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Stephen K. Urice

University of Miami School of Law, surice@law.miami.edu

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ELIZABETH TAYLOR'S VAN GOGH: AN ALTERNATIVE ROUTE TO RESTITUTION OF HOLOCAUST ART?

Stephen K. Urice*

I. INTRODUCTION

Between 1933 and 1945, the Third Reich stole or otherwise wrongfully appropriated cultural property from private and public collections across Europe in a quantity and quality unprecedented in human history.¹ As part of a genocide of unparalleled scale, they also murdered (or forced into exile) many owners of that property. Thus, at the end of World War II, most of those best positioned to establish claims for restitution of their stolen property were unlikely to have survived. For those who did survive, or for their heirs, the practicalities of locating property and compiling evidence to support a claim for restitution were

* Associate Professor of Law, University of Miami School of Law. I express appreciation to colleagues and friends who discussed ideas presented in, or read drafts of, this paper, including David Abraham, Andrew Lee Adler, Ricardo Bascuas, Scott Cohen, Donna Coker, Mary Coombs, Mary Doyle, Jennifer Kreder, William Krisel, Milton Hirsch, Stephen J. Knerly, John Henry Merryman, Edward Rewolinski, Robert Rosenwald, and William Widen. I accepted many of their comments and criticisms but, at my—and the reader's—peril left others behind. Accordingly, shortcomings in this paper are entirely mine. I benefited greatly from the work and suggestions of my research assistants, most prominently Gayland Hethcoat, and William Joseph Bucciero, Michael Ford, Michael Greenfield, Richard Rosengarten, Omar Salazar, and Jason Sosnovsky. I especially thank the superb staff of the Library of the University of Miami School of Law for the many ways they have assisted my work.

1. See *Orkin v. Taylor*, 487 F.3d 734, 736 (9th Cir. 2007) (“From the time of Adolf Hitler’s election as Chancellor of Germany in 1933 until the end of World War II, Hitler’s Nazi regime engaged in a systematic effort to confiscate thousands of works of art throughout Europe.”); MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 202 (2003) (“Between 1933 and 1945, the Germans stole approximately 600,000 pieces of art from both museums and private collections throughout Europe, including paintings, sculpture, objects [sic] d’art, and tapestries.”).

daunting.² Indeed, relatively few claims for restitution of Holocaust art were filed in United States courts until more than fifty years following the close of World War II.³ That half-century gap is central to this discussion because it provides current possessors with a significant advantage over Holocaust art claimants: an affirmative defense predicated on the statute of limitations. That advantage diminishes impetus to settle prior to trial and can lead to judicial decisions based on procedural grounds rather than the merits.⁴

This article describes an approach to the restitution of Holocaust art that would avoid state statutes of limitations by relying on federal civil forfeiture proceedings predicated on violations of the

2. Researching the provenance, that is, the history of ownership, of Holocaust art is painstakingly difficult, often requiring reference to archives in multiple countries and the ability to read multiple languages. For an introduction to the issues and difficulties, see NANCY H. YEIDE, KONSTANTIN AKINSHA & AMY L. WALSH, *THE AAM GUIDE TO PROVENANCE RESEARCH* (2001) and Stephen K. Urice & Elizabeth Somerstein, *Provenance: Introductory Comments*, SC40 A.L.I.-A.B.A (1998) (unpaginated insert; on file with author).

3. The first case involving Holocaust art in U.S. courts was filed in the mid-1960s, more than twenty years after the close of World War II. *See Menzel v. List*, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified as to damages*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd*, 246 N.E.2d 742 (N.Y. 1969).

4. *See, e.g., Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010), *cert. denied*, No. 09-1254, 2011 WL 2518833 (U.S. June 27, 2011); *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511 (C.D. Cal., Feb. 2, 2005), *aff'd sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007). The statute-of-limitations obstacle has not gone unnoticed. For example, California has twice enacted legislation extending the statute of limitations specifically for Holocaust art claims. In 2010, the Ninth Circuit held that the first of these, CAL. CIV. PROC. CODE § 354.3 (West 2003), constituted an unconstitutional state infringement on the federal foreign affairs power. *Von Saher*, 592 F.3d at 963-68. In response, later that year, the California legislature enacted a new statute drafted to avoid the constitutional deficiencies of the prior one. *See* CAL. CIV. PROC. CODE § 338(c)(3) (West 2011). For a succinct critique of the new statute, see Simon J. Frankel & John Freed, *Statute Without Limits?*, L.A. DAILY J., Aug. 20, 2010, at 7. For arguments that the new statute is unconstitutional, see Notice of Demurrer to Complaint, General Demurrer to Complaint, and Memorandum of Points and Authorities, *W. Prelacy of the Armenian Apostolic Church of Am. v. J. Paul Getty Museum*, No. BC 438824 (Cal. Super. Ct. filed May 27, 2011).

National Stolen Property Act (NSPA).⁵ Although the NSPA is not a forfeiture statute, acts indictable under the NSPA can lead to civil forfeiture under other provisions of federal law.⁶ If the government prevails in a forfeiture action, it has authority to transfer forfeited property to the victim of the original theft—in these cases, Holocaust victims or their heirs.⁷ Accordingly, this paper argues that in cases in which individual plaintiffs are likely to be time-barred in state courts, the United States could act on their behalf. Such action is strongly supported by long-standing, clearly-articulated U.S. policies favoring restitution of Holocaust art.⁸ However, this paper also asks whether the United States *should* pursue such action under the novel interpretation of the NSPA described here. That question arises out of two concerns. First, this approach of the NSPA demonstrates the difficulties of applying a general theft statute aimed at controlling the market in stolen *fungible* goods to unique cultural property. Second, statutes of limitations have long had powerful justifications and judicial support; an end-run around state statutes of limitations by even clear federal statutory authority raises troubling concerns.

II. DEFINING THE PROBLEM

Claims in U.S. courts for restitution of Holocaust art were rarely brought in the first half-century following the close of World War II. In addition to the profound psychological and emotional issues confronting Holocaust survivors,⁹ the practicalities of learning the

5. 18 U.S.C. §§ 2311-18 (2006).

6. See discussion *infra* Part IV.

7. See 18 U.S.C. § 981(e)(6) (2006) (“[The government] is authorized to retain property forfeited pursuant to this section, or to transfer such property on such terms and conditions as [it] may determine . . . as restoration to any victim of the offense giving rise to the forfeiture . . .”).

8. See discussion *infra* Part VI.

9. See, e.g., Kaslow, *The Lingering Holocaust*, 30(6) PROF. PSYCHOLOGY: RESEARCH & PRACTICE 611, 613 (1999) (discussing the common experience, referred to as the “conspiracy of silence,” of Holocaust survivors “trying to repress the memories of and the feelings about the awful events that had occurred.”); see also Jennifer Anglim Kreder, *The Holocaust, Museum*

whereabouts of displaced cultural property and building sufficient evidence to present claims presented formidable obstacles.¹⁰ Today, the delay itself has become an impediment for at least three reasons. First, and most simply, state statutes of limitations are likely to have expired. Second, in a jurisdiction where the statute of limitations may not have run, notably New York, which applies a “demand and refusal” rule to govern running of the statute of limitations, the equitable defense of laches may have an equivalent effect in barring claims. Third, state legislation to extend the statute of limitations specifically for Holocaust art claims faces constitutional barriers. These are serious obstacles. A recent review of New York stolen art cases concluded: “[T]aking into consideration these recent developments [i.e., New York courts’ increasing receptivity to the equitable defense of laches] it is justified to say that, henceforth, (heirs of) Holocaust survivors will likely no longer prevail in any attempt to obtain recovery of their stolen heirlooms.”¹¹ And the most prolific scholar on Holocaust art litigation commented recently on the Ninth Circuit’s decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*—holding unconstitutional a California statute extending the statute of

Ethics and Legalism, 18 S. CAL. REV. L. & SOC. JUST. 1, 3 (2008) (emphasizing the “emotional toll endured by a survivor or heirs litigating a claim”).

10. Merely documenting prior ownership is a preliminary hurdle made more complicated by the loss of records of ownership. This problem is particularly acute when the original owner failed to survive the Holocaust, and heirs are unaware of their family’s collections. The situation is analogous to a modus operandi for museum insider theft: the thief steals both the object and, in pre-computer registries, the museum’s documentation for the object. The museum, thus, is left without knowledge that it should have the stolen object, and the object itself has disappeared. A recent instance of this practice is described in Ton Cremers’ . . . *And the Curator Did It*, a presentation given at the AXA Art Conference on November 1, 2005. The curator of the Army Museum in Delft, Alexander Polman, was found to have stolen books and prints from the museum’s library. It is unknown exactly how many prints were stolen, “for Polman also made the old handwritten registration [of the stolen works] disappear . . .” Ton Cremers, Museums Security Network, Presentation at the AXA Art Conference: . . . *And the Curator Did It* (Nov. 1, 2005) (transcript available at <http://www.museum-security.org/insider-theft.pdf>).

11. Bert Demarsin, *Has The Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 691 (2011).

limitations for Holocaust art claims on grounds that it impermissibly infringed on the federal foreign affairs power—that “[i]f the Supreme Court does not correct *Von Saher*, then the need for Congress to enact federal legislation eliminating the statute of limitations defense in Holocaust-era art cases is acute.”¹² The Supreme Court denied certiorari in *Von Saher* on June 27, 2011.¹³ In short, civil claimants now confront significant barriers based on the passage of time.

In the United States, concerted efforts to define and address the complex legal, ethical, and moral questions presented by Holocaust art did not begin until the 1990s. While some commentators have blamed the lag on Holocaust survivors’ suppressed memory of events between 1933 and 1945,¹⁴ a more careful observer sees another factor. The art market in the post-war decades demonstrated an astonishing capacity to forget: Even *before* the war ended, and immediately after, books and widely circulating periodicals documented the massive scale of Nazi plundering.¹⁵ The art world, though aware of war-time spoliation of cultural property, had no interest in opening that Pandora’s Box.

12. Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. UNIV. L. REV. COLLOQUY 315, 331 (2011).

13. *Von Saher v. Norton Simon Art Museum at Pasadena*, No. 09-1254, 2011 WL 2518833 (U.S. June 27, 2011).

14. *See supra* note 10.

15. *See, e.g.*, GEORGE MIHAN, *LOOTED TREASURE: GERMANY’S RAID ON ART* (1944); THOMAS CARR HOWE, JR., *SALT MINES AND CASTLES: THE DISCOVERING AND RESTITUTION OF LOOTED EUROPEAN ART* (1946); James S. Plaut, *Loot for the Master Race*, ATLANTIC MONTHLY, Sept. 1946, <http://www.theatlantic.com/past/docs/unbound/flashbks/nazigold/loot.htm>; James S. Plaut, *Hitler’s Capital*, ATLANTIC MONTHLY, Oct. 1946, <http://www.theatlantic.com/past/docs/unbound/flashbks/nazigold/hitler.htm>; Janet Flanner, *The Beautiful Spoils*, NEW YORKER, Feb. 22, 1947, at 31. For a chronological compilation of publications, see Constance Lowenthal & Stephen Urice, *Chronological Check List of Significant Developments, Publications, and Cases Regarding Holocaust Period Art in the United States*, Art Law Centre: International Symposium on Claims for the Restitution of Looted Art, Geneva, November 10, 2000. For reasons not yet explored in the literature, these early descriptions of Nazi looting seem to have had little impact on art dealers and collectors in the decades following World War II, when many of the works at issue in Holocaust art disputes appeared on the art market.

Both factors contributed to the situation in which Holocaust victims and current possessors are, today, plaintiffs and defendants.

A new wave of publications and other events in the 1990s,¹⁶ brought Holocaust art issues into a broad discussion among journalists, legal scholars, the art world, and the public. That discussion led to three significant outcomes. First, it secured a place for Holocaust art in the wider debate of restitution efforts involving other kinds of assets (e.g., life insurance, real property, bank accounts) that emerged in the 1990s among Holocaust victims, their attorneys, and policymakers.¹⁷ Second, it led the

16. For books, see, for example, LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND SECOND WORLD WAR* (1994) and HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997), the latter of which was published in French a year earlier. Other developments include the first academic symposium on the subject, *The Spoils of War—World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, organized and sponsored by the Bard Graduate Center for Studies in the Decorative Arts in New York in January of 1995, see *THE SPOILS OF WAR—WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Elizabeth Simpson ed. 1997) (collecting proceedings from the symposium), and an exhibition, *Degenerate Art: The Fate of the Avant Garde in Nazi Germany*, that opened at the Los Angeles County Museum of Art on February 17, 1991. See STEPHANIE BARRON, *DEGENERATE ART: THE FATE OF THE AVANT-GARDE IN NAZI GERMANY* (1991) (exhibition catalog). A chronological bibliography of other publications appears in Lowenthal & Urice, *supra* note 16.

17. Two reasons for the emergence of Holocaust art claims in the early 1990s are the subject of various interpretations. A straightforward assessment is provided by the Commission for Art Recovery:

In the early 1990s, a new focus on the entire issue of Holocaust-era art claims came about for a number of reasons. Several scholarly and popular books addressed the problems and found a wide audience, not only among aging survivors and their grown children, but in the general public. The fall of the USSR, dissolution of the Warsaw Pact, and the unification of East and West Germany produced new possibilities for claimants to approach governments and museums in formerly communist Europe. Dramatic news of the survival of art masterpieces hidden for decades in Moscow and Leningrad prompted a reappraisal of what had been destroyed in the war. A growing interest in other assets including real estate, bank accounts, and life insurance policies revived

executive branch to articulate new U.S. policies supporting restitution of Holocaust art.¹⁸ Third, it promoted the institutionalization of restitution efforts.¹⁹ Those outcomes manifested themselves quickly. On the part of collectors, U.S. museums undertook research to identify and make known works in their collections that were known to have been in Europe between 1932 and 1945 and had a lacuna in their provenance.²⁰ On the part

memories of the material losses and the post-war injustices that left the business of restitution unfinished.

Overview, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/content/overview> (last visited Nov. 19, 2011); see also MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S*, at 60–84 (2009) (contextualizing the emergence of Holocaust restitution claims in the 1990s within both the general human rights concerns that flourished at that time and broader developments, such as the lifting of the Iron Curtain, which allowed greater access to archives and other sources of information); Israel Singer, *Why Now?*, 20 CARDOZO L. REV. 421 (1998) (attributing the emergence of claims to greater Holocaust awareness, accomplished by popular movies such as *Schindler's List* and books such as *Hitler's Willing Executioners*).

18. See *infra* Part VI.A.

19. These included private efforts such as the World Jewish Congress's Commission for Art Recovery, founded in 1997, see *About*, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/content/about> (last visited Nov. 19, 2011), and the Holocaust Art Restitution Project, also founded in 1997, see *About*, PLUNDERED ART <http://plundered-art.blogspot.com/p/about.html> (last visited Nov. 19, 2011). Public efforts included the Presidential Advisory Commission on Holocaust Assets in the United States (PCHA), established by Congress in 1998 to develop a record of Holocaust-era assets possessed by the federal government. PCHA's work culminated in a lengthy report issued in 2001, which many felt was inadequate, especially with respect to looted art. See Ralph Blumenthal, *Panel on Nazi Art Theft Fell Short, Experts Say*, N.Y. TIMES, Mar. 3, 2003, at E1. On a state level, Governor Pataki of New York created the Holocaust Claims Processing Office of the New York State Banking Department in 1997 to "provide institutional assistance to individuals seeking to recover Holocaust-looted assets" *History and Mission*, HOLOCAUST CLAIMS PROCESSING OFFICE, <http://www.claims.state.ny.us/hist.htm> (last visited Nov. 19, 2011).

20. In 1999, the American Association of Museums (AAM), the largest U.S. museum service organization, adopted guidelines urging museums to undertake research to identify works in their collections with a gap in provenance between 1933 and 1945 and to make that information public. See AM. ASS'N OF MUSEUMS, *GUIDELINES CONCERNING THE UNLAWFUL*

of Holocaust victims and their heirs, the number of claims for restitution grew rapidly. Nevertheless, despite these developments and the massive scale of Nazi looting, fewer than seventy claims for restitution of Holocaust art are documented in the United States.²¹

APPROPRIATION OF OBJECTS DURING THE NAZI ERA (2001) [hereinafter AAM GUIDELINES], *available at* http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm. A year earlier, in 1998, the Association of Art Museum Directors (AAMD), representing the directors of the approximately 200 largest art museums in North America, had promulgated guidelines with similar focus of the AAM's subsequent report. Among the guidelines, one states that "members of the AAMD, if they have not already done so, should begin immediately to review the provenance of works in their collections to attempt to ascertain whether any were unlawfully confiscated during the Nazi/World War II era and never restituted." ASS'N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) § II(A)(1) (1998) [hereinafter AAMD REPORT], *available at* <http://www.aamd.org/papers/guideln.php>. Another states that "[m]ember museums should facilitate access to the Nazi/World-War-II-era provenance information of all works of art in their collections." *Id.* § II(C)(1).

Of course, no equivalent guidelines exist for personal collections, inventory in commercial galleries, and other privately maintained holdings. *See Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic & Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 104-124 (2006) (statement of Stuart E. Eizenstat, Former Commissioner Presidential Advisory Commission on Holocaust Assets U.S.) (discussing "the difficulty of producing evidence of ownership" and public attempts at amassing information to create central registries for Holocaust art restitution claims. In contrast to public efforts, Eizenstat commented, "sadly, the private dealers are not providing this [kind of information]").

21. The numbers in this paragraph and in the remainder of the paper are approximations, drawn from the following three sources: Stephen W. Clark & Eliza Jacobs, *Litigation Update: Legal Issues in Museum Administration 2011 Case Summaries*, SS024 A.L.I.-A.B.A. 247, 259-91; Jennifer Anglim Kreder, Chart of Dismissed Federal Holocaust Claims (June 9, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295; and HERRICK, FEINSTEIN LLP, RESOLVED STOLEN ART CLAIMS (Mar. 3, 2011), *available at* <http://www.herrick.com/siteFiles/Publications/09537E70916B0044E6A2B1464074F137.pdf>.

Some current possessors have proved cooperative in efforts to balance legal and ethical issues presented by Holocaust art claims. For example, the U.S. museum community has adopted ethical standards favoring resolution of legitimate claims through mediation and acknowledging that museums may waive available defenses, such as statutes of limitations or laches.²² The guidelines appear to have had an impact. More than eighty percent of the fifty claims involving museums have settled out of court. In all but one of those settlements either the work of art was restituted or its value (or an agreed portion of its value) was paid to the claimant.²³ Ethical standards and professional guidelines applicable to public institutions do not, of course, bind private parties. Of the handful of claims involving individuals alleged to be in possession of Holocaust art, fewer than half have settled. Of

22. AAM's guidelines state in pertinent part:

If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner. . . . AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.

AAM GUIDELINES, *supra* note 21, § 4(c), (f). AAMD's guidelines include the following language:

If a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted . . . the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner. . . . AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted.

AAMD REPORT, *supra* note 21, §§ 11(D)(1)–(2), (E)(3). For a negative assessment of United States museums' actions, see Jennifer Anglim Kreder, Essay, *Guarding the Historical Record from the Nazi-Era Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENNUMBRA 253 (2011), available at <http://www.pennumbra.com/essays/04-2011/Kreder.pdf>.

23. Generally, the financial terms of settlements are not publicly available, making it impossible to speculate whether they approach current fair market value of the works.

the others that have concluded, the results are approximately evenly balanced between claimants and current possessors.

In a number of disputes involving both museums and individual possessors, the cases have been decided not on the merits or by findings of facts that clarify the history of the works in question, but, instead, by successful assertion of a statute-of-limitations defense.²⁴ One of those was a case involving the late actress Elizabeth Taylor²⁵ and a painting by Vincent van Gogh.

III. ELIZABETH TAYLOR'S VAN GOGH²⁶

In April 1963 Elizabeth Taylor's father, an art dealer acting on behalf of his daughter, placed a winning bid of £92,000 for Vincent van Gogh's painting, *Vue de l'Asile et de la Chapelle de Saint-Remy*,²⁷ at a public auction at Sotheby's in London. Forty-

24. Additionally, in two cases involving museums that did not settle the museums brought declaratory judgment actions preemptively to quiet title. The museums prevailed when the courts determined that applicable statutes of limitations had run against the claimants. *See* *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007) (finding that the statute of limitations began to run against the claimants in 1938, three years after the alleged coerced sale of the work occurred); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (determining that the statute of limitations had run against claimants who, under the applicable discovery rule, should have learned of the disputed painting's whereabouts in 1939). For a discussion of these cases, see Andrew Adler, *Expanding the Scope of Museums' Ethical Guidelines with Respect to Nazi-Looted Art: Incorporating Restitution Claims Based on Private Sales Made as a Direct Result of Persecution*, 14 INT'L J. CULT. PROP. 57 (2007).

25. Taylor died on March 23, 2011. Mel Gussow, *A Lustrous Pinnacle of Hollywood Glamour*, N.Y. TIMES, Mar. 23, 2011, at A1, available at <http://www.nytimes.com/2011/03/24/movies/elizabeth-taylor-obituary.html>.

26. The facts summarized here are detailed in *Orkin v. Taylor*, 487 F.3d 734, 735-38 (9th Cir. 2007).

27. Color images of the disputed van Gogh appear in the auction sales catalogues. *See* SOTHEBY & CO., CATALOGUE OF THE COLLECTION OF IMPRESSIONIST AND POST-IMPRESSIONIST PAINTINGS: THE PROPERTY OF THE LATE ALFRED WOLF OF STUTTGART AND SOUTH AMERICA 20 (1963), and CHRISTIE'S VUE DE L'ASILE ET DE LA CHAPELLE DE SAINT-RÉMY BY VINCENT VAN GOGH 17 (1990); *see also* "Vue de l'Asile et de la Chapelle de Saint-Remy," CHRISTIE'S IMAGES VIA BLOOMBERG,

two years later, a federal district court in California granted Taylor's motion to dismiss claims asserted against her by the heirs of Margarete Mauthner (the "claimants") for recovery of the painting. The claimants alleged that Mauthner purchased the painting in 1914 and that her ownership of the painting is evidenced by its inclusion in catalogues raisonnés of van Gogh's works published in 1928 and 1939 identifying Mauthner as the owner.²⁸ They alleged further that in the face of increasing Nazi persecution of Jews, Mauthner and her family fled their home in Berlin in 1939 and settled in South Africa where Mauthner died at age eighty-four in 1947.²⁹ The circumstances surrounding Mauthner's loss of the van Gogh are "clouded in uncertainty."³⁰ The claimants alleged Mauthner parted with the painting in a coerced sale; Taylor asserted that there was no evidence of coercion or Nazi participation in the sale.³¹ The claimants further alleged that the 1963 Sotheby's auction catalogue presented a patently false (or mistaken) provenance (Figure 1). Although the description refers to the entries for the painting in the 1928 and 1939 catalogues raisonnés (in which Mauthner is listed as the painting's owner), the description also states that the well-known German art dealer Paul Cassirer was the owner of the painting *after* Mauthner. Cassirer, however, died by suicide in 1926.³² The claimants alleged that this discrepancy could easily have been

<http://www.bloomberg.com/photo/-vue-de-l-asile-et-de-la-chapelle-de-saint-remy-/105541.html> (last visited December 21, 2011).

28. Complaint for Restitution and Damages Under the Holocaust Victims Redress Act and Nazi War Crimes Disclosure Act (112 Statutes 15; 114 Statutes 2865) ¶ 18, *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511 (C.D. Cal., Feb. 2, 2005) [hereinafter Complaint].

29. For a report on research undertaken by the New York State Holocaust Claims Processing Office (HCPO) about a *different* van Gogh owned by Mrs. Mauthner and background on the Mauthner family's persecution in Berlin and their flight to safety, see Adler, *supra* note 25, at 65 n.22. The HCPO concluded that Mrs. Mauthner's sale of that work "was a 'flight asset,' i.e., a cultural asset that was sold because of the extreme situation of the time to finance [Mauthner's] family's day-to-day survival and imminent emigration from Nazi Germany." *Id.* (citation omitted).

30. *Orkin*, 487 F.3d at 737.

31. *Id.*

32. Complaint, *supra* note 29, ¶ 20.

discovered by, and would have informed, a diligent purchaser of the earlier coerced sale.³³ Either unaware of the questionable provenance or in disregard of it, Taylor acquired the work and held it in her collection for decades. In 1990, Taylor unsuccessfully attempted to sell the painting at Christie's in London. The catalogue for the 1990 auction gave a significantly different provenance than the one Sotheby's published in 1963 (Figure 2): It indicated that Cassirer owned the painting *prior* to Mauthner and listed a Frankfurt art dealer as the owner subsequent to her. The claimants alleged that those changes indicate that by 1990 Taylor was aware that the 1963 provenance was incorrect and that even with that awareness failed to investigate the painting's history. The claimants asserted that such investigation would have indicated Mauthner's ownership in Nazi Germany.³⁴

Following the parties' unsuccessful efforts to settle the dispute, Taylor filed a complaint for declaratory relief to establish title to the van Gogh in 2004.³⁵ Subsequently, the claimants filed their own law suit seeking recovery of the painting. In 2005, the federal district court granted Taylor's motion to dismiss for failure to state a claim on grounds that the applicable California statute of limitations began to run in 1963, barring the claimants' assertion of their claims.³⁶ The Ninth Circuit Court of Appeals affirmed,³⁷ and the Supreme Court denied certiorari.³⁸

Given the circumstances of World War II and especially given the fate of art collections owned by German Jews, the facts presented do not surprise: A work of art, well-documented as having been owned by a Jewish collector in Germany during the

33. *Id.* ¶ 18-20.

34. Complaint, *supra* note 29, ¶¶ 21, 29-31.

35. *Orkin*, 487 F.3d at 738.

36. *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511, at *5 (C.D. Cal. Feb. 2, 2005). The district court found that the statute of limitations began to run when Taylor acquired the painting in 1963. *Id.* at *4. It noted that subsequent legislation included an explicit "discovery rule" and that there remains a conflict among California courts of appeal whether the prior statute of limitations had an implied discovery rule. *Id.* The court rejected that interpretation of the earlier statute. *Id.* at *4-5.

37. *Orkin*, 487 F.3d at 736.

38. *Orkin v. Taylor*, 552 U.S. 990 (2007).

Third Reich, appears on the art market twenty years after the war. It is bought, apparently in good faith, at public auction. In response to developments in the 1990s, heirs of a Holocaust victim assert a claim for the painting. The court dismisses the claim as time-barred, never hearing evidence or finding facts that would establish the credibility—if any—of the claimants' allegations. The cloud of uncertainty as to what happened to the painting during the war remains without judicial clarification.³⁹

This paper asks whether a different result might have occurred under a federal civil forfeiture action. Put another way, had the case been *United States v. One Painting by Vincent van Gogh* rather than *Adler v. Taylor (Adler)*, what might the outcome have been?

IV. THE NATIONAL STOLEN PROPERTY ACT AND CIVIL FORFEITURE ACTIONS

The NSPA is a general theft, criminal statute.⁴⁰ Other federal statutes authorize the government to bring civil forfeiture

39. In an influential article published early in the development of art law as a distinct academic discipline, John Henry Merryman pioneered an attempt to articulate the public's interest in works of art and other forms of cultural property. See J.H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989). Professor Merryman identified three key elements of the public interest: preservation, access, and truth. *Id.* at 345. In this case, the financial value of the van Gogh assures that the public interest in its *preservation* is likely to be protected. Its aesthetic significance provides reasonable assurance that the work will eventually migrate from private hands into a museum collection where the public will have *access* to it. However, the public interest of *truth* has been and will remain badly served. The procedural stance of the case required the court to accept the claimants' allegations as true. There was no opportunity for the opposing parties to present evidence and for a neutral fact-finder to weigh that evidence. Thus, the opportunity to determine what actually happened to the work during the Third Reich has been, of legal necessity, postponed to a later time when documents, memories, and other potential evidence may be even less available. That delay diminishes the possibility that the work's history will ever be clarified.

40. The NSPA is codified at 18 U.S.C. §§ 2311–18 (2006). Section 2311 provides definitions for purposes of the statute. The two operative provisions—§§ 2314–15—are related: in general, the first criminalizes transportation of stolen goods; the second, receipt and possession of them. For a discussion of

proceedings against the stolen property involved in any act indictable under the NSPA.⁴¹ Such in rem forfeiture actions proceed independently of, and do not require the government to pursue, an in personam criminal proceeding under the NSPA.⁴² Accordingly, the government has significant discretion in applying the NSPA: It can prosecute the person involved in the illegal act, initiate civil forfeiture proceedings against the property involved, or both.⁴³ This flexibility, of course, provides the government with significant negotiating leverage.

the NSPA's background and history, see *United States v. Turley*, 352 U.S. 407, 413–17 (1957).

41. 18 U.S.C. § 981(a)(1)(C) provides that property “which constitutes . . . a violation of . . . any offense constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title)” is subject to forfeiture to the United States. 18 U.S.C. § 1956(c)(7)(A) defines “specified unlawful activity” to mean “any act or activity constituting an offense listed in section 1961(1) of this title” 18 U.S.C. § 1961(1)(B) includes “any act which is indictable under” the NSPA. Although 18 U.S.C. § 1961(1) constitutes a component of the U.S. Code describing racketeering crimes, at least one court has held that a violation of a statutory provision cross-referenced in 18 U.S.C. § 1961(1) need not be in the context of a RICO violation to come within this statutory chain. See *United States v. 16899 S.W. Greenbrier*, 774 F. Supp. 1267, 1273–74 (D. Or. 1991). For discussions of civil forfeiture in the context of cultural property, see Stefan D. Cassella, *Using the Forfeiture Laws to Protect Archaeological Resources*, 41 IDAHO L. REV. 129, 132–33 (2004), and Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT’L L. 1199, 1222–23 (2005).

42. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938) (holding that acquittal on a criminal charge did not bar a civil forfeiture proceeding against the property involved in the alleged crime); *United States v. U.S. Currency*, 626 F.2d 11, 12 (6th Cir. 1980) (holding that invocation of the Fifth Amendment privilege against self-incrimination did not require dismissal of a forfeiture proceeding to recover the property involved in the alleged crime). Cassella observes generally: “civil forfeiture cases do not require a criminal conviction and proceed independent of any criminal trial.” Cassella, *supra* note 42, at 132.

43. Additionally, the United States can bring criminal forfeiture proceedings if it pursues a criminal indictment under the NSPA: Section 981(a)(1)(C) . . . is a civil forfeiture statute. Standing alone, it does not authorize criminal forfeiture. But 28 U.S.C. § 2461(c) has been amended to authorize the criminal forfeiture of any property for which civil forfeiture is authorized. Therefore, taken together, these two statutes authorize the

In 1986, Congress added possession of stolen property as an enumerated crime under 18 U.S.C. § 2315.⁴⁴ Previously, only the receipt, concealment, storage, barter, or disposition of stolen goods constituted criminal acts under that section.⁴⁵ Congress had two purposes in criminalizing possession: expanding the base of potential defendants and resolving a jurisdictional problem.⁴⁶ Congress achieved more than those two goals. While the other

government to include notice of criminal forfeiture in any criminal indictment filed after August 23, 2000, in which any “specified unlawful activity” [as defined in 18 U.S.C. § 1956(c)(7)] is alleged.

Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 119 n.133 (2001).

44. See Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 76, 100 Stat. 3592. Congress enacted the National Stolen Property Act in 1934 to replace the National Motor Vehicle Theft Act, significantly expanding the kinds of stolen and counterfeit properties subject to federal criminal law. See National Stolen Property Act, ch. 333, 48 Stat. 794 (1934). The legislative history of the NSPA is discussed in part in George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT’L. L. & COM. 77, 89–91 (1978), and Graham Green, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251 (2007).

45. 18 U.S.C. § 2315 reads in pertinent part as follows: Whoever receives, possesses, conceals, stores, barter[s], sell[s], or disposes of any goods, wares, or merchandise, securities, or money of the value of \$5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

46. See 131 CONG. REC. S7399 (1985) (“[The addition of] a possession offense [is intended] so that the section will reach persons who knowingly possess stolen property that has moved in interstate or foreign commerce as well as those who receive, conceal, or store such property. While obviously a person who possesses such property must have received it, a successful prosecution of a receipt-of-stolen-property case requires proof that the person received the property in the district of prosecution. The addition of a possession offense eliminates the requirement that the government prove that the defendant first received the stolen property in a particular district, an element which is sometimes difficult to prove and which has no bearing on the defendant’s criminal culpability.” (citation omitted)).

enumerated crimes in § 2315 occur at a moment or over short periods,⁴⁷ possession extends through time. Congress thus expanded the NSPA's temporal reach by criminalizing a continuing offense that does not terminate until the stolen property is dispossessed.⁴⁸

Congress simultaneously amended the first paragraph of 18 U.S.C. § 2315, replacing the former requirement that stolen goods be in interstate commerce with a simpler rule: The section now applies to "[goods] which have crossed a State or United States boundary after being stolen"⁴⁹ Congress's purpose in making this amendment was to eliminate a defense predicated on stolen goods' having left interstate commerce—either by "coming to rest" or as a result of the passage of time.⁵⁰

In conjunction, these amendments produce remarkable results. At a minimum, they effectively eliminate a statute of limitations for forfeiture actions based on possession of stolen goods: Possession is an ongoing offense; each moment of possession is, in

47. An exception is concealment. *United States v. Mardirosian*, 602 F.3d 1, 9 (1st Cir. 2010) (citing *United States v. Frezzo*, 659 F. Supp. 54, 57–58 (E.D. Pa. 1987)) (noting, in a case involving stolen paintings, that "possession and concealment of stolen property is a continuous crime").

48. See *Mardirosian*, 602 F.3d at 9; see also Annotation, *Possession of Stolen Property as Continuing Offense*, 24 A.L.R. 5th 132 (1994).

49. 18 U.S.C. § 2315 (2006). The amendment has survived constitutional challenge. See *United States v. Trupin*, 117 F.3d 678, 682–85 (2d Cir. 1997) (holding, inter alia, that the amended language of 18 U.S.C. § 2315 was a legitimate exercise of Congress's power to regulate channels of interstate commerce and not unconstitutional under *United States v. Lopez*, 514 U.S. 549 (1995)).

50. Congress explained its legislative purpose as follows: The second change, which is related to the first [adding "possession" to the statute], eliminates the present requirement that the property still be considered as moving in interstate or foreign commerce at the time the defendant receives, conceals, or disposes of it. Although the courts have construed the "in commerce" requirement broadly, this requirement is also unnecessarily burdensome and is unrelated to the blameworthiness of the defendant's conduct. 131 CONG. REC. S7399 (1985) (citation omitted). Two years later, Congress reversed course for purposes of the *second* paragraph of the statute, reinserting the explicit requirement of "interstate or foreign commerce," but did *not* do so in the first paragraph. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7048, 7057(b); *Trupin*, 117 F.3d at 683.

effect, a new violation that continuously restarts the statute of limitations, which is “five years after the time when the alleged offense was discovered”⁵¹ Moreover, Congress eliminated the argument that the statute of limitations commenced when stolen property left interstate commerce: 18 U.S.C. § 2315 now requires proof only that the property crossed a state or U.S. boundary after it was stolen. That fact, once it has occurred, never changes. Thus, the only way a current possessor can start the statute of limitations running against the government is to dispossess herself of the stolen property.⁵² A broader interpretation of these amendments, discussed below, leads to the conclusion that they transform stolen goods into contraband: property to which one may even have good title but not a right of possession.

51. 19 U.S.C. § 1621 (2006). The statute of limitations for an action under 18 U.S.C. § 981 is determined by reference to 19 U.S.C. § 1621. *See* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, §§ 11, 21, 114 Stat. 202, 217, 225 (amending 19 U.S.C. § 1621 and mandating that “this Act and the amendments made by this Act shall apply to any forfeiture proceeding commenced on or after the date that is 120 days after the date of the enactment of this Act”). As an alternative to the five-year period, the government can initiate a timely forfeiture action “within 2 years after the time when the involvement of the property in the alleged offense was discovered, whichever was later” 19 U.S.C. § 1621. The “alleged offense” is the illicit *possession* of stolen property, which is ongoing—as opposed to receipt, for example, which may have occurred at a moment or over a short period more than five years prior to the forfeiture action. *See, e.g.,* United States v. 5443 Suffield Terrace, 607 F.3d 504, 508 (7th Cir. 2010) (stating that “[w]hen there are multiple, distinct underlying crimes that independently could support forfeiture of the same property, nothing in the plain language of § 1621 bars a court from adjudicating a forfeiture action as long as at least one alleged offense is not time-barred, even if the statute of limitations has run on the remainder of the underlying crimes” and upholding the forfeiture action “based not on [the claimant’s] attempted smuggling of cigars into the country in April 1996, but on the discovery of smuggled cigars in his house in March 1997 and October 1999”).

52. *See Trupin*, 117 F.3d at 686–87 (affirming the defendant’s conviction for possession of art he knew to be stolen after Congress amended the NSPA in 1986 to add possession as an actionable offense and holding that, to avoid conviction, the defendant would have had to cease “his possession within a reasonable time after the 1986 amendment”).

V. UNITED STATES V. ONE VAN GOGH PAINTING⁵³

Although the United States has alleged violations of the NSPA in three civil forfeiture cases involving Holocaust art, those allegations involved underlying offenses of the receipt or transport of stolen property.⁵⁴ This section describes the NSPA's potential role in situations in which there has been long-term *possession* rather than recent receipt or sale. That role will be explored here through the lens of a hypothetical case based on the alleged facts presented in *Adler*.

In considering Taylor's motion to dismiss for failure to state a claim under Federal Rule of Procedure 12(b)(6), the district court was required to assume that the claimants' allegations were true.⁵⁵ And for purposes of its review, the Ninth Circuit assumed that the claimants' allegations were "true and that Mauthner was coerced into giving up the painting before she left Germany."⁵⁶ Fully

53. Again, this discussion assumes the United States could prove all elements of a *prima facie* case for possession of stolen property under 18 U.S.C. § 2315 and the claimants' allegations (e.g., that the Nazis stole or otherwise wrongfully took the van Gogh and that it was never restituted to the claimants). For assertions that the claimants presented no such evidence, 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, 59-60 (2009); accord Jennifer Michelle Anglim, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199 (2005). In a recent email, Professor Kreder stated that the claimants likely could have presented such evidence with more research. E-mail from Professor Jennifer Anglim Kreder to author (July 25, 2011, 13:35 EDT) (on file with author).

54. See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005). In a third, more recent case, the Complaint is too general to determine which NSPA violation is the basis for the government's position. See *United States v. One Julian Falat Painting Entitled "Off to the Hunt,"* No. 1:10-cv-09291 (S.D.N.Y. filed Dec. 13, 2010). On July 19, 2011, the government filed a Notice of Motion for Default Judgment in the case.

55. See *Adler v. Taylor*, No. CV 04-8472-RGK(FMOX), 2005 WL 4658511, at *1 (C.D. Cal., Feb. 2, 2005).

56. *Orkin v. Taylor*, 487 F.3d 734, 738 (9th Cir. 2007) ("Because the district court dismissed this case on a Rule 12(b)(6) motion, we must assume

understanding that no court has determined the facts in the case, this paper will take the same position—assuming the claimants' allegations to be true and provable by admissible evidence—in analyzing two questions. First, had the United States brought a civil forfeiture proceeding against the van Gogh in place of the Mauthner heirs' suit against Taylor, what might the outcome have been? Second, if the United States were to bring such a civil forfeiture action *after* Taylor prevailed on a statute-of-limitations defense, what might the outcome be? This paper concludes that under either hypothetical the United States would likely prevail. The plain language of the NSPA, congressional intent in criminalizing possession of stolen property, and clearly articulated statements of U.S. policy supporting restitution of Holocaust art support a conclusion that the United States could have achieved—and still could achieve—restitution of the painting. Put another way, the NSPA as amended by Congress in 1986 permits the United States to accomplish for Holocaust victims what they, at law, may be time-barred from accomplishing for themselves.

*A. United States v. One van Gogh Painting in the Absence of
Adler*

What would the outcome of a civil forfeiture proceeding against the van Gogh have been had the United States brought an action in place of *Adler*?

Procedurally, a civil forfeiture action predicated on a violation of the NSPA is straightforward. It commences with the issuance of a warrant.⁵⁷ To obtain a warrant, the government must demonstrate to a magistrate judge that probable cause exists to seize the property.⁵⁸ In the subsequent forfeiture proceedings, the

that all facts stated in the complaint are true and that they are provable by admissible evidence. . . . We assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany.”).

57. See 18 U.S.C. § 981(b) (2006).

58. FED. R. CRIM. P. 41(d)(1); 18 U.S.C. § 981 (b)(2) (providing generally that seizures pursuant to 18 U.S.C. § 981 “shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.”).

government carries the initial burden of proof to establish by a preponderance of the evidence that the seized property was involved in an act that violated the NSPA.⁵⁹ Once the government provides that proof, the burden shifts to the claimant to prove either that the work is not subject to forfeiture⁶⁰ or that the claimant is an “innocent owner.”⁶¹ If the government prevails in the forfeiture proceeding, title to the property passes to the United

59. See 18 U.S.C. § 983(c)(1) (2006) (“In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.”). Although it involved a different forfeiture statute, *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009), exemplifies the burden-shifting in a forfeiture action. The underlying offense in that case was the transportation of a stolen Nazi-era painting into the United States. *Portrait of Wally*, 663 F. Supp. 2d at 236. Because the government initiated the forfeiture action pursuant to 19 U.S.C. § 1595a(c), a customs statute, its initial burden of proof was lighter than the burden of proof under 18 U.S.C. § 983(c)(1): the government had merely to demonstrate *reasonable cause* to believe both that the painting was stolen and that the claimant knew it was stolen. See *id.* at 251. On crossing that relatively low threshold, the burden then fell to the claimant to demonstrate by a *preponderance* of the evidence that the painting was not stolen. See *id.* (citations omitted); see also *United States v. Davis*, 648 F.3d 84, 95-96 (2d Cir. 2011) (holding in a forfeiture action involving stolen artwork that the Civil Asset Forfeiture Reform Act of 2000 did not change the burden of proof in a 19 U.S.C. § 1595a action).

60. See Cassella, *supra* note 43, at 108–09.

61. See, e.g., *United States v. \$493,850.00 in U.S. Currency*, 518 F.3d 1159, 1170 (9th Cir. 2008) (citing 18 U.S.C. § 983(d)) (describing the burden-shifting). An innocent owner is a claimant who proves by a preponderance of the evidence that he or she “(1) did not know of the conduct giving rise to forfeiture; or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.” *Id.* at 1170 (citing 18 U.S.C. § 983(d)(2)(A)). Obviously, a current possessor who gains sufficient knowledge to satisfy the NSPA’s scienter requirement loses the protection of the innocent owner defense if she remains in possession. Although an innocent owner defense is available in forfeitures predicated on a violation of the NSPA, it is generally *not* available for forfeitures predicated on a violation of United States customs’ statutes codified in Title 19 of the United States Code. See *Davis*, 648 F.3d at 93-94.

States,⁶² which has statutory authority to transfer forfeited property to the victim of the original theft.⁶³

Substantively, the action is equally clear-cut. As the First Circuit succinctly noted in a recent case involving stolen paintings, “[t]o [prevail] . . . the government must prove . . . that (1) the property was stolen; (2) after the property was stolen, it crossed a United States boundary;⁶⁴ (3) the defendant possessed . . . the property; (4) the defendant knew the property was stolen; and (5) the property was worth \$5,000 or more.”⁶⁵

Taking the claimants’ alleged facts as true, what is the analysis of these elements here? Possession, value, and transport across boundaries are easily demonstrated. Taylor possessed⁶⁶ the van Gogh in California after her acquisition of it in London in 1963; for purposes here, I assume the painting had a value in excess of \$5,000 in Berlin in 1939;⁶⁷ and, clearly, the painting crossed U.S. and state boundaries to get from London to Los Angeles. The

62. 18 U.S.C. § 981(f) (2006) (“All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.”)

63. 18 U.S.C. § 981(e)(6).

64. 18 U.S.C. § 2315 requires the property to have “crossed a State *or* United States boundary after being stolen” 18 U.S.C. § 2315 (2006) (emphasis added).

65. *United States v. Mardirosian*, 602 F.3d 1, 7 (1st Cir. 2010) (citing *United States v. Tashjian*, 660 F.2d 829, 839 (1st Cir. 1981) (affirming conviction under 18 U.S.C. § 2315 for possession of paintings the defendant knew to be stolen despite defendant’s assertion that he subjectively believed he had good title to the paintings)).

66. No case defines “possession” for purposes of the NSPA. However, in a case involving unlawful possession of a firearm under 18 U.S.C. § 922, the Seventh Circuit defined the term as follows: “[p]ossession of an object is the ability to control it. Possession may exist even when a person is not in physical contact with the object, but knowingly has the power and intention to exercise direction or control over it, either directly or through others.” *United States v. Hernandez*, 39 F. App’x 365, 370-71 (7th Cir. 2002).

67. This assumption seems reasonable but not beyond doubt. The NSPA defines value to mean “the face, par, or market value, whichever is the greatest.” 18 U.S.C. § 2311 (2006). Market value is determined by reference to the time and place of the wrongful taking. *See United States v. Cummings*, 798 F.2d 413, 416 (10th Cir. 1986) (citations omitted).

more difficult questions are whether the van Gogh was, and whether Taylor knew it to be, stolen.

For purposes of applying the NSPA, the Southern District of New York recently observed:

Under [precedent in the Fifth, Second, and Eleventh Circuits], federal law controls the question of whether an item is stolen, and local law . . . controls the analytically prior issues of (a) whether any person or entity has a property interest in the item such that it can be stolen, and (b) whether the receiver of the item has a property interest [in] it.⁶⁸

Federal courts have given exceptionally broad scope to the term “stolen” in NSPA cases. The Supreme Court set the bar in a case involving the predecessor statute to the NSPA (the National Motor Vehicle Act), holding that “[s]tolen’ as used in [the statute] includes all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.”⁶⁹ In a recent case involving Holocaust art, the court observed:

While the NSPA does not define “stolen,” the Court of Appeals has held that the term should be broadly construed to encompass “all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.” Its meaning does not depend on “the archaic distinctions between larceny by trespass, larceny by trick, embezzlement and obtaining properly by false

68. *Portrait of Wally*, 105 F. Supp. 2d at 292, amended by No. 99 Civ. 9940(MBM), 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000), disapproved on other grounds by No. 99 Civ. 9940(MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

69. *United States v. Turley*, 352 U.S. 407, 417 (1957) (resolving a split in the circuit courts on the definition of “stolen” in the National Motor Vehicle Theft Act). In a case involving the NSPA, the Second Circuit observed: “[w]e regard [the Court’s definition of ‘stolen’ in] *Turley* as controlling here [in an NSPA case] because the word ‘stolen’ is used in the same way in both the NSPA and the NMVTA.” *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d Cir. 1978).

pretenses.” Rather, determination of whether property is “stolen” in the NSPA context depends on “whether there has been some sort of interference with a property interest.” An item is stolen if it “belonged to someone who did not . . . consent” to its being taken.⁷⁰

How do these precedents apply? The core of the claimants’ allegations was that the van Gogh left the family’s possession as the result of a “coerced sale,” that is, without voluntary consent.⁷¹ The van Gogh catalogues raisonnés of 1928 and 1939 establish Mauthner’s “property interest” in the painting.⁷² A coerced sale would clearly constitute a sale without voluntary consent, that is, “some sort of interference with a property right.”⁷³ Thus, the allegations, if proven, would establish that the painting was “stolen” within the meaning of the NSPA.

The question, then, is whether the painting ever ceased to be stolen. The court in *United States v. Portrait of Wally* addressed how that question should be answered:

70. *Portrait of Wally*, 663 F. Supp. 2d at 252 (quoting *Long Cove*, 582 F.2d at 163; *United States v. Schultz*, 333 F.3d 393, 399 (2d Cir.2003)).

71. See *Orkin v. Taylor*, 487 F.3d 734, 737 (9th Cir. 2007) (“Notably, the [claimants] do not contend that the painting was confiscated by the Nazis. Rather, they allege economic coercion, contending that Mauthner sold the painting ‘under duress.’”). Nazi spoliation ranged from outright confiscation to coerced sales. The first case in a United States court to recover Holocaust art involved a work taken from the plaintiffs’ home and for which the Nazi agents issued a receipt. See *Menzel v. List*, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966). Claims involving coerced sales, for which extant records are unlikely, are necessarily more complex. And even with documentation of a sale, circumstances of coercion are unlikely to be evidenced in the sales documents. As one commentator noted, “Although it is clear that claims based on confiscation are limited to theft, looting, and forcible physical possession . . . it is unclear just how far the concept of coercion extends in this unique context.” Adler, *supra* note 25, at 57–58.

72. See Complaint, *supra* note 29, ¶18.

73. See *supra* quoted paragraph accompanying note 71. I am unaware of a case addressing the specific question whether a coerced sale transforms the sold goods into “stolen” goods for purposes of the NSPA. Given federal courts’ broad reading of the term “stolen” in NSPA cases, however, it is reasonable to conclude that a court would find a coerced sale a sufficient “interference with a property right” to have that effect.

Under the common law, “one cannot be convicted of receiving stolen goods if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent, including the police.” This doctrine . . . is well-established federal law; federal courts routinely apply it in cases involving federal statutes that prohibit the receipt or transportation of stolen goods without inquiring into whether the doctrine is part of the relevant body of local law, as they would have to do if local law controlled this issue.⁷⁴

The reciprocal conclusion is implicit: Until a stolen work is returned to the owner from whom it had been wrongfully taken (or to the owner’s agent), it remains stolen for NSPA purposes. Accordingly, assuming the allegations to be true and provable, the van Gogh remains stolen.

The next question is whether Taylor had the requisite knowledge to satisfy the NSPA’s scienter requirement. The government’s burden is to prove only that a possessor “knows” the property is

74. *Portrait of Wally*, 105 F. Supp. 2d at 290 (quoting *United States v. Muzii*, 676 F.2d 919, 923 (2d Cir. 1982)). The *Wally* court refers only to “receipt or transportation” of stolen goods. *Id.* The doctrine was applied to a case of possession in *United States v. Mardirosian*, 602 F.3d 1, 8 (1st Cir. 2010). There also is precedent applying the doctrine to possession cases under other federal statutes. See *United States v. Monasterski*, 567 F.2d 677 (6th Cir. 1977) (holding, in a case involving an alleged possession crime under 18 U.S.C. § 659, that the defendant could not be convicted of receiving stolen goods when actual physical possession of such goods had been recovered by the owner’s agent for delivery to the intended receiver). The *Monasterski* court provides a history of the doctrine, beginning with two 19th century English cases, and a careful summary of prior federal case law. See *id.* at 679-82. The court observes:

All would agree that at some point in time the goods in this case ceased being stolen goods. We must decide at what point the goods lost that status in contemplation of the law. We feel the best and only workable rule is the common law rule *viz*, the goods lost their stolen character immediately upon being recovered by the owner or his agent.

Id. at 681. For a discussion of the *Wally* court’s handling of this issue, see Susan E. Brabenec, *The Art of Determining “Stolen Property:” United States v. Portrait of Wally, A Painting by Egon Schiele*, 69 U. CIN. L. REV. 1369 (2001).

“stolen, unlawfully converted, or taken.”⁷⁵ That is, the government must demonstrate that the defendant has “factual knowledge [that the good is stolen] as distinguished from knowledge of the law.”⁷⁶ Knowledge that property was stolen “may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact.”⁷⁷ Moreover, after-acquired knowledge meets the scienter requirement, even if the government is the source of that information⁷⁸ and even if the period between acquisition of the goods and acquisition of knowledge that they are stolen is many years.⁷⁹ The government

75. 18 U.S.C. § 2315 (2006). The NSPA’s scienter requirement is limited to the status of property as having been stolen; the U.S. need not prove the possessor’s knowledge of the NSPA’s other elements—for example, that the possessor knows the property crossed a state or U.S. boundary (notwithstanding that the government must prove those other elements). *See, e.g.,* United States v. Rosa, 17 F.3d 1531, 1544 (2d Cir. 1994); United States v. Tannuzzo, 174 F.2d 177, 180 (2d Cir. 1949). Further, 18 U.S.C. § 2315, the section of the NSPA criminalizing possession of stolen goods, requires no proof of unlawful or fraudulent intent, meaning that no inquiry into the possessor’s state of mind is required. *See* Gendron v. United States, 295 F.2d 897, 901 (8th Cir. 1961) (holding that 18 U.S.C. § 2315 contains no specific requirement of unlawful or fraudulent intent and reasoning that Congress deliberately omitted this intent requirement given that it included such a requirement in the parallel provision of the NSPA codified at 18 U.S.C. § 2314).

76. United States v. Howard, 214 F.3d 361, 363 (2d Cir. 2000) (quoting Bryan v. United States, 524 U.S. 184, 192–93 n.14 (1998)) (discussing the knowledge requirement with respect to possession of a stolen firearm in violation of 18 U.S.C. § 922(j)).

77. Corey v. United States, 305 F.2d 232, 238 (9th Cir. 1962) (quoting Melson v. United States, 207 F.2d 558, 559 (4th Cir. 1953)).

78. For example, in *United States v. Simon*, 225 F.2d 260, 261 (3d Cir. 1955), the court quoted that:

There was evidence . . . that appellant acquired knowledge that the turkeys had been stolen after he had received them; for example, that such knowledge was acquired by means of or as a result of appellant’s interviews . . . with two separate teams of F.B.I. agents who questioned him about stolen “Lynbrook” turkeys

For an example of how CAFRA’s innocent owner defense intersects with the NSPA scienter requirement, see *supra* note 62.

79. In a contract dispute that turned on whether the property was stolen within the meaning of the NSPA, the court held that knowledge that a

may demonstrate scienter by proving that a defendant with reason to suspect a theft acted with deliberate ignorance or conscious avoidance to prevent discovering that the property is stolen.⁸⁰

Under the alleged facts, there are three occasions when “a person of ordinary intelligence” might have learned the van Gogh was stolen. The first is at the time of public auction in 1963; the second, when Taylor attempted to sell the work in 1990; and the third, when the claimants demanded return of the painting in 2003 and filed a complaint for its return in 2004.

As to the first, the question is whether incorrect information and errors in the work’s provenance published in the 1963 Sotheby’s sales catalogue sufficed to alert a person of ordinary intelligence that the work was stolen.⁸¹ For at least two reasons, the answer to that question is likely no. First, as discussed above, the art market in the decades following the war paid scant attention to the recent history of Nazi looting: There appears to be no evidence of heightened scrutiny of works whose provenance indicated German ownership during the Third Reich. Even had the errors been noticed, there is nothing to suggest that collectors would have interpreted them as evidence of Nazi looting. Second, standards for diligence in the acquisition of art were not what they are today: The first scholarly article on the topic appeared only in 1990.⁸²

seventeenth-century Benin bronze statue acquired more than ten years after the plaintiff acquired the object satisfied the scienter requirement. *Hartman v. Harris*, 810 F. Supp. 82, 83, 85 (S.D.N.Y. 1992). Because the other elements of 18 U.S.C. § 2314 were met, the court found that a contract regarding the statue was illegal, and thus void and unenforceable. *Id.* at 85. Further bolstering the court’s conclusion that the plaintiff knew the statue was stolen was that an art dealer told the plaintiff it was stolen some years after the plaintiff had acquired it, and the plaintiff had “taken [the art dealer’s] word.” *Id.* at 83.

80. See *United States v. Schultz*, 333 F.3d 393, 412, 414 (2d Cir. 2003) (upholding a conscious avoidance jury instruction in an NSPA case involving stolen antiquities). In the words of the *Wally* court: “[t]he Painting is also subject to forfeiture if [the transporter of the painting] was aware of a high probability that [the painting] was stolen and deliberately looked the other way.” *Portrait of Wally*, 663 F. Supp. 2d at 269.

81. See Complaint, *supra* note 29, ¶¶ 17–25.

82. See Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT’L L. 1 (1990). The first symposium on provenance and due diligence standards was held only in 2000: the April 2000 Conference on

The art market of the 1960s simply did not work on the basis of diligence; it worked on understandings.⁸³ Accordingly, it is difficult to see a court determining that in 1963 Taylor had knowledge, or sufficient information to warrant diligent investigation, of a link between the work and Nazi looting.

In 1990, when Taylor offered the van Gogh for sale at auction in London, Christie's sales catalogue corrected errors in the work's provenance that appeared in the 1963 Sotheby's catalogue.⁸⁴ Whether those corrections constitute sufficient circumstances to "convince a person of ordinary intelligence" that the work was stolen or justify a conscious avoidance instruction is unclear and probably doubtful. Although Taylor had had twenty-seven years to investigate the work's history, no claim for the painting had been asserted during those three decades despite the notoriety of Taylor's ownership of it.⁸⁵ Moreover, as discussed above, the

Provenance and Due Diligence sponsored by the International Foundation for Art Research in collaboration with New York University. See *Provenance & Due Diligence*, INT'L FOUND. ON ART RES. (April 29, 2000), http://www.ifar.org/past_event.php?docid=1192514072.

83. As late as 1978, a New York court observed about the New York art market:

We have just completed a journey through the fantasy land of marketing in the fine arts. Prestigious names have been dropped freely as rain. Large sums of money or negotiable paper have changed hands suddenly. Valuable *objets d'art* have moved internationally with comparable swiftness. . . . The relevant core of testimony is that in an industry whose transaction cry out for verification of both title to and authenticity of subject matter, it is deemed poor practice to probe into either.

Porter v. Wertz, 23 UCC Rep. Serv. 614, 1978 WL 23505 (N.Y. Sup. Ct. Mar. 13, 1978).

84. Complaint, *supra* note 29, ¶¶ 29–30.

85. For the acquisition in 1963, see *Sotheby's Sells Wolf Collection*, N.Y. TIMES, April 25, 1963, at 30: "The highest price [for a work in the Wolf Collection] was paid by Francis Taylor, bidding for his daughter, Elizabeth Taylor, the actress. He paid £92,000 for a landscape painted by Vincent van Gogh in 1889, entitled 'Vue de l'Asile et de la Chapelle de Saint-Remy.'" For the sale in 1990, see *Taylor Selling van Gogh*, N.Y. TIMES, Nov. 5, 1990, at C13, available at <http://www.nytimes.com/1990/11/05/arts/taylor-selling-van-gogh.html?scp=1&sq=Taylor%20Selling%20van%20Gogh&st=cse>.

sensibility to Holocaust art issues was still, in 1990, undeveloped. Thus, it is again hard to conclude that the United States could prove scienter in 1990.

Finally, in December 2003, the claimants made a demand on Taylor for return of the van Gogh following which there were failed negotiations; in 2004, the parties filed suit.⁸⁶ The claimants' demand and subsequent filing of a complaint in court would not by themselves prove that Taylor had either actual knowledge or an obligation to investigate the allegations to obviate a later assertion of conscious avoidance of the truth. However, if the United States had demonstrated probable cause to a magistrate that the work was stolen and then fully informed Taylor of the evidence it had regarding the work's provenance, it would be hard to conclude that Taylor did not then learn—did not “know”—that the work was stolen or, in the absence of a diligent effort to make an independent determination, that Taylor did not consciously avoid learning the truth.⁸⁷

Accordingly, there would have been no impediment to the United States' prevailing in a civil forfeiture action against the van Gogh. All elements of an indictable act under the NSPA are present and the action would not be time-barred. If the government prevailed, title to the painting would, as a matter of law, transfer to the United States, which would then have the option of transferring its title to the claimants, thereby accomplishing restitution and achieving, in this instance, long-standing United States public policy.⁸⁸

B. United States v. One van Gogh Painting Following Adler

The more difficult question is whether Taylor's having prevailed in the civil action immunizes the van Gogh from a *subsequent* federal civil forfeiture action. That question has two components: First, did Taylor's successful assertion of a statute of limitations

86. Complaint, *supra* note 29, ¶¶ 36–37; see *supra* text accompanying note 36 (noting that Taylor initially filed a complaint for declaratory relief to establish title to the van Gogh).

87. See *supra* text accompanying note 78.

88. See discussion *infra* Part VI.A.

defense vest her with good title to the van Gogh? Second, even if the answer is yes, does the van Gogh nevertheless remain “stolen” for purposes of the NSPA? The answer to the first question is uncertain under applicable (California) law; however, even if the answer were yes—that the judgment vested good title in Taylor—under federal law the work remains “stolen” for purposes of the NSPA: It has not yet been returned to the Mauthner family or its agent. Put another way, even if the effect of the California civil action were to vest good title to the painting in Taylor, for purposes of the NSPA it remains stolen. Accordingly, the painting can not legally be possessed by anyone other than the claimants or their agent: Good title under state law provides no defense for possession of federally-defined contraband.⁸⁹

California courts have proved skeptical of the argument that California law allows a possessor to acquire title to chattel by the passage of time, and have failed to respond fully to the merits of the claim.⁹⁰ The question rose to national prominence in 1980 in a case involving stolen paintings by Georgia O’Keeffe. There, the New Jersey Supreme Court abolished application of adverse possession to stolen art and instituted a discovery rule standard for determining ownership rights as between a theft victim and a subsequent possessor. (The discovery rule, by statute or common law, is today the majority rule and applies in California.) However, the New Jersey Supreme Court was unable to articulate a rule of law supporting the assertion that expiration of a statute of limitations under a discovery rule vests good title:

89. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress’ Commerce Clause authority includes the power to prohibit possession of marijuana notwithstanding California’s enactment of a state statute permitting such possession).

90. See *Soc’y of Cal. Pioneers v. Baker*, 50 Cal. Rptr. 2d 865, 872 n.13 (Cal. Ct. Appl. 1996) (suggesting “that the doctrine of adverse possession would not apply to personal property” (citing *S.F. Credit Clearing House v. Wells*, 196 Cal. 701, 707 (Cal. 1925))); see also *Reukema v. Hawkins*, No. B168321, 2005 WL 2090791, at *6 (Cal. Ct. App. Aug. 31, 2005) (unpublished) (same); cf. 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 123 (10th ed. 2005) (opining that under California law one could “acquire title to personal property by adverse possession” but recognizing that case law has “cast some doubt upon this conclusion”).

[T]he effect of the expiration of the statute of limitations, albeit on the theory of adverse possession, has been not only to bar an action for possession, but also to vest title in the possessor. There is no reason to change that result although the discovery rule has replaced adverse possession. History, reason, and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor.⁹¹

Even conjoined, “history, reason, and common sense” do not comprise a sound legal argument. Indeed, in a case involving a museum’s attempt to quiet title of allegedly stolen coins, a California court of appeal praised New York’s “demand and refusal rule” primarily because it works in direct opposition to the logic presented in *O’Keeffe*:

We note that under New York’s demand rule of accrual, the limitations period commences upon the owner’s demand for the return of the stolen property, without regard to the owner’s diligence in locating the property. New York’s demand rule of accrual precludes a thief from, in effect, laundering stolen property by waiting out the civil limitations period and then fencing the goods free and clear of the owner’s lawful title. New York thus avoids the prospect of allowing the person in possession of the stolen property to acquire, in effect, stolen property by expiration of the statute of limitations.⁹²

Assuming, for the moment, that a California were to rule that foreclosure of the theft victim’s claim by the state’s statute of limitations does vest good title in the current possessor, what effect

91. *O’Keeffe v. Snyder*, 416 A.2d 862, 873-74 (N.J. 1980).

92. *Naftzger v. Am. Numismatic Soc’y*, 49 Cal. Rptr. 2d 784, 792 (Cal. Ct. App. 1996) (citing *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429-31 (N.Y. 1991)).

would that ruling have on a *federal* action based on a violation of the NSPA? In brief, none.

In applying the NSPA, federal law determines whether a work is stolen and whether and when it is no longer stolen.⁹³ Thus, even if state law vested good title to stolen property in a party who has successfully asserted a statute of limitations defense, a federal court interpreting the NSPA looks to federal, not state, law to determine whether the work remains stolen.⁹⁴ As discussed above, if the claimants' allegations were proven, the van Gogh fits well within the definition that courts have given to "stolen" in NSPA cases: Mauthner held an interest in the painting, and that interest was interfered with. The painting has not been returned to the Mauthner family or its agent, the *only* way property can shed the taint of being stolen under the NSPA.⁹⁵ Thus, until the painting is restituted, it is, at law, property to which one may have good title but not a right of possession. In short, it is contraband.

Justice Stevens, in his vigorous dissent in *Bennis v. Michigan*,⁹⁶ articulated what is now the standard, tripartite classification of contraband: "pure contraband; proceeds of criminal activity; and tools of the criminal's trade."⁹⁷ Examples of pure contraband—that is, "objects the possession of which, without more, constitutes a crime"—include "adulterated food, sawed-off shotguns, narcotics, and smuggled goods."⁹⁸ Stevens observed that "the government has an obvious remedial interest in removing [pure contraband] from private circulation, however blameless or unknowing their owners may be."⁹⁹ Although Stevens omitted

93. See *United States v. Portrait of Wally*, 105 F. Supp.2d 288, 291-92 (S.D.N.Y. 2000), and discussion *supra* Part V.A.

94. See discussion *supra* note 75.

95. *Id.*

96. 516 U.S. 442, 458-62 (1996) (upholding the forfeiture of a married couple's jointly owned car in which the husband engaged in sexual activities with a prostitute).

97. *Id.* at 459 (Stevens, J., dissenting).

98. *Id.* (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)).

99. *Id.* The Supreme Court has upheld convictions for possession of pure contraband in the absence of a statutory scienter requirement. See *United States v. Freed*, 401 U.S. 601, 607 (1971) (unregistered firearms); *United States v.*

reference to the statutory authorities that transform chattel into “pure contraband,” those statutes are easily found; some refer explicitly to the identified goods as “contraband” and others simply criminalize possession of them.¹⁰⁰ In 1986, Congress added a new item to the list of contraband property: stolen goods as defined in the NSPA.¹⁰¹

Accordingly, it is well within a reasonable interpretation of the NSPA and precedent to conclude that the United States could prevail in a civil forfeiture action against the van Gogh even after *Adler*. Congress may not have intended that result when it criminalized possession of stolen goods and eliminated the defense that goods were no longer in interstate commerce. Indeed, the result could strike a reasonable person as being more than unreasonable. But the jurisprudence that has arisen under the NSPA’s long history and the 1986 amendments to the statute, compel this conclusion: The United States has clear statutory authority to achieve restitution of the van Gogh.

Balint, 258 U.S. 250, 254 (1922) (narcotics). In a case where a contraband statute included an explicit scienter requirement, the Sixth Circuit narrowly construed the requirement as mandating only that the defendant know he possessed goods that matched the statutory criteria of “contraband.” *See United States v. Elshenawy*, 801 F.2d 856, 859 (6th Cir. 1986) (cigarettes).

100. *See, e.g.*, 18 U.S.C. § 2341(2) (2006) (cigarettes without tax stamps); 26 U.S.C. § 5861(d) (2006) (unregistered firearms); 49 U.S.C. § 80302(a)(1) (2006) (narcotics). In both of those statutes the term “contraband” is used explicitly. However, other federal law prohibits possession of statutorily defined property without explicitly defining it as “contraband.” *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1538(a)(1)(D) (2006) (making it “unlawful for any person . . . [to] possess, sell, deliver, carry, transport, or ship [endangered species taken in violation of other provisions of the Act]”); *cf.* 18 U.S.C. § 545 (2006) (criminalizing, *inter alia*, the knowing receipt, concealment, buying, or selling of merchandise imported or brought into the United States “contrary to law” and instructing that “[p]roof of defendant’s possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section”).

101. Although the van Gogh fits within Justice Stevens’ first category, it falls also within the second: “The second category—proceeds [of criminal activity]—traditionally covered only stolen property, whose return to its original owner has a powerful restitutionary justification.” *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting).

VI. THE EQUITIES: APPLYING UNITED STATES LAW TO ACCOMPLISH UNITED STATES POLICY

The NSPA's purposes and language fully support the United States' active use of civil forfeiture proceedings based on NSPA violations to achieve restitution of Holocaust art. The question remains whether the United States *should* bring such forfeiture actions. On the one hand, for more than 60 years it has been explicit executive branch policy to support restitution efforts,¹⁰² which would argue for an affirmative answer. On the other, applying a federal statute that effectively eliminates a statute-of-limitations defense conflicts with strong, historic policy rationales for legislative enactment and judicial enforcement of statutes of limitation: avoiding stale lawsuits and prompting those with claims to come forward expeditiously.¹⁰³ Those policies argue for a negative answer. Moreover, the legislative history of Congress's 1986 amendments to the NSPA, indicates no awareness of the potential difficulties and unanticipated outcomes of applying a general theft statute to works of art, which differ significantly from other kinds of "goods."

A. Arguments that the United States should apply the NSPA

Application of an existing federal statute to accomplish clearly-articulated policy goals is entirely appropriate, even if the interpretation of the statute is novel and untested.¹⁰⁴ Although the

102. For a succinct summary of executive branch policy from the war to present, see Kreder, *supra* note 22, at 257–60, who concludes: "From wartime declarations to recent seizures, executive policy in the United States has been to examine the merits of each case and, wherever possible, return looted art to its rightful owner or country." *Id.* at 260.

103. See generally Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453 (1997). For an analysis of the role of statutes of limitations in cases seeking reparations (rather than restitution), see Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005).

104. Although the government has not applied the amended NSPA as described in this paper, it has brought two cases involving stolen art that would not have been feasible prior to the 1986 amendments. See *United States v.*

United States has not yet pursued the approach propounded here—that *mere possession* of Holocaust art provides grounds for civil forfeiture proceedings no matter how long the possession, is no argument for the government not to do so. To the contrary, were the United States not to implement its policy goals when it has statutory means to accomplish them, would require explanation—or revision of the government’s policies. Recent executive branch activity, however, has reinforced the country’s historic policies and efforts favoring of Nazi-looted art.

Since 1943, when President Roosevelt established a special unit of the armed forces to protect works of art in the European theater,¹⁰⁵ executive policy has consistently supported efforts to preserve and to restitute works of art and other cultural property displaced during the war. Following renewed attention to Holocaust art matters in the 1990s,¹⁰⁶ the executive¹⁰⁷ has played an active, highly visible role in international efforts to promote restitution.¹⁰⁸ For example, in Washington in 1998, the

Mardirosian, 602 F.3d 1, 4 (1st Cir. 2010) (affirming a conviction for possession of stolen paintings under 18 U.S.C. § 2315); *United States v. Trupin*, 117 F.3d 678, 680 (2d Cir. 1997) (affirming a conviction for possession of a stolen painting under 18 U.S.C. § 2315).

105. For a description of the founding of what would come to be known as the “MFA&A” (Monuments Fine Arts & Architecture) unit, see NICHOLAS, *supra* note 17, at 203–27.

106. See discussion *supra* Part II.

107. The legislative branch has acted to indicate clearly its sympathy with efforts to promote the restitution of Holocaust assets. For a summary of legislation and resolutions, see *International List of Current Activities Regarding Holocaust-Era Assets, Including Historical Commissions, and Forced and Slave Labor*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/assets/> (follow “List, By Country, of Governmental Attempts . . .” hyperlink, and then follow instructions) (last visited Nov. 19, 2011).

108. For examples of policy documents, see *Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. DEP’T OF STATE (June 30, 2009), <http://www.state.gov/p/eur/rls/or/126162.htm> [hereinafter *Terezin Declaration*]; *Vilnius Forum Declaration*, LOOTEDART.COM (Oct. 5, 2000), <http://www.lootedart.com/MFV7EE39608> [hereinafter *Vilnius Declaration*]; *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm> [hereinafter *Washington Principles*].

Department of State cosponsored the first international conference to address these issues. At the conclusion of that meeting, approximately forty governments promulgated the Washington Conference Principles on Nazi-Confiscated Art, which emphasized the importance of identifying Holocaust art and assisting those seeking their looted property. Principle eight (of eleven) recommends that “steps should be taken expeditiously to achieve a just and fair solution” when a match between claimant and property occurs.¹⁰⁹ Two years later the United States participated in the Vilnius International Forum, and joined approximately forty governments in signing the Vilnius Forum Declaration, whose first principle states:

The Vilnius Forum asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs. To this end, it encourages all participating States to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art as well as Resolution 1205 of the Parliamentary Assembly of the Council of Europe.¹¹⁰

Most recently and most importantly, in 2009, the United States joined forty-five other countries in promulgating the Terezin Declaration, a document prepared at the Prague Holocaust Era Assets Conference. In signing this Declaration, the United States committed itself to a remarkable goal: assuring that the U.S. legal

109. *Washington Principles*, *supra* note 1089, ¶ 8 (“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.”).

110. *Vilnius Declaration*, *supra* note 108, ¶ 1. Resolution 1205 of the Parliamentary Assembly of the Council of Europe (November 1, 1999) is titled “Looted Jewish Cultural Property” and states, *inter alia*, that “[t]he Assembly believes that restitution of [Nazi] looted cultural property to its original owners or their heirs . . . is a significant way of enabling the reconstitution of the place of Jewish culture in Europe itself.” EUR. PARL. ASS. RES. 1205 ¶ 8 (Nov. 5, 1999), *available at* <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/ERES1205.htm>.

system makes certain that Holocaust art claims are resolved “*on the facts and merits* of the claims.”¹¹¹

Thus, there is no question that prior and current U.S. policy supports—indeed, one could say, demands—the executive to apply the NSPA as described here. That position is also supported by sound legal arguments: Most simply, the language of the NSPA and precedent interpreting it fully support the novel application of the NSPA described here. Moreover, as a matter of common-law principles, it is axiomatic that even a good-faith purchaser cannot obtain title from or through a thief.¹¹² Application of the NSPA in this context allows the government to accomplish the goals of the venerable *nemo dat* rule even (or, especially,) in situations in which a private, civil litigant is time-barred. Finally, pursuing these cases should not present difficulties for federal prosecutors.

The Department of Justice has substantial experience using forfeiture actions predicated on NSPA violations in the context of another form of cultural property theft. For more than thirty years, the Department has assisted foreign nations’ efforts to repatriate antiquities from U.S. possessors.¹¹³ Indeed, federal prosecutors were on the cutting edge of the law, when, in the mid-1970s, it

111. *Terezin Declaration*, *supra* note 108 (emphasis added).

112. The doctrine *nemo dat quod non habet* (no one can give what one does not have) refers to the common law principle that no one whose chain of title derives from or through a thief has good title to the stolen property. However, a current possessor’s defenses based on passage of time, such as statutes of limitations and laches, may prevent the theft victim from regaining the stolen property or its value. The *nemo dat* rule is not a part of civil law, which generally grants title by prescription to a bona fide purchaser after a period of years. This “contrasting treatment of good faith purchasers in the US and in the civil law world is an oddity, a rare example of opposing substantive private law rules in the two major traditions of Western law.” John Henry Merryman, *The Good Faith Acquisition of Stolen Art* 24 (Stanford Pub. Law & Legal Theory Working Paper Series, Paper No. 1025515), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025515&download=yes. Merryman’s article provides a thorough discussion from the perspective of a comparativist between the common and civil law treatment of bona fide purchasers of stolen art.

113. For a list of these cases, see Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N. MEX. L. REV. 123, 137 n.89 (2010).

successfully placed the NSPA at the center of U.S. efforts to control the trade in illicit antiquities. When the Department of Justice started to apply the NSPA in this unprecedented way, the result was so stunning as to prompt Judge Minor Wisdom, in the first case of its kind to reach a Circuit court,¹¹⁴ to open his opinion as follows: “[m]useum directors, art dealers, and innumerable private collectors throughout this country must have been in a state of shock when they read the news if they did of the convictions of the five defendants in this case.”¹¹⁵ The U.S. has brought such actions even in situations in which foreign nation could have brought a civil action against the U.S. possessor and even when such action would not have been time-barred.¹¹⁶ Thus the question arises: If the United States has been willing, indeed eager, to apply the NSPA in novel ways for one form of cultural property (antiquities), why could it not—or, better, why has it not—been equally innovative in applying the NSPA in Holocaust art cases?

In short it is difficult to see any reason why the United States should not pursue the approach described in this paper. That approach may be the only avenue available to assure that Holocaust art claims are, in the words of the Terezin Declaration, decided “on the facts and merits of the claims.”¹¹⁷

114. For a discussion of why *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974), often cited as the first of these cases, must yield pride of place to *McClain*, see Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. (forthcoming 2011) (manuscript at 9), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792588.

115. *United States v. McClain*, 545 F.2d 988, 991 (5th Cir. 1977). Federal prosecutors had succeeded in arguing that Mexican antiquities that Mexico did not know to exist were nevertheless stolen for NSPA purposes when they were illegally exported from Mexico after Mexico had nationalized all antiquities within its borders. For a discussion of the “McClain Doctrine,” see Urice, *supra* note 114, at 130-31.

116. See, e.g., *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

117. *Terezin Declaration*, *supra* note 109.

B. Arguments Against Application of the NSPA

There are at least two arguments against applying the NSPA as described in this paper. One is premised on the very nature of cultural property; the other, on the long-standing deference to reasonable statutes of limitations.

Although works of art are typically treated as “goods”¹¹⁸ for purposes of U.S. law, art’s unique characteristics fit uncomfortably into a general theft statute.¹¹⁹ Generally, cultural property is non-fungible; is not consumed; has no measurable useful life; tends to be possessed through time; does not become obsolete through wear, tear, or innovation; and often maintains or increases in value through time. Cultural property moves: Virtually no work of art remains where it was made; and for security and other reasons, collectors frequently keep their collections out of public view. Establishing a work’s provenance is often exceedingly difficult, making it difficult to determine whether a work has, at some time

118. The NSPA does not define “goods” in its definitional section. *See* 18 U.S.C. § 2311 (2006). Although no court has interpreted “goods” in a prosecution under 18 U.S.C. § 2315, courts have considered the appropriate definition under the other operative section of the NSPA, 18 U.S.C. § 2314. In *United States v. Seagraves*, 265 F.2d 876 (3d Cir. 1959), a case involving geophysical maps, the court developed a two-part definition: “Goods” must be (1) personal property or chattels that (2) are ordinarily a subject of commerce. *Id.* at 880 (citations omitted). The court observed: “Since the maps were shown without doubt to be subjects of commerce, albeit of a specialized nature, they are goods or wares or merchandise within the terms of the [NSPA].” *Id.* Cultural property easily fits within the definition of goods in *Seagraves*.

119. The same is true for other statutes that consider works of art as if they were widgets. For example, sales of works of art are generally governed by Article 2 of the Uniform Commercial Code. In a case of first impression determining whether an art dealer’s offer to substitute one Picasso print for another Picasso print previously sold to a collector and found to have an inauthentic signature (thereby breaching the seller’s express warranties under the UCC), the court held that New York’s enactment of UCC § 2-508(2), permitting substitution of conforming goods for nonconforming goods, did not apply to fine art prints because each print is unique. *See*, RALPH E. LERNER AND JUDITH BRESLER, *ART LAW*, 78-80 (3d ed. 2005).

in the past, been stolen.¹²⁰ Above all, it is the characteristic of *ars longa* that collides uncomfortably with Congress's having effectively eliminated a time bar to U.S. action under the NSPA for knowing possession of stolen goods.

Elsewhere, I have argued that for purposes of regulating traffic in illicitly exported antiquities the NSPA is unwieldy—either too broad or too narrow depending on how one interprets the two circuit court decisions that addressed the issue.¹²¹ In the case of Elizabeth Taylor's van Gogh, the NSPA appears equally unwieldy but for other reasons: Its use defeats state statutes of limitations even in a case in which all of the arguments favoring statutes of limitations are present: Witnesses are dead, evidence is cold, and memories are either weak or nonexistent. Under these circumstances the opportunity for fraud increases and a court's ability to determine what actually happened diminishes. In short, the very nature of the van Gogh as an enduring work of art and the belief that time eventually shifts the balance of equities in favor of the status quo both argue against application of the NSPA in these circumstances. Put another way, repose has its place in commercial and civic life.

VII. CLOSE

As discussed above, most new claims brought by Holocaust victims or their heirs against U.S. possessors to recover Nazi-looted art will confront potentially insurmountable defenses based on the passage of time. Civil forfeiture proceedings predicated on knowing possession of stolen goods in violation of the NSPA offer an alternative route to restitution under these circumstances. Indeed, it may well be the *only* route to accomplish what the United States, under the Washington Principles and the Terezin Declaration, committed itself to achieving, just and fair solutions of Holocaust art claims. The hard question remains, of course,

120. Indeed, under the broad judicial interpretation of "stolen" for purposes of the NSPA vast amounts of cultural property have, sometime in their history, been wrongfully taken.

121. See Urice, *supra* note 113, at 159.

how to determine what a “just and fair” solution in these exceptional circumstances?

Vincent van Gogh

6Vue de l'Asile et de la Chapelle de Saint-Rémy
17½ by 23¾ in. 44.5 by 60 cm

Painted in the summer or autumn of 1889.

Provenance:

Mme Margarethe Mauthner, Berlin.

Paul Cassirer, Berlin.

M. Goldschmidt & Co, Berlin.

Figure 1: Provenance of the van Gogh painting from the 1963 Sotheby's sales catalogue

12B

VINCENT VAN GOGH (1853-1890)

Vue de l'Asile et de la Chapelle de Saint-Rémy

oil on canvas
17½ x 23¾in. (44.5 x 60cm.)

Painted in Saint-Rémy, October 1889

PROVENANCE:

Johanna van Gogh-Bonger, Amsterdam

Paul Cassirer, Berlin, bought from the above in Feb. 1907

Margarete Mauthner, Berlin, bought from the above in May 1907, still in her collection in 1928

Marcel Goldschmit & Co., Frankfurt

Alfred Wolf, Stuttgart and Buenos Aires; sale, Sotheby's, London, 24 April, 1963, lot 6 (illustrated in colour; bought by the present owner for £92,000)

Figure 2: Provenance of the van Gogh painting from the 1990 Christie's sales catalogue