moral Commitments

Both elements of the doctrine of laches are intrinsic to the claims that Congress has chosen to support. Yet when deciding whether there was unreasonable delay, courts do not properly weigh the circumstances that victims faced in the aftermath of World War II and throughout the following decades. At the same time, possessors can easily meet their burden to prove prejudice by demonstrating that an individual who may have been able to comment on earlier transactions is unavailable. This inflexible approach in considering whether the possessor has suffered prejudice contravenes the Washington Principles.

¹⁹⁷ This requirement is meaningful. The statute of limitations will begin to run at that moment of "actual discovery." Holocaust Expropriated Art Recovery Act § 5(a) When suing under the HEAR Act, a claimant will not adjust her behavior based on whether a defendant may assert a laches defense, since she will want to sue to take advantage of the limitations period under the Act. See *id.*

¹⁹⁸ See Demarsin, *supra* note 11, at 686–89 (discussing how the passage of time and death of key witnesses increasingly lead courts to allow the defense of laches); Alexandra Minkovich, Note, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 *Colum. J.L. & Arts* 349, 364 (2004) (predicting that in the future, witness deaths and loss of evidence will transform laches into a "useful tool" for good faith purchasers defending against World War II-era stolen artwork claims); Phil Hirschorn, *Why Finding Nazi-Looted Art Is 'a Question of Justice'*, PBS (May 22, 2016, 10:13 AM), <https://www.pbs.org/newshour/arts/why-finding-nazi-looted-art-is-a-question-of-justice> [<https://perma.cc/XU9L-7FVY>]. The director of the Kimbell Art Museum noted after returning a looted painting, "It's a question of justice . . . [a]nd it's becoming increasingly important as we get further and further away from World War II, because the original owners are dying, and even knowledge about collections is disappearing with each subsequent generation." *Id.*

These cases involve tough factual determinations that courts have the expertise to make. Removing the availability of the doctrine of laches will situate courts to carry out Congress's stated aims and make decisions on the merits.

1. "Unreasonable Delay" Does Not Consider Practical and Historical Realities

Courts considering the doctrine of laches do not take proper account of the history surrounding the uniquely horrible injustices of the Holocaust. They further fail to consider the difficulty of tracking down and recovering stolen art, generally. The doctrine of laches therefore punishes claimants for a delay that arose through no real fault of their own.¹⁹⁹ This defense should be removed if the HEAR Act's putative goals are to be achieved.

A common refrain throughout the case law is that the work was discoverable or that a claim could have been brought earlier.²⁰⁰ This is at odds with the Holocaust's unique historical context and with claimants' situations. It is dependent on the belief that in the intervening decades, owners or their descendants believed that they had either the right or the ability to reclaim stolen art.²⁰¹ The history of restitution efforts starting in the 1990s, discussed *supra*, supports the conclusion that descendants generally had neither,²⁰² as does the general absence of suits in the intervening years.²⁰³ Delay is justifiable without such a structure to

¹⁹⁹ Courts' increased receptiveness to arguments that claimants unreasonably delayed has been discussed elsewhere. Demarsin, *supra* note 11, at 677–86; Minkovich, *supra* note 198, at 378. This section seeks to build off their work and the work of others to demonstrate why the defense should be removed for the HEAR Act to have a meaningful impact.

²⁰⁰ E.g., Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 193–94 (2d Cir. 2019); Bakalar v. Vavra, 819 F. Supp. 2d 293, 304–05 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012); Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., No. 105575/00, 2001 WL 1657237, at *7 (N.Y. Sup. Ct. Sept. 28, 2001), *aff'd*, 752 N.Y.S.2d 295 (N.Y. App. Div. 2002).

²⁰¹ See DeWeerth v. Baldinger, 804 F. Supp. 539, 553 (S.D.N.Y. 1992) ("Where a plaintiff delays in bringing suit because she is 'justifiably ignorant of the facts giving rise to the cause of action,' a laches defense will not operate." (quoting *In re Estate of Barabash*, 286 N.E.2d 268, 271 (N.Y. 1972))); see also Cohen, *supra* note 178 (quoting a letter from artist George Grosz in 1953 expressing that he was "powerless" against the Museum of Modern Art's display of his work that he believed had been stolen and sold). A later action to recover Grosz's works were time-barred on statute of limitations grounds. *Grosz v. Museum of Mod. Art*, 403 F. App'x 575, 577 (2d Cir. 2010).

²⁰² See discussion *supra* Part II.

²⁰³ But see DeWeerth v. Baldinger, 658 F. Supp. 688, 690–92 (S.D.N.Y. 1987), *rev'd*, 836 F.2d 103, 104 (2d Cir. 1987), *remanded to* 804 F. Supp. 539, 541 (S.D.N.Y. 1992) (granting

facilitate claims or to make victims aware that they may still have claims. The argument for excusing delay is even stronger when considering that victims and their families were scattered throughout Europe and the rest of the world due to Nazi genocide and persecution.²⁰⁴

In using victims' restitution efforts immediately after the war to demonstrate that victims could have brought their claims earlier, courts are unsympathetic to the realities of post-war Europe.²⁰⁵ One author phrased this issue best in asking, "At what point—after seeking some post-war restitution and reaching the point of futility—could survivors and heirs justifiably conclude that no more restitution was possible?"²⁰⁶ When post-war restitution programs ended, it is reasonable that victims like the Leffmans in *Zuckerman*—who had made some claims²⁰⁷—believed their window of opportunity to recover their Picasso closed, too.²⁰⁸

Allowing current possessors to weaponize delay against claimants also ignores that even a diligent, continued search for stolen artwork may be

relief from judgment), rev'd, 38 F.3d 1266, 1268–69 (2d Cir. 1994); *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 831–32 (E.D.N.Y. 1981), aff'd, 678 F.2d 1150, 1153 (2d Cir. 1982); *Menzel v. List*, 267 N.Y.S.2d 804, 806 (N.Y. Sup. Ct. 1966), modified on other grounds, 279 N.Y.S.2d 608, 608–09 (N.Y. App. Div. 1967), modification rev'd, 246 N.E.2d 742, 743, 746 (N.Y. 1969). These three cases deal with artwork stolen during World War II and were litigated prior to the Washington Principles. The surge in claims since the Washington Principles indicate that these are exceptions. In addition, the claimant in *Menzel* fortuitously discovered the missing artwork. 246 N.E.2d at 743.

²⁰⁴ See Peresztegi Testimony, supra note 18, at 4.

²⁰⁵ See Soltes, supra note 1, at 467 ("Frankly, survivors were not overly interested in this matter at that moment either. They usually didn't want to relive the most horrific years of their families' lives."); Leah Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 *Cardozo Arts & Ent. L.J.* 837, 866 (2007) ("[T]he psychology of Holocaust survivors made the suggestion of the restitution of material possessions a 'taboo' topic, as most were grateful for having survived the war."). The son of Dutch Jew Bernard Goodman noted of his father's experience that "[t]hese new governments were overwhelmed with all the problems after the war The last thing they wanted to deal with was some annoying man like my father who said, 'What happened to my mother's teacups?' Or even an important painting, or a priceless Renaissance gold cup." Hirschhorn, supra note 198.

²⁰⁶ Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 *Kan. L. Rev.* 75, 114–15 (2012) [hereinafter Kreder, *Fighting Corruption*].

²⁰⁷ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 193–94 (2d Cir. 2019).

²⁰⁸ Other factors may have weighed against a decision to pursue works after the war. In *Von Saher v. Norton Simon Museum of Art*, the victims had the opportunity to reclaim the works at issue pursuant to the Dutch government's restitution process. 897 F.3d 1141, 1144–45 (9th Cir. 2018). However, the family's lawyers and business advisors counseled against seeking restitution because of the costs associated with operating a gallery to care for the works. *Id.* at 1145.

ineffective. The recovery rate for stolen artwork sits at an unimpressive ten percent.²⁰⁹ To require such continued diligence in order to stave off a laches defense is to then require that an owner or her descendants have incurred “a panoply of financial, emotional, and logistical strains” with little chance of success.²¹⁰ Works held in private collections amplify this contrast between courts’ expectation and victims’ reality. Because so much art is held in private collections, once a stolen piece is sold, victims are forced to wait until it goes back on the market.²¹¹ Courts looking back at the situation can point out the various opportunities that a claimant could have taken, but these require an heir to have been continually searching²¹²—an unreasonable command given these difficulties.

Yet the inherent difficulty of finding pieces in private collections has not prevented courts from holding that the claimant unreasonably delayed in bringing an action. In *Wertheimer*, the painting had been sold by a New York gallery fifty years earlier, making its way into a private collection in Switzerland.²¹³ Only when the Swiss family sold the piece did a dealer with knowledge that the claimant had a connection to the piece contact the claimant.²¹⁴ The court nevertheless held the action barred by the

²⁰⁹ Andrea E. Hayworth, Note, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 *Duke L.J.* 337, 367 (1993).

²¹⁰ *Id.*; see also *DeWeerth v. Baldinger*, 804 F. Supp. 539, 553 (S.D.N.Y. 1992) (in rejecting a laches defense, emphasizing that the original owner “lack[ed] institutional resources to trace stolen art”); *Menzel v. List*, 246 N.E.2d 742, 743 (N.Y. 1969) (detailing how a couple lost a Chagall painting as they fled German occupied Belgium and only serendipitously rediscovered its whereabouts); Kreder, *Fighting Corruption*, *supra* note 206, at 115 (“One wonders how many refugees had the funds in the post-war, pre-internet environment to finance such a potentially endless, fruitless hunt for assets on multiple continents.”).

²¹¹ Phelan, *supra* note 98, at 672 (“‘Once art objects are stolen,’ one observer commented, ‘owners often have no other alternative but to wait for their property to resurface on the art market.’” (quoting Leah E. Eisen, Commentary, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 *J. Crim. L. & Criminology* 1067, 1070 (1991))); see also Henson, *supra* note 13, at 1148 (noting how artwork is often transferred by inheritance rather than public sale). Although relatively recent innovations like the Art Loss Register—a computerized database of art reported as stolen—have made searches easier, no standard process for a search exists. See Phelan, *supra* note 98, at 671–72, 717. For an explanation of how the Art Loss Register does not resolve the difficulties a claimant faces in her search, and how its availability may ironically make a laches defense more viable, see Minkovich, *supra* note 198, at 378–79.

²¹² See Demarsin, *supra* note 11, at 685 (noting that “[c]ourts that look for ‘equitable’ reasons to dismiss an original owner’s action . . . on laches grounds can easily find a ‘crucial’ means of redress the owner did not undertake”); Minkovich, *supra* note 198, at 378.

²¹³ *Wertheimer v. Cirker’s Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 WL 1657237, at *2 (N.Y. Sup. Ct. Sept. 28, 2001), *aff’d*, 752 N.Y.S.2d 295 (N.Y. App. Div. 2002).

²¹⁴ See *id.* at *2–4.

doctrine of laches because the claimant had not actively searched for the piece in the half-century after seeking post-war restitution.²¹⁵ Against the backdrop of a world inattentive to the issues of art looted during World War II, consideration that this work had been hidden for decades could have counseled against a finding of unreasonable delay. Legislation promoting resolution on the merits should recognize how these circumstances are stacked against claimants. A policy in favor of restitution cannot succeed while courts so restrictively balance the equities. Removing laches would be one way to effectuate this policy, ensuring that courts no longer isolate this delay and utilize it to bar claims for recovery.

In ordinary circumstances, courts should not necessarily excuse a claimant's delayed search and suit for lost property.²¹⁶ But in the context of the Holocaust's atrocities in which the looting of art was itself an act of genocide,²¹⁷ Congress should make an exception. Precluding a laches defense would implement this exception in preventing possessors from using delay against victims' descendants. To do anything else would allow current possessors to "benefit from the crimes committed as part and parcel of the horrifying campaign to eliminate the Jews of Europe."²¹⁸

2. Prejudice Will Become a Foregone Conclusion, Incompatible with the Washington Principles

Prejudice is baked into these claims for restitution that Congress says it hopes to be resolved through the HEAR Act, since prejudice takes the form of lost testimony by now-deceased witnesses.²¹⁹ As the number of

²¹⁵ See *id.* at *7–8.

²¹⁶ See, e.g., *Greek Orthodox Patriarchate of Jerusalem v. Christie's*, No. 98 Civ. 7664, 1999 WL 673347, at *10 (S.D.N.Y. Aug. 30, 1999) (finding insufficient the monks' sole excuse offered for their delay. The order of monks argued it "could not be expected to search for a painting," but the court was not persuaded, considering that the order was "able to retain counsel with impressive speed to bring this action the night before the Christie's auction").

²¹⁷ *Simon v. Republic of Hungary*, 812 F.3d 127, 134, 142 (D.C. Cir. 2016) (stating that Nazi looting "did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as *themselves genocide*." (citation omitted)).

²¹⁸ *Peresztegi Testimony*, *supra* note 18, at 1.

²¹⁹ See *Phelan*, *supra* note 98, at 705 (citing *Filler v. Richland County*, 806 P.2d 537, 540 (Mont. 1991)).

remaining Holocaust survivors dwindles, a current possessor's ability to demonstrate prejudice will become a foregone conclusion.²²⁰

Over twenty years ago, when the Washington Principles were adopted, ten percent of Holocaust survivors were passing away every year.²²¹ Today, relatively few survivors remain.²²² The fourth Washington Principle directly addresses the evidentiary problem this poses by directing nations to give consideration to “unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.”²²³ However, these “unavoidable gaps or ambiguities” can be fatal to a claim for restitution.²²⁴ Achieving flexibility therefore requires precluding the doctrine of laches in litigation covered by the HEAR Act. The frequency with which possible witnesses will be unavailable as survivors continue to pass away amplifies the likelihood that a court will find that a possessor suffered prejudice.²²⁵

Loss of evidence will put some possessors at a disadvantage in attempting to prove their legitimate title. Because the Nazis often kept records of seizures to give looting an appearance of legality,²²⁶ concern is heightened as to whether claims that lack such records are legitimate. In a replevin action under New York law, the claimant must show “legal title

²²⁰ See Demarsin, *supra* note 11, at 686–89 (discussing courts' increased receptiveness to arguments that a possessor has been prejudiced once possible witnesses have passed away, turning a laches defense into an “impervious shield”).

²²¹ See 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, 154 (2002) (citing *World War II Assets of Holocaust Victims: Hearing Before the H. Comm. On Banking and Fin. Servs.*, 106th Cong. 5 (1999) (statement of Stuart E. Eizenstat, Deputy Treasury Secretary)).

²²² See *Archivists Are Racing To Identify Every Jewish Holocaust Victim*, *Economist* (Jan. 25, 2020), <https://www.economist.com/graphic-detail/2020/01/25/archivists-are-racing-to-identify-every-jewish-holocaust-victim> [<https://perma.cc/ZK39-94ML>].

²²³ Washington Principles, *supra* note 7, at 971 (Principle IV).

²²⁴ *Id.*; see, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 194–95 (2d Cir. 2019) (finding that the absence of a claim in the “more than six decades that have elapsed since the end of World War II . . . has resulted in ‘deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,’ as well as the likely disappearance of documentary evidence” (quoting *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 621 (N.Y. 1990))).

²²⁵ See Demarsin, *supra* note 11, at 686–89.

²²⁶ See Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 *Or. L. Rev.* 37, 48–49 (2009) (citing Brief Amici Curiae of Bernard Beliak et al. in Support of Defendants-Counter-Claimant-Appellants at 6, *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) (No. 08-5119-cv) [hereinafter Kreder, *New Battleground*]).

or a superior right of possession” before the burden is shifted to the possessor to prove that she holds good title.²²⁷ The understandable concern is that through loss of witnesses, a current possessor will not be able to carry her burden, and laches provides protection for that possessor. However, placement of this heavy burden on the possessor reflects a considered policy judgment that a possessor “deal[s] with the property” at her own risk.²²⁸ Amateur collectors like those in *Bakalar* who are fairly characterized as blameless might lose,²²⁹ and that would be a sacrifice to the HEAR Act’s moral aims. However, for other possessors, the nature of the art market discussed *infra* casts serious doubt on their innocence, which mitigates the concern and effectuates the reasoning behind that policy judgment.²³⁰

The Washington Principles were accompanied by a call to deemphasize the ordinary “rules designed for commercial transactions of societies that operate under the rule of law.”²³¹ Laches should be removed to allow both parties the chance to produce the evidence that is available on a claim for Nazi-looted art and to have the dispute resolved on the merits.

3. Removing Laches Would Be a Practical Solution

With better direction from Congress, courts would be well situated to hear disputes dealing with the Holocaust’s horrific legacy. Revising the HEAR Act to preclude the doctrine of laches would be a practical fix to remove the tension between the Act and the Washington Principles. Though it may have broad implications for private parties litigating a narrow category of property claims, it will not require sustained

²²⁷ *Reif v. Nagy*, 80 N.Y.S.3d 629, 632 (N.Y. Sup. Ct. 2018), *aff’d* in part and modified in part, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019); see also *Bakalar v. Vavra*, 619 F.3d at 147 (directing the district judge on remand that if the claimants “have made a threshold showing that they have an arguable claim to the Drawing, New York law places the burden on . . . the current possessor, to prove that the Drawing was not stolen” (citing *Solomon F. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991))).

²²⁸ See *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 624 (N.Y. App. Div. 1990) (citing *W. Page Keeton et al., Prosser and Keeton on The Law of Torts* § 15, at 93 (5th ed. 1984)), *aff’d*, 569 N.E.2d 426 (N.Y. 1991).

²²⁹ See *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011) (recounting the court’s previous conclusion that the possessor, *Bakalar*, had acquired the Drawing in good faith), *aff’d*, 500 F. App’x 6 (2d Cir. 2012); *Bakalar v. Vavra*, No. 05 Civ. 3037, 2008 WL 4067335, at *3 (S.D.N.Y. Sept. 2, 2008), vacated, 619 F.3d 136 (2d Cir. 2010) (describing *Bakalar* as “a novice art collector who was unfamiliar with Schiele”).

²³⁰ See *infra* Subsection III.C.1.

²³¹ *Eizenstat, Explanation of the Washington Principles*, *supra* note 68, at 418.

governmental action or resources. Until such a time, courts applying laches will not have to meet the unique factual challenges posed by these suits.

Precluding a laches defense would increase the likelihood that courts will engage with the merits and utilize their fact-finding expertise to determine a rightful possessor. *Zuckerman* demonstrates how the doctrine of laches allows courts to avoid reaching a decision on the underlying merits in Holocaust-era art litigation.²³² After the district court determined that the claimant had not alleged circumstances amounting to duress, the Second Circuit dismissed all claims as time-barred by the doctrine of laches.²³³ If Congress revised the HEAR Act to preclude a laches defense, the Second Circuit would have been more likely to make its decision on the claim's merits.²³⁴ Even if the Second Circuit affirmed the dismissal for failure to state a claim, that result would at least be consistent with the Act and the Washington Principles as a decision on the merits. Removing the doctrine of laches would redirect courts to address the tough legal issues posed by these suits.

Holocaust survivors' descendants deserve more than being told that they waited too long to seek restitution, especially when that delay was not their fault.²³⁵ This may require courts to make difficult pronouncements that such actions lack merit, but courts should have to make those decisions. Removing laches will ensure that courts fill that role.

²³² 928 F.3d 186, 197 (2d Cir. 2019); see also discussion *supra* Section II.C (describing *Zuckerman*'s procedural and substantive history in greater detail).

²³³ *Zuckerman*, 928 F.3d at 197; *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 308, 319–20 (S.D.N.Y. 2018), *aff'd* on other grounds, 928 F.3d 186, cert. denied, 140 S. Ct. 1269 (2020) (mem.).

²³⁴ See *supra* note 182 (explaining that dismissals for failure to state a claim can be accurately considered “on the merits”).

²³⁵ See S. 2763, the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 2 (2016) (statement of Dame Helen Mirren), https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage [<https://perma.cc/S-QE4-UPE9>] (To access the hearing transcript, click on the first hyperlink and scroll down to the various witnesses. Under each witness is a link to the transcript of that individual's hearing testimony. The second “permanent” hyperlink links directly to the cited hearing testimony transcript.) (“The generation of Jewish people that were burdened by the cruel acts of the Nazi regime had little choice but to carry on with their lives. . . . [T]oday we live in a freer world, where a new generation has emerged with the resources and time to finally begin to deal with this issue and pursue justice.”); see discussion *supra* Subsection III.B.1.

C. Courts Should Consider the Unique Nature of the Art Market in Allowing or Prohibiting a Laches Defense

This Note has discussed the appeal of removing the doctrine of laches entirely, faithful to the HEAR Act's first draft.²³⁶ An alternative solution is to require courts to assess the investigation taken by a current possessor claiming an acquisition in good faith. If the possessor did not undertake a thorough investigation when an artwork's provenance placed it in wartime Europe, then she will not be allowed to assert laches. The art market is rife with abuse.²³⁷ Any possessor relying on the market's permissive customs to claim good faith should not be allowed to then invoke equitable jurisdiction in her defense. This approach, however, will allow for the possibility that a true good faith purchaser or donee who did not rely on the art market's customs suffered prejudice, and will allow that party to assert laches.

For this solution to be an effective improvement upon the HEAR Act, its coverage must extend beyond good faith purchase to capture donations of art as well. Aside from donors' generosity, parties donating art to museums often do so for tax purposes and can act as intermediaries when museums will not directly acquire a piece of art.²³⁸ To exclude donations from this solution would be to ignore the troves of artwork with undocumented gaps in their provenance held in United States museums.²³⁹ A contested piece in a museum collection should not be carved out from future efforts to promote restitution just because the museum did not itself purchase the artwork.

This proposal has the added benefit of incentivizing museums to adhere to self-imposed guidelines that suggest waiving defenses when faced with claims for artwork stolen during the Nazi Era.²⁴⁰ Museums have chosen not to follow these voluntary guidelines when they believe the merits are

²³⁶ See discussion *supra* Section I.C.

²³⁷ See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 *Colum. L. Rev.* 377, 385–87 (1995).

²³⁸ *Id.* at 387.

²³⁹ See Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *Cardozo J. Int'l & Comp. L.* 409, 438 n.118 (2003) (citing Elizabeth Neff, *Nazi-Era Art Probe Takes to the Internet*, *Chi. Trib.* (Apr. 12, 2000), <https://www.chicagotribune.com/news/ct-xpm-2000-04-12-0004120227-story.html> [<https://perma.cc/8L2B-RBQ2>], which describes a list of over five hundred works in the Art Institute of Chicago with gaps in their history from 1933 to 1945, as well as the published lists of other museums, like Boston's Museum of Fine Arts).

²⁴⁰ See discussion *infra* Subsection III.C.3.

uncertain,²⁴¹ and this proposal would adjust these institutions' litigation calculations.

1. Good Faith Is Not Adequately Considered in a Laches Defense, and the Normal Conception of Good Faith Is Not Appropriate with Respect to Nazi-Looted Art

The art market is uniquely opaque,²⁴² and in an action covered by the HEAR Act, the court should scrutinize a possessor's provenance investigation in assessing a laches defense. In doing so, however, courts should not apply the normal conception of good faith as defined by the U.C.C. Although the U.C.C. applies to art transactions,²⁴³ its undemanding good faith requirements enable the art market's secretive

²⁴¹ See, e.g., *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *2, *4 (E.D. Mich. Mar. 31, 2007).

²⁴² See Gregory Day, *Explaining the Art Market's Thefts, Frauds, and Forgeries (And Why the Art Market Does Not Seem To Care)*, 16 *Vand. J. Ent. & Tech. L.* 457, 469 (2014).

²⁴³ See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012); *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361, 1366 (N.D. Cal. 1995) ("[A]rt is subject to any applicable provisions of the Uniform Commercial Code and the various state analogues."). New York law, which has adopted the U.C.C., subject to a variation discussed *infra* note 244, typically applies in actions for Nazi-looted art in the New York forum. It prevails over jurisdictions where the theft or earlier transactions occurred. See, e.g., *Bakalar v. Vavra*, 619 F.3d 136, 140–46 (2d Cir. 2010) (determining that New York's interest in "prevent[ing] the state from becoming a marketplace for stolen goods" necessitates application of New York law, even when the relevant transaction took place overseas (quoting *Kunstammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 846 (E.D.N.Y. 1981))); see also *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 307, 320–25 (S.D.N.Y. 2018) (tracing the Second Circuit's analysis in *Bakalar* to determine that New York law should apply, despite the fact that the disputed transaction took place in Italy), *aff'd* on other grounds, 928 F.3d 186 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020) (*mem.*); *Reif v. Nagy*, 80 N.Y.S.3d 629, 632 (N.Y. Sup. Ct. 2018) (applying New York law due to the jurisdiction's "overwhelming interest in preserving the integrity of its market" (citing *Bakalar*, 619 F.3d at 145)), *aff'd* in part and modified in part, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019). The U.C.C. was released in 1952 and adopted by individual states in the following years. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 *Colum. L. Rev.* 798, 800–01 (1958). It would not apply to transactions for value completed before adoption, or to donations, like in *Zuckerman*. See *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 192 (2d Cir. 2019) (noting that The Actor was donated to the museum in 1952); U.C.C. §§ 2-102, 2-106 (Am. L. Inst. & Unif. L. Comm'n 2002) (defining the scope of Article 2 as covering "transactions in goods," and defining a "sale" as "the passing of title from the seller to the buyer for a price" (emphasis added)). However, because the U.C.C. would apply to almost all cases discussed herein, it is useful to illustrate how a possessor's good faith does not have a meaningful impact under current law, and to provide a standard against which the proposed solution is contrasted.

“hear no evil, see no evil” nature.²⁴⁴ Museum directors have even bragged about acquisitions when there is a seeming disregard for the law or ethics.²⁴⁵ The art market’s secrecy can confer a benefit on the parties involved—to escape publicity, to avoid taxation on the transfer, or to shield the work from a claim that could cloud its title.²⁴⁶

Foundational to American property law, and embodied in the U.C.C., is the principle that a thief can never convey good title.²⁴⁷ Because a purchaser’s good faith provides no protection against a meritorious suit over stolen art, parties do not litigate whether the purchaser has met the applicable standard of good faith.²⁴⁸ The fact that good faith is rarely discussed in Nazi-looted art cases is troubling because laches, as an equitable doctrine, should only award relief to a possessor who acted equitably when acquiring artwork.²⁴⁹ The U.C.C.’s provisions are

²⁴⁴ See Day, *supra* note 242, at 469. A dealer must demonstrate “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” U.C.C. § 2-103(1)(b) (Am. L. Inst. & Unif. L. Comm’n 2002). The “in the trade” language means that the U.C.C. does not impose a substantial duty of diligence because of the art market’s low standards. See Gerstenblith, *supra* note 239, at 457. In New York, the U.C.C. disincentivizes a non-merchant from inquiring into title, as the purchaser need only lack subjective knowledge that the artwork was stolen in order to qualify as a “good faith” purchaser. N.Y. U.C.C. Law § 1-201(b)(20) (Consol. 2016) (“‘Good faith’ means honesty in fact in the transaction or conduct concerned.”); Gerstenblith, *supra* note 239, at 456 (“[T]he use of this standard discourages a purchaser from searching title because what the purchaser does not know will not hurt.”). The Official Text of the U.C.C. has heightened the standard for a non-merchant, but the subjective standard remains in force in New York. Compare U.C.C. § 1-201(b)(20) (Am. L. Inst. & Unif. L. Comm’n 2017), with N.Y. U.C.C. Law § 1-201(b)(20) (Consol. 2016).

²⁴⁵ See Thomas Hoving, *Making the Mummies Dance: Inside the Metropolitan Museum of Art 20–21*, 50 (1993) (boasting about the museum’s decision to acquire a work of art that had “obviously been smuggled out of France and would still have to be spirited out of Belgium,” and about its arrival in the Met’s storeroom just ten days later).

²⁴⁶ Cf. Borodkin, *supra* note 237, at 386–87.

²⁴⁷ Alan Schwartz & Robert E. Scott, *Essay, Rethinking the Laws of Good Faith Purchase*, 111 *Colum. L. Rev.* 1332, 1333 n.2 (2011) (“The ‘theft’ rule is an application of the fundamental common law principle that one cannot convey greater rights in property than one has. It applies to sales transactions through U.C.C. § 1-103 (2011).”).

²⁴⁸ See Deborah A. DeMott, *Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets*, 62 *Duke L.J.* 607, 634 (2012) (noting that the question of good faith is “immaterial to the outcome,” but if it mattered, the U.C.C. definitions would apply).

²⁴⁹ See *Schoeps v. Museum of Mod. Art*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009) (refusing to grant the possessors’ motion for summary judgment because, *inter alia*, there were factual issues as to “whether the Museums . . . had reasons to know that the Paintings were misappropriated and so are barred from invoking laches by the doctrine of ‘unclean hands’”); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991) (“The conduct of both the appellant and the museum will be relevant to any consideration of this

nevertheless relevant to purchasers as the conduct-regulating body of law,²⁵⁰ which provides the necessary standards of diligence to undertake when buying art. Parties will therefore have conformed their conduct to U.C.C. standards in case other issues with title arise, like those covered by entrustment under U.C.C. § 2-403.²⁵¹

However, even if courts were to use the U.C.C.’s standards in considering the possessor’s behavior in a laches defense, it would add little to a balancing of the equities. Only in *Bakalar* did a court discuss the possessor’s good faith under the U.C.C. in a laches inquiry.²⁵² The claimant argued that by failing to investigate provenance, the possessor caused his own prejudice.²⁵³ However, the court quickly dismissed the assertion because, as a non-merchant, the possessor had no duty to investigate title.²⁵⁴ In addition, a “merchant” art dealer is able to easily satisfy the U.C.C. standard because of the market’s permissive customs.²⁵⁵ Equity is meant to adjudicate disputes with the “fullest awareness of the situation of the parties.”²⁵⁶ However, the law as it stands will not fulfill that task since possessors’ actions are not given due consideration.

The application of this good faith standard would be especially deficient when placed in the historical context of World War II. The art market was keenly aware of Nazi looting while it occurred,²⁵⁷ and those transacting in the art market were also aware of trafficking in looted art during the post-war period.²⁵⁸ *The New Yorker* published a series of pieces on the scale of the theft, and the State Department contacted museums and dealers as late as 1950 to direct their attention to Nazi-looted art

defense . . .”); Phelan, *supra* note 98, at 701–02 (explaining the flexibility of the laches defense, and how a court can consider the diligent investigation of the current possessor).

²⁵⁰ See Gerstenblith, *supra* note 239, at 455 n.186 (“The concept of good faith is relevant to the U.C.C. provisions pertaining to the performance of obligations, because all parties to contracts are required to perform in good faith.”).

²⁵¹ See DeMott, *supra* note 248, at 627–32.

²⁵² See *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 306 (S.D.N.Y. 2011).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *supra* note 244 and accompanying text.

²⁵⁶ Joshua Getzler, Patterns of Fusion, in *The Classification of Obligations* (Peter Birks ed., 1997), reprinted in *History of the Common Law: The Development of Anglo-American Legal Institutions* 317, 318 (John H. Langbein et al. eds., 2009).

²⁵⁷ See Kreder, *Fighting Corruption*, *supra* note 206, at 94–102 (providing an account of the contemporaneous knowledge of Jewish persecution and Nazi-looting); Francis Henry Taylor, *Europe’s Looted Art: Can It Be Recovered?*, N.Y. Times Mag., Sept. 19, 1943, at SM18.

²⁵⁸ See Kreder, *Fighting Corruption*, *supra* note 206, at 94–102.

entering the United States.²⁵⁹ Even without this notice, the amount of valuable artwork entering the market itself should have been enough to alert purchasers and institutions to the fact that they were dealing in stolen art.²⁶⁰

One scholar has asked “whether in this context the normal meaning of good faith has any validity.”²⁶¹ It does not, and the solution proposed below provides a lens through which courts can scrutinize good faith in past acquisitions of Nazi-looted art. Congress should legislate further to instruct courts to more thoroughly consider the behavior of a purchaser or donee who acquired looted art before that party can assert laches. Possessors should not be able to hide behind the art market’s customs to justify their own lack of investigation, only to then argue that the claimant should not recover because she and her displaced ancestors failed to diligently search for the work. Possessors who failed to investigate the provenance of looted art, or perhaps even chose to remain willfully ignorant, should face an uphill battle in asserting a laches defense.

2. Congress Should Enact Standards for “Good Faith” for Courts To Consider in Allowing a Possessor To Assert Laches

Congress should restrict the availability of laches to possessors who investigated a work’s history when the provenance placed the piece in Europe between 1933 and 1945 and subsequently found no indication of looting. One author has suggested that to improve the HEAR Act, Congress could legislate on the doctrine of laches by setting standards under which courts will evaluate the defense.²⁶² If a reasonably diligent investigation would have alerted the possessor to the artwork’s troubled past, then the party will be precluded from asserting laches, regardless of whether the failure to investigate prejudiced the claimant. Having relied on a seller’s assurances, or having refused to ask a donor questions, will not suffice.

²⁵⁹ See *id.* at 96–97.

²⁶⁰ See Yehuda Z. Blum, *On the Restitution of Jewish Cultural Property Looted in World War II*, 94 *ASIL Proc.* 88, 89–90 (2000). Although Blum raises this question with respect to stolen Jewish cultural property, like Judaica, which would not include “paintings of Renoir or Picasso owned by French Jews,” the question seems equally appropriate to ask about stolen artwork. *Id.* at 88.

²⁶¹ *Id.* at 89.

²⁶² See Emily J. Cunningham, Note, *Justice on the Merits: An Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 69 *Case W. Rsrv. L. Rev.* 427, 464 (2018).

This proposal will institute a meaningful standard of good faith for courts to consider in deciding whether a possessor should be allowed to assert the doctrine of laches. Furthermore, this solution will give courts broader discretion to sort through complex factual issues and fashion more just outcomes. It leaves room to consider the information available to the possessor at the time of acquisition, while making certain that claimants will not lose on their claim for recovery if the possessor did not demonstrate meaningful good faith.

Zuckerman can provide some insight into this proposal's impact on litigation covered by the HEAR Act. The disputed Picasso first arrived in the United States in 1939, and it was donated to the Met in 1952.²⁶³ When the Met first published the Picasso's provenance in 1967, it was "manifestly erroneous," though it is unclear what provenance information was given to the Met at the time of the donation.²⁶⁴ With the awareness of stolen art flooding the market and the piece's prominence,²⁶⁵ the Met arguably should have been on notice and taken action to determine the accuracy of the provenance information in their possession.²⁶⁶ It is possible that under this proposal, the museum would have been precluded from asserting laches. As a result, the Second Circuit would have had to make its decision on the merits—though quite possibly adverse to the claimant—consistent with the Washington Principles.

This proposal might appear to impose a significant obstacle on parties who purchased qualifying pieces of art in the decades after World War II. It would hold them to a standard higher than that mandated by industry custom at the time of the acquisition.²⁶⁷ However, it is also unjust and in

²⁶³ *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 192 (2d Cir. 2019); *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 314, 322 (S.D.N.Y. 2018), *aff'd* on other grounds, 928 F.3d 186 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020) (*mem.*).

²⁶⁴ *Zuckerman*, 307 F. Supp. 3d at 314. The Met's Motion To Dismiss does not provide an answer, but suggests that the misleading provenance might have been published after the museum relied on Hugo Perls, who purchased the Picasso from the Leffmans. Memorandum of Law in Support of Defendant the Metropolitan Museum of Art's Motion To Dismiss the Amended Complaint at 6, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16 Civ. 07665), 2016 WL 9109033.

²⁶⁵ See *Zuckerman*, 307 F. Supp. 3d at 312; *supra* notes 257–60 and accompanying text.

²⁶⁶ See Brief for B'nai B'rith International et. al. as Amici Curiae in Support of Plaintiff-Appellant *Zuckerman* at 15–16, *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019) (No. 18-0634-cv), 2018 WL 3013320 (arguing that "[t]he Met should have reconciled the donated painting's provenance before eagerly hanging it on the wall").

²⁶⁷ A potential objection to this proposal is that it violates the possessor's right to due process under the Fifth Amendment. However, this proposal would only legislate on the availability of a defense and the claimant's right to have a court adjudicate the dispute on the merits, rather

contravention of the HEAR Act's stated purpose to allow parties to benefit from the art market's lax requirements when a purchaser could have determined whether there were issues in the chain of title. This framework would create a better balance between the rights of possessors and the claimants of Nazi-looted art.

A disadvantage to this proposal is the possibility that meritorious actions will nevertheless be barred by laches. This approach would represent a sacrifice of the HEAR Act's moral aims to the practicality of adjudicating claims far after the events took place. It would reward the individuals or museums that took reasonable steps to determine that artwork did not have a provenance that suggested Nazi looting. There is an argument that if a party acts in true good faith, the loss of potentially vital evidence should bar the claim. That basic rationale is what underlies a successful laches defense. Furthermore, this approach would balance other commercial policy considerations.²⁶⁸ In any such case, one of the parties will suffer an inequity.²⁶⁹ This solution allows for the consideration that a possessor who demonstrated meaningful good faith is the party less deserving of experiencing that inequity.

3. Incentivizing Museums To Follow Their Guidelines' Suggestion To Waive Defenses

The American Alliance of Museums ("AAM"), which includes many of the most prominent art museums in the United States,²⁷⁰ has

than on a rule about property itself. This logic has allowed retroactive changes to statutes of limitations to survive due process challenges. See Cunningham, *supra* note 262, at 453–55. That same rationale should suffice in this instance. However, dicta in *Chase Securities Corp. v. Donaldson* could complicate this analysis if the revised defense would have altered conduct *ex ante* had the new law "been known and the change foreseen." *Id.* at 455 (quoting *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945)).

²⁶⁸ See Hawkins et al., *supra* note 95, at 51. But see Turner, *supra* note 104, at 1541–42 (arguing that concerns about a "chilling effect" on the international art market are not a reason to forgo policies favoring original owners and that these policies would make buyers more careful about their purchases). However, Turner does note that such proposals could affect museums as institutions that, to a degree, rely on owners for loans and donations of artwork. *Id.* at 1542. Such an effect would be unfortunate, but that possibility does not warrant maintaining the status quo in response to historical injustice.

²⁶⁹ See Minkovich, *supra* note 198, at 350–51.

²⁷⁰ Museums such as the Met, the Museum of Modern Art, and the J. Paul Getty Museum are members of the American Alliance of Museums. Am. All. of Museums, <https://www.aam-us.org/> [<https://perma.cc/7HH3-H57A>] (Follow "About Museums" hyperlink; then follow "Find a Museum" hyperlink to "Find a Member Museum;" search "Museum Name" field for

promulgated ethical guidelines encouraging members to waive defenses to claims for Nazi-looted art held in their collections.²⁷¹ Instituting more exacting requirements for good faith as a prerequisite to asserting laches has the additional benefit of incentivizing museums to follow these guidelines. If a museum is aware of a deficient investigation relating to an acquisition, it will be less tempted to assert a laches defense that the court may not entertain.²⁷² Otherwise, they face increased risk of unsavory practices being exposed before a court.²⁷³ If museums choose to proceed in asserting a laches defense, the adjusted definition of good faith will ensure that laches will only bar claims for artwork improperly acquired through no fault of the institution.

When the world began paying more attention to this problem in the late 1990s, two industry associations—the Association of Art Museum Directors (“AAMD”) and the American Alliance of Museums (“AAM”)—took charge and promulgated ethical guidelines for dealing with artwork tainted by a troubled past.²⁷⁴ These guidelines also encourage more thorough investigations for future acquisitions,²⁷⁵ resulting in stricter museum-specific collection policies that adhere to these guidelines and the public’s evolving expectations.²⁷⁶ While both the

“Metropolitan Museum of Art,” “Museum of Modern Art,” and “J. Paul Getty Museum of Art.”).

²⁷¹ Am. All. of Museums, *Unlawful Appropriation of Objects During the Nazi Era*, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/> [https://perma.cc/DR4P-EYAR] (last visited Dec. 14, 2019) [hereinafter AAM Guidelines]. The AAM guidelines are not binding on museums in litigation, and museums are free to assert affirmative defenses like the statute of limitations. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 808–09 (N.D. Ohio 2006).

²⁷² Prominent museums have already identified works in their collections with undocumented gaps in provenance. Museums should therefore be well-situated to make these determinations. See *infra* notes 279–81 and accompanying text.

²⁷³ See Dubin, *supra* note 55, at 132 (describing the “two main pitfalls of litigation for the art world” as “bad publicity and immense financial expense”).

²⁷⁴ See *id.* at 115, 118.

²⁷⁵ AAM Guidelines, *supra* note 271; Ass’n of Art Museum Dirs., *Art Museums and the Identification and Restitution of Works Stolen by the Nazis* (May 2007), https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf [https://perma.cc/Y9QP-UP7M] (last visited Jun. 12, 2020).

²⁷⁶ See, e.g., Metro. Museum of Art, *Collections Management Policy* § 2, <https://www.metmuseum.org/about-the-met/policies-and-documents/collections-management-policy#staff> [https://perma.cc/4CG5-LVUH] (last updated Mar. 3, 2020); J. Paul Getty Trust, *J. Paul Getty Museum Collection Policy* § V.C.2 (Sept. 15, 2019), http://www.getty.edu/about/governance/pdfs/acquisitions_policy.pdf [https://perma.cc/PZL-7-WG6Q].

AAM and AAMD promote provenance research, the AAM guidelines go a step further and suggest that in order to achieve the “equitable and appropriate resolution of claims,” museums “may elect to waive certain available defenses.”²⁷⁷

Museums are institutional purchasers, better situated than individuals to undertake an investigation into a piece’s provenance.²⁷⁸ These purchasers have the assets, resources, and expertise to engage in a thorough investigation.²⁷⁹ In response to the United States’ interest in Nazi-looted art, prominent museums compiled lists of all the works in their collections with gaps in their provenance from 1933 to 1945.²⁸⁰ There is no reason to think that these lists are replete with the names of looted artwork. However, that does not mean museums’ provenance investigations were sufficient, especially given contemporary awareness of looted art that was flooding the United States market.²⁸¹ While museums’ voluntary dedication to provenance research is commendable, it does not excuse earlier decisions to look the other way.²⁸² This holds

²⁷⁷ Dubin, *supra* note 55, at 137 (quoting AAM Guidelines, *supra* note 271).

²⁷⁸ See *DeWeerth v. Baldinger*, 658 F. Supp. 688, 694–95 (S.D.N.Y. 1987) (refusing to compare the claimant’s ability to conduct a diligent search to that of a museum); Christel Force, *Provenance Research: An Art Detective Traces the Life of Artworks*, *The Metropolitan Museum of Art: Collection Insights* (Aug. 31, 2018), <https://www.metmuseum.org/blogs/collection-insights/2018/provenance-research-art-detective> [<https://perma.cc/2PKE-X-9AP>] (explaining and discussing the process of a provenance investigation in the context of concerns over artwork that had been looted by the Nazis).

²⁷⁹ See Phelan, *supra* note 98, at 673.

²⁸⁰ Gerstenblith, *supra* note 239, at 437–38.

²⁸¹ See Phillippe de Montebello, *supra* note 6 (explaining that “questions of provenance touching on the World War II era were only addressed casually by museums, collectors and the art market as a whole,” but also noting that the sources relied on by dealers and donors were “perfectly legitimate”); Blum, *supra* note 260, at 89–90; Judith H. Dobryznski, *Tracing a van Gogh Treasured by the Met*, *N.Y. Times*, Feb. 11, 1998, at E3 (quoting a museum curator, “Today, we might ask, say, for more documentation to allay any concern about where this painting was during the war.”); Taylor, *supra* note 257, at SM18.

²⁸² Soltes, *supra* note 1, at 469–70 (recounting the absence of investigation by the Fred Jones Jr. Museum of Art at the University of Oklahoma into a collection that included Pissarro’s *La Bergere*); Walton, *supra* note 31, at 572–73 (citing Dobryznski, *supra* note 281, at E3); Graham Bowley, *The Mystery of the Painting in Gallery 634*, *N.Y. Times* (Feb. 8, 2020), <https://www.nytimes.com/2020/02/08/arts/met-art-nazi-loot.html?referringSource=articleShare> [<https://perma.cc/8997-KTUR>]; Maureen Goggin & Walter V. Robinson, *Murky Histories Cloud Some Local Art*, *Bos. Sunday Globe*, Nov. 9, 1997, at A1 (noting that records “should have aroused curiosity, if not suspicion” about the wartime history of some works at both the Fogg Art Museum at Harvard and at the Boston Museum of Fine Arts); see also Graham Bowley, *Met Museum Adjusts Painting’s History To Note Former Jewish Owner*, *N.Y. Times* (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/arts/design/Metropolitan-Museum-Jewish-Owner.html> [<https://perma.cc/7J6L->

true even if that decision was in accord with industry practice at the time. If museums are not going to follow suggested guidelines self-imposed as a result of the art market's failings, Congress can make defenses more difficult to assert and promote resolution on the merits.

A museum's voluntariness in waiving defenses or resolving these claims in a manner agreeable to both parties may be limited by the fiduciary duties it owes to the public.²⁸³ These duties extend to how a museum will respond to a claim for a piece in its collection and what kind of defense it should mount.²⁸⁴ While the voluntary guidelines can thereby inform the duty of care in determining whether a fiduciary's decision to litigate, settle, or deaccession artwork is acceptable,²⁸⁵ a case like *Zuckerman* lays bare the shortcomings of that approach. Presumably the Met would need to be certain of the claim's merit before voluntarily parting with the \$100 million Picasso.²⁸⁶ As a result, the museum may have risked breaching a fiduciary duty if it had not asserted a laches defense.²⁸⁷

When fiduciary duties force litigation over a claim,²⁸⁸ this proposal will at least require resolution on the merits if the institution acquired that work without a sufficient investigation. Alternatively, removing a defense may lead to increased settlements or mediation, thereby saving all parties

2BFR] (describing the Met's recent update of provenance information reflecting a painting's pre-war Jewish owners when faced with new information).

²⁸³ Emily A. Graefe, Note, The Conflicting Obligations of Museums Possessing Nazi-Looted Art, 51 B.C. L. Rev. 473, 495–99 (2010).

²⁸⁴ Id. at 499.

²⁸⁵ Id. at 507–08 (“[T]rustees can act within their discretion by adopting professional codes of conduct as a way to inform and fulfill their fiduciary duties.” (citing Restatement (Third) of Trusts § 87 (Am. L. Inst. 2007))); Gerstenblith, *supra* note 239, at 444 n.151.

²⁸⁶ See Vogel, *supra* note 185.

²⁸⁷ To the Met's credit, the museum asked the district court to decide its motion to dismiss on the merits, “in the spirit of the AAM and AAMD guidelines.” Memorandum of Law in Support of Defendant the Metropolitan Museum of Art's Motion To Dismiss the Amended Complaint at 4, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16 Civ. 07665), 2016 WL 9109033. The museum nevertheless briefed a laches defense, ensuring that the defense would serve as a backstop, as it did at the Second Circuit. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 193–94 (2d Cir. 2019); Brief for Defendant-Appellee at 58, *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186 (2d Cir. 2019) (No. 18-634-cv), 2018 WL 3533217; Memorandum of Law in Support of Defendant The Metropolitan Museum of Art's Motion To Dismiss the Amended Complaint at 19–20, *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (No. 16 Civ. 07665), 2016 WL 9109033.

²⁸⁸ A museum may settle if a reasonably prudent person would do the same in that situation. Graefe, *supra* note 283, at 499.

from expending substantial resources on litigation.²⁸⁹ Such settlements can provide claimants with the recognition of ownership they seek for their families, along with the possibility that works will remain available for the public to appreciate.²⁹⁰ This would result in outcomes better aligned with the Washington Principles.²⁹¹

D. Concerns About Attenuation and Claimants' Motivations Do Not Justify Inaction

Objections to continued efforts to restitute Nazi-looted art allege an attenuated link between the original injustice and the beneficiaries of restitution.²⁹² It has been argued that after a few generations, restitution claims are motivated more by financial opportunity than by concerns about injustice.²⁹³ Objections to this attenuated link are misplaced, however, if directed at a proposal to preclude or adjust a laches defense. Arguments like these rest on the notion that as each generation grows more removed from World War II and the original injustice, the case for redress weakens.²⁹⁴ This is further echoed in cries of a “Holocaust Industry” in which select Jewish organizations and lawyers are portrayed as invoking genocide for their own gain.²⁹⁵

²⁸⁹ See Dubin, *supra* note 55, at 129–35 (discussing the advantages of mediation and settlements in disputes over Nazi-looted art). Promoting settlement and mediation is another AAM and AAMD guideline and a tenet of the Washington Principles. *Id.* Congress echoed the desirability of alternative dispute resolution in the findings located in § 2 of the HEAR Act. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §§ 2(5), 2(8), 130 Stat. 1524, 1524–25.

²⁹⁰ See Dubin, *supra* note 55, at 131–35. In one such example, the North Carolina Museum of Art and the rightful owners of Lucas Cranach the Elder’s *Madonna and Child in Landscape* reached an amicable agreement. The museum, faced with a legitimate claim but unable to purchase the piece at market price, offered half of the piece’s estimated value for it to remain in the museum, with its Nazi-era history told to the public. Although proof of the Cranach theft was much clearer than the evidence available in the other disputes discussed herein—Hitler himself saw the piece at one point—this anecdote demonstrates how museums, the public, and survivors’ families can all benefit. Eizenstat, *supra* note 7, at 201–02.

²⁹¹ See Washington Principles, *supra* note 7, at 972 (Principle XI) (advocating for mediation when possible).

²⁹² Cronin, *supra* note 97, at 547; Katharine N. Skinner, Note, Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention To Balance the Interests of Victims and Museums, 15 *Vand. J. Ent. & Tech. L.* 673, 701 (2013).

²⁹³ Cronin, *supra* note 97, at 547.

²⁹⁴ See *id.* at 537, 547.

²⁹⁵ See *id.* at 547–48; see also Von Ulrike Knöfel, A Question of Morality: An End to Restitution of Nazi Looted Art?, *Der Spiegel* (Sept. 4, 2009) (noting that auction house director Bernd Schultz previously accused heirs of having “a purely financial interest in looted

Claimants' actual motivations rebut this objection. Restitution represents the fulfillment of promises and emotional imperatives to reclaim what violence and persecution stole from claimants' ancestors.²⁹⁶ These promises have been described as nothing short of a "sacred duty,"²⁹⁷ and Senator John Cornyn made specific note of this emotional link during the bill's drafting.²⁹⁸ The Senator described the HEAR Act as "an important and symbolic step to reclaiming not just artwork, but familial legacy."²⁹⁹

Aside from the sustained emotional link that preserves the moral case for restitution, the type of relief sought also favors the argument that the connection is not too attenuated. The goal of these suits is to recover distinct, identifiable pieces of property. These artworks would have been inheritable by subsequent generations had the Nazis not dispossessed their Jewish victims of their property. In that sense, it differs from proposals to redress other historical injustices where monetary compensation is sought.³⁰⁰ Were it not for the injustice committed, a particular artwork would have belonged to the party bringing suit. It is an attempt to correct an injustice by restoring the property to those who should have inherited the piece along with any corresponding appreciation in value.

The HEAR Act reflects a considered policy choice that justice and fairness dictate the artwork's return if it is determined that the artwork

art: "They say Holocaust, but they mean money.""), <https://www.spiegel.de/international/germany/a-question-of-morality-an-end-to-restitution-of-nazi-looted-art-a-618400.html> [<https://perma.cc/HP8V-XX56>].

²⁹⁶ See Kreder, *New Battleground*, *supra* note 226, at 43–44 (discussing the emotional significance of restitution efforts to the families of victims).

²⁹⁷ See *id.* (quoting Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in *Resolution of Cultural Property Disputes* 139, 139–40 (Int'l Bureau of the Permanent Court of Arbitration ed., 2004)).

²⁹⁸ See Press Release, Blumenthal, Cornyn, Cruz, Schumer Bill To Help Recover Nazi-Confiscated Art Passes Judiciary Committee (Sept. 15, 2016), <https://www.cornyn.senate.gov/content/cornyn-cruz-blumenthal-schumer-bill-help-recover-nazi-confiscated-art-passes-judiciary> [<https://perma.cc/YKB6-4ZCE>].

²⁹⁹ *Id.*

³⁰⁰ Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 *Ethics* 114, 119–20 (2001) (arguing that descendants' claims based on inheritance of identifiable property are more easily justified than inheriting a right to reparation because the right to possession has been violated). But see Jeremy Waldron, *Superseding Historical Injustice*, 103 *Ethics* 4, 8–9 (1992) (arguing that even a claim based on inheritable property loses salience over time because of the counterfactual possibility of voluntary disposition in the intervening years).

rightfully belongs to the claimant.³⁰¹ It is not an attempt to punish the current possessors as if they themselves had committed the Nazis' genocidal acts, and it does not command them to make victims whole for all of the Holocaust's atrocities.³⁰² Parties who have no direct connection to Nazi crimes may lose artwork, but the specific piece should never have been in their possession in the first place. Rather than taking assets with an uncertain link to the injustice, these suits seek a discrete item which was itself central to that injustice.

In a more practical sense, too, passing the HEAR Act demonstrates that Congress disagrees with arguments surrounding attenuation and the worthiness of restitution. One purpose of a statute of limitations is to promote fairness to a possessor: after the limitations period, her right to the disputed property outweighs the claimant's right to bring a challenge.³⁰³ Thus, Congress has already made the decision that the families of original owners should still have the chance to recover artwork on the merits. Revising the HEAR Act would be the logical continuation of that judgment and would carry the relief Congress originally planned for into reality.

CONCLUSION

Time is running out for claimants so long as the doctrine of laches remains an available defense. If Congress does not take further action, the odds of possessors prevailing on laches will only increase,³⁰⁴ preventing resolution on the merits. By effectively removing a statute of limitations defense, the HEAR Act signaled congressional recognition that time-based defenses unfairly decide the outcomes of these claims. Congress recognized in its first draft of the HEAR Act that laches also needed to be removed to act consistently with the United States' international commitments.³⁰⁵ To then remove the statute of limitations as an obstacle, but to leave laches unaddressed in the final text is to have undermined the

³⁰¹ See Stephen A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* 235–36, 246 (2019) (explaining justice and fairness as the philosophical underpinnings of state facilitation of restitutionary compensation, even to the detriment of innocent third parties).

³⁰² See *id.* at 234–35 (“The courts order defendants to cure injustices because, notwithstanding that failing to correct an injustice is not a legal wrong, curing injustices is valuable.”).

³⁰³ See Cronin, *supra* note 97, at 537–38.

³⁰⁴ See Demarsin, *supra* note 11, at 689.

³⁰⁵ Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. §§ 2(3), 2(5), 5(a).

HEAR Act's effectiveness from the start. Congress should remove the doctrine of laches or restrict its use so that claimants who deserve to recover artwork will have their claims adjudicated on the merits.

Zuckerman, in particular, demonstrates how easy it is for a court to use laches to dispose of an action. Although the district court dismissed the claim on the merits, there is nothing about this result that is inconsistent with the statute.³⁰⁶ But given the HEAR Act's putative goal to promote resolution on the merits and to further the Washington Principles, it is disappointing that Congress decided to leave this obstacle intact. Given the first draft's explicit mention of laches,³⁰⁷ this decision was a conscious one. HEAR does not sunset until the end of 2026,³⁰⁸ and there is still time for Congress to remove the defense to enable the statute to do as much good as possible for victims and their descendants.

Removing laches or restricting its use would better align outcomes with the Washington Principles and fulfill Congress's goal in passing the HEAR Act. Courts would be forced to grapple with the tough legal and historical issues involved in these disputes. This legislative fix will ensure that claims are decided on the merits, and for many victims, provide the "just and fair" solution that has been delayed for decades.

³⁰⁶ 928 F.3d 186, 196 (2d Cir. 2019).

³⁰⁷ See discussion *supra* Section I.C.

³⁰⁸ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(g), 130 Stat. 1524, 1527.