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Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions

by

ERIN L. THOMPSON

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“The problem of stolen art must be recognized as a moral issue that can be solved only with morality as its primary basis.”

Parallel to their campaign of physically exterminating the Jewish population of Europe, the Nazis carried out a highly organized plan of cultural genocide that involved the confiscation or forced sale of hundreds of thousands of pieces of art. The Allied forces returned a sizable number of these works to their owners or their heirs after the
war, but many disappeared into the hands of private possessors. While some remain hidden in private collections, a number of these artworks were given to, or purchased by, museums or other public institutions. In recent decades, the heirs of Holocaust victims have been using the American court system to make claims for the return of these works. This paper investigates one little-examined, but ethically problematic, aspect of these claims: the fact that the vast majority of these claims are made against public institutions rather than private collectors.

The paper begins with a short survey of the history of World War II art looting and the current legal responses. This introduction makes the dilemmas inherent in this legal response more concrete through descriptions of claims made against the Israel Museum of Jerusalem and the Jewish Museum of Prague. Part II discusses the public interest in keeping art in museums, and is followed by Part III, an analysis of the practical reasons explaining why claims are easier to make against museums and other public institutions. Part IV explores the goals and attitudes of claimants and their attorneys through interviews and other public statements. Finally, Part V concludes by reconsidering the identified ethical dilemmas, leading to a proposal of a better means for heirs, their attorneys, and museums to work together to preserve both the private and the public good.

I. Jewish Claimants, Jewish Museums

The scale and organization of art looting during World War II was astounding. Estimates place the percentage of art confiscated by the Nazis as between one forth and one third of the total artworks in Europe. The Nazis passed special laws to regularize confiscation of


artworks or even entire galleries from Jewish owners. The army also created commando groups whose responsibility was to locate and remove artworks, which were either sold to fund the war or retained to be used to create a planned Führermuseum in Hitler’s hometown. The best documented of these commando groups, the Einsatzstab Reichsleiter Rosenberg, took more than 22,000 artworks from museums and private collections across Europe. An estimated half of these looted artworks were never returned to their pre-war owners. There is still no knowledge as to the location of over 100,000 of these works.

For several decades after the war, relatively few claimants used the courts to attempt to recover lost artworks. This changed beginning in the late 1980s. Classified governmental archives of documents relating to the war opened to the public in Washington, Switzerland, and Germany allowing survivors and heirs to discover the fate of their families’ artworks. The increasing digitalization of such archives, as well as the archives of museums and other large

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8. Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 244.


10. Redman, supra note 9, at 784–85; Derrossett, supra note 9, at 23; Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 255–56.
holders of art, have also made research significantly easier.\textsuperscript{11} Additionally, an increase in scholarly and journalistic publications about World War II looting gave crucial information to potential claimants about histories that their parents or grandparents, the immediate survivors of the war, may not have wanted to discuss.\textsuperscript{12} The growth of foundations or other organizations dedicated to the issue of Nazi-looted art has also had an effect on the rise in claims. For instance, in one recent case, neither the heirs nor the holder of a Picasso painting were aware of its World War II history. Instead, the Art Loss Register, an online organization dedicated to maintaining a database of stolen art, discovered the connection and alerted the heirs, leading to a lawsuit against the holder.\textsuperscript{13} Finally, increases in art prices made the expenses of research and the legal process seem justified.\textsuperscript{14} All of these factors led to a sharp increase in restitution claims.\textsuperscript{15}

The majority of these claims for restitution are made against public institutions, as evident from the list of stolen World War II art claims maintained by the firm Herrick, Feinstein LLP.\textsuperscript{16} Of around 170 claims listed (litigations, settlements, and negotiations), only eighteen of the claimed artworks were held by private collectors and

\begin{itemize}
\item \textsuperscript{14} Kelly Crow, \textit{The Bounty Hunters}, Wall St. J., Mar. 23, 2007, at W1 (“As art prices reach further uncharted territory, lawyers are accepting jobs that wouldn’t have paid off in the past. Top cases yield nine-figure payouts.”); Jill Schachner Chanen, \textit{Art ATTACK: Ownership of Paintings and Other Objects of Value Is Being Challenged on a Number of Legal Fronts}, A.B.A. J., Dec. 25, 2006, at 50, 52 (arguing that pursuing a claim becomes worthwhile when the “painting is worth $100,000 or $200,000”). The stakes can indeed be high: five paintings successfully claimed by one family in 2007 sold for a combined $327 million. Leah J. Weiss, Note, \textit{The Role of Museums in Sustaining the Illicit Trade in Cultural Property}, 25 Cardozo Arts & Ent. L.J. 837, 8678 (2007). Kreder has estimated that $700 million of Nazi-looted art has been restituted since 2002. Jennifer Anglim Kreder, \textit{Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes}, 73 Brook. L. Rev. 155, 178–79 (2007).
\item \textsuperscript{15} Thus, Sotheby’s reported auctioning thirty-eight restituted works in 2006, as opposed to none a decade earlier. Crow, supra note 14.
\item \textsuperscript{16} \textit{Resolved Stolen Art Claims}, Herrick, Feinstein LLP (2009), http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=12567.
\end{itemize}
only thirteen by art dealers or auction houses. The majority—137 cases—were claims made against public museums, country or city governments, or non-profit foundations. Of these 137 claims, only fifteen resulted in litigation; in other words, more than 120 heirs received works from public institutions without instituting a lawsuit.17 The United States museums which have surrendered Nazi-looted art include the Fine Arts Museum in San Francisco,18 the Wadsworth Atheneum in Stanford, Conn.,19 the Art Institute of Chicago;20 the Seattle Art Museum;21 the North Carolina Museum of Art in Raleigh;22 the Princeton University Art Museum;23 the Springfield Art Museum (Mass.);24 the Yale University Art Museum in New Haven, Conn.,25 the Menil Collection in Houston, Tex.;26 the Los Angeles

17. Id.
County Museum of Art; the Detroit Institute of Arts; the Utah Museum of Fine Arts; the Virginia Museum of Fine Arts; the Metropolitan Museum of Art; the Minneapolis Institute of Arts; the Solomon R. Guggenheim Foundation; the Museum of Modern


Art;\textsuperscript{34} the Seattle Art Museum,\textsuperscript{35} and the Hearst Castle in San Simeon, Calif.\textsuperscript{36}

Commentators have not given this pattern of claims against public institutions the sustained attention it deserves. Recovering art from a museum implicates two conflicting sets of ethical goods. First is the right of heirs to recover a personal benefit as compensation for their losses caused by the Holocaust. Second is the right of the public to retain the public good of art displayed in museums, which in most cases, came into possession of the works long after the war and via owners or donors far removed from the Nazis or looters who removed the works from their original owners.

The conflict of these two ethical principles can be seen in the several cases where claims have been made against institutions devoted to the welfare of Judaism as a whole. Thus, in 2009, the Jewish Museum of Prague conceded ownership of thirty-two paintings, including works by Paul Signac, Andre Derain, and Maurice Utrillo, to the heirs of Emil Freund. Freund was a Jewish art collector whose Prague-based collection was confiscated by the Nazis upon his deportation to the Jewish ghetto in Lodz, Poland, where he died in 1942.\textsuperscript{37} The Nazis placed the confiscated works in a German storage facility, the Treuhandstelle, in Prague.\textsuperscript{38} In 1943, for unknown reasons, a large part of the collection was sent to the Jewish Museum of Prague.\textsuperscript{39}

Freund’s sisters made the first claim for the paintings in 1949, from their residence in the United States.\textsuperscript{40} They were not successful, perhaps because of the then-Communist government in Czechoslovakia. In 1950, the Jewish Museum was nationalized, and all of its works were removed to the Czech National Gallery.\textsuperscript{41} The
Freund collection was returned to the Jewish Museum in 2000, whose curators began to track down Freund’s heirs.\textsuperscript{42} There was no litigation once the heirs were located. Instead, the Jewish Museum gave the majority of the works to the heirs. The Czech Culture Ministry declared the remaining thirteen paintings part of the Czech Republic’s national heritage. The state then purchased these from the heirs.\textsuperscript{43}

Similarly, the Israel Museum of Jerusalem has returned works to heirs in at least three cases. In 2000, after negotiations with no subsequent litigation, the Museum conceded ownership of Camille Pissarro’s “Boulevard Montmartre, Spring” (1897) to Gerta Silberberg.\textsuperscript{44} She is the sole heir to a German-Jewish businessman and art collector who was forced by the Nazis to sell the painting in 1935.\textsuperscript{45} The Israel Museum knew that the painting had been owned by this businessman, but learned of the conditions of its forced sale from Silberberg’s attorneys, who had done research in the archives in the former East Germany.\textsuperscript{46} Joachim and Lionel Pissarro, great-grandsons of the artist (who was also Jewish) and experts on his work, helped identify the painting in question as one of the 143 works in the forced art collection sale.\textsuperscript{47} Silberberg currently allows the painting to be displayed in the Israel Museum on a long term loan, with a placard identifying its role in the history of Nazi persecutions.\textsuperscript{48}

Second, the Israel Museum returned an Edgar Degas drawing, “Four Nude Dancers in Repose” (1898), to Marei von Saher, heir of the prominent art dealer Jacques Goudstikker, in 2005. There was no

\textsuperscript{42} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
litigation.49 A Museum patron had donated the drawing, and the Museum was unaware where it had been after it left Degas’ studio. Von Saher sold the drawing in order to fund her continuing search for other works from her family’s lost collections.50

Finally, in 2008, the Israel Museum conceded ownership of three ancient gold-glass medallions to the heirs of the Dzialy ska Collection of the Goluchow Castle, Poland.51 In 1914, the Nazis had looted the medallions, two of which featured Jewish symbols such as torah scrolls, and sent them to Austria. At the end of the war, locals again looted the medallions from their storage place. The Israel Museum purchased the medallions from the antiquities market in Vienna in the 1960s with no information about their provenance. The heirs contacted the Museum and after several years of negotiation, the Museum conceded ownership without litigation. The Museum repurchased one of the medallions from the heirs, and a patron of the Museum purchased another, which is now on long term loan to the Museum.52

II. Museums and the Public Good

Few scholars have attempted to lay out comprehensive ethics of art, and even fewer have addressed the specific problems inherent in the situation when art recovered from museums ends up in private collections.54 Only a few commentators have noted that removing restituted art from public access is problematic.55

50. John Follain, Trader of the Lost Art, LONDON SUNDAY TIMES (Sep. 24, 2006), available at http://www.timesonline.co.uk/tol/life_and_style/article638800.ece.
52. Lovell, supra note 51.
53. Id.
54. For the ethics of art law in general, see John Henry Merryman, Stephen K. Urice & Albert E. Elsen’s LAW, ETHICS, AND THE VISUAL ARTS (5th ed. 2007)—though this collection of essays lacks a sustained discussion of Nazi-looted art.
Considering these specific examples of art returned by Jewish institutions, the conflict between art ethics and art law becomes clearer. Of those few who have attempted to provide a theory that covers many questions about the ethics of art, John Merryman’s treatment of the issue remains the most convincing and influential.\(^{56}\)

Merryman proposes that our treatment of artworks should be motivated by the importance that art has for society as a whole.\(^{57}\) He begins by surveying the different types of values art can present,\(^{58}\) pointing to the “expressive” values of artworks; their embodiment of the past; their expression of moral attitudes; their innate pathos; and their ability to express both individual and community identities.\(^{59}\) Merryman also discusses the educational, aesthetic, and monetary values of artworks.\(^{60}\)

Other scholars have also analyzed the different values of art. Some have pointed to the moral or religious values of art, such as its “power to edify and spiritually uplift.”\(^{61}\) Others look at art’s social and political value, such as its ability to inspire social movements.\(^{62}\) The value of the experience that art produces in its viewers has also been addressed, whether this experience is entertainment, shock, or aesthetic pleasure.\(^{63}\) Finally, there are the financial values of artworks—both the monetary value and the cultural cachet of owning a work, which can signal the collector’s taste and social place.\(^{64}\)

Unlike other thinkers who have discussed different values of art, Merryman presents a theory for ranking the importance of these values.\(^{65}\) Merryman proposes three “considerations” which he believes are necessary to any decision about the fate of an important work: preservation, truth, and access.\(^{66}\) He refers to preservation as


\(^{57}\) Id. at 348.

\(^{58}\) Id. at 345–55.

\(^{59}\) Id. at 345–49. For a discussion of the history of philosophers—including Croce and Collingwood—analyzing art’s expressive values, see Michael Hutter & Richard Shusterman, *Value and the Valuation of Art in Economic and Aesthetic Theory*, in *HANDBOOK OF THE ECONOMICS OF ART AND CULTURE* 197 (Victor A. Ginsburgh et al. eds., 2008).

\(^{60}\) Id. at 353–55.

\(^{61}\) Hutter et al., *supra* note 59, at 197.

\(^{62}\) Id. at 198.

\(^{63}\) Id. at 198–99.


\(^{66}\) Id. at 355.
not destroying the physical artwork.\textsuperscript{67} Merryman uses “truth” to “sum up the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship.”\textsuperscript{68} Finally, “access” means that artworks should be accessible to scholars and enjoyed by the public.\textsuperscript{69}

Merryman recognizes that those principles will often conflict.\textsuperscript{70} For example, the preservation of a watercolor is threatened if it is always accessible to the public, due to exposure to light in a public gallery.\textsuperscript{71} Accordingly, Merryman ranks the “considerations,” arguing that preservation of artwork is the most important, followed by truth, with access in the last place.\textsuperscript{72} He suggests that this ranking be taken into account when making decisions about the treatment of art. Thus, in the example of the watercolor, Merryman would limit public access in order to preserve the work.\textsuperscript{73}

Although Merryman does not suggest prohibiting the private ownership of important works of art, it is clear that public institutions, such as museums, are best suited to provide preservation, truth, and access, and are thus the best places to house art. Thus, Merryman’s proposal should be interpreted as giving priority to those values of art which provide the most good to the most people. In general, museum professionals are deeply committed to the value of public ownership of art. Indeed, a key feature of the standard ethical codes for American museums, as promulgated by the American Association of Museums (“AAM”) and the American Association of Museum Directors (“AAMD”), is that artworks may be “deaccessioned” (removed from a museum’s collections) only in extremely limited circumstances.

The importance of the role of the museum is even more crucial for institutions such as the Jewish Museum of Prague and the Israel Museum of Jerusalem. These museums have a mission of continuing to educate the public about Jewish history, such as through the display of the ancient gold-glass medallions with Jewish symbols—some of the earliest surviving representations of Jewish religion—or

\begin{itemize}
\item \textsuperscript{67} Id. at 355–56.
\item \textsuperscript{68} Id. at 359.
\item \textsuperscript{69} Id. at 360–61.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 361.
\end{itemize}
the work of the Jewish Impressionist painter Pissarro. Even more importantly, these museums remind the public of what happened during World War II. Indeed, the fact that works in their collections are examples of the history of looting or forced sales during World War II contributes to these museums’ mission because this history is precisely what they are trying to bring to public attention.

But when the ethics of museum display run up against the ethics of Nazi-era theft, the great majority of museums choose to give priority to private rights rather than the public good. For instance, even though the AAM bases its recommendations to its members on the belief that museums hold their collections in the public trust, the AAM recommends the restitution of Nazi-looted art. Similarly, Bernd Neumann, Germany’s Federal Commissioner for Culture, has stated that:

It’s understandable that [museum directors] would like to keep their collections as complete as possible. They’ve restored their pieces and cared for them over the decades. They want to have something to offer the public. But their behavior stands in contradiction to the moral responsibility that we have, which is without doubt more important.

By “moral responsibility,” Neumann referred to a responsibility to return Nazi-looted art. However, is it not true that offering art to the public is a moral responsibility as well? If so, the decision about which moral good to prioritize becomes more difficult than what commentators tend to assume.

III. Holocaust Claims in United States Courts and the Court of Public Opinion

As stated above, the vast majority of claims for the return of World War II looted art are made against public institutions rather

75. See supra notes 18–36 and accompanying text.
77. Id.
than private holders. A large part of the practical explanation for this is that the United States legal system gives claimants many reasons to pursue claims against public institutions.

There is little explicit statutory law addressing the issue of claims of Nazi-looted art. One exception is California’s Civil Procedure Code Section 354.3, which provides that an owner, heir, or beneficiary of an owner may bring an action to recover Holocaust-era artwork from a museum or gallery in a California state court, without having the claim dismissed because of the statute of limitations, if the action is commenced on or before December 31, 2010. The text of the statute does not specify whether the extension applies to claims brought against individuals and a California district court held in 2005 that the extension does not, in fact, apply to claims against individuals.

In the absence of specific statutes, most looted art claims are conducted as ordinary replevin actions for the return of stolen property. Thanks to the negotiations and suits brought by heirs, the legal mechanics of bringing such claims are currently well understood.

79. See supra Part I.
81. CAL. CIV. PRO. CODE § 354.3 (West 2006).
82. Adler, at *1 (involving a claim of ownership over a painting owned by Elizabeth Taylor).
As an initial step, the plaintiff must prove his or her legal standing to bring a claim. This is difficult, especially since the claimant is usually an heir of the original owner, not the owner himself. Lacking personal knowledge of the work, these heirs must rely on photos, family government records, or other documents such as insurance policies to prove their legal status. Reliance on faded photographs or vague records can lead to the confusion with similar paintings. Another difficulty inherent in these heirs’ claims is that different heirs may dispute their degree of ownership.

If the heirs have located the current holder of the work and can prove their family’s past ownership of a work, they can initiate a replevin action. Replevin allows the claimant to repossess wrongfully taken personal property. In the United States, such replevin actions are possible because no one, not even a good-faith purchaser, can acquire good title to stolen property. Thus, the court will award the artwork to a claimant who proves ownership, right to


84. Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 256.
85. Id.
86. Id.
89. Civil and Criminal Remedies in Stolen Art Litigation, supra note 81, at 1240.
91. See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), aff’d, 917 F.2d 278 (7th Cir. 1990); Schrier v. Home Indem. Co., 273 A.2d 248, 250 (D.C. 1971) (“[A] possessor of stolen goods, no matter how innocently acquired, can never convey good title”); O’Keeffe v. Snyder, 416 A.2d 862, 867 (N.J. 1980); Menzel v. List, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966); RESTATEMENT (SECOND) OF TORTS § 229 (1965). A good-faith purchaser is defined as one who buys without notice of the type of facts that would encourage an ordinarily prudent person to inquire about the seller’s title. 77 AM. JUR. 3D Proof of Facts § 2 (2008). See also Reyhan, supra note 83 (providing a general discussion of the reasoning behind legal systems that favor original owners as opposed to those that favor subsequent good-faith purchasers).
possession, detention of the property by the defendant, a demand for return made by the plaintiff, and a refusal by the defendant. 92

Looted art cases sometimes use conversion as an alternative theory to replevin. 93 Conversion, which allows plaintiffs to recover the monetary value of the claimed artwork instead of the return of the work itself, requires proof of plaintiff’s right to possess the property at the time of conversion, defendant’s wrongful act in depriving the plaintiff of this right, and damages. 94

However, the statute of limitations constrains when claimants can seek to recover works under either replevin or conversion theories. 95 A plaintiff’s claim will fail if title has vested in the good-faith purchaser of a stolen work upon the expiration of the statute of limitations on the initial theft. 96 There are several policy rationales for using a statute of limitations to cut off the original owner’s rights. One reason is to encourage claimants to initiate litigation before the passage of time decreases the availability and quality of evidence. 97 Another is to give repose to purchasers so they need not worry about original owners claiming property beyond the limitations period. 98

Jurisdictions have different rules for when the statute of limitations tolls. New York’s “demand and refusal” rule means that the statute of limitations begins to run only when the original owner

92. See Jennifer Anglim Kreder, Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal, 73 BROOK. L. REV. 155, 200 (2007) [hereinafter Creation of an International Tribunal]; 66 AM. JUR. 2d Replevin § 1 (2001); Tyler, supra note 83, at 456–57. See, e.g., Autocephalous, 917 F.2d at 290 (holding that a plaintiff must prove right to possession along with wrongful possession and unlawful detention by the defendant).


94. 77 AM. JUR. 3D Proof of Facts § 26 (2008); RESTATEMENT (SECOND) OF TORTS § 222A (1965) (defining conversion as “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel”).


has made a demand for return and the possessor has refused to return. This rule favors the plaintiff because it gives the plaintiff more time in which to find the current holder of the claimed work. However, a defendant can still point to the plaintiff’s lack of due diligence when arguing laches. The defendant may claim that the plaintiff’s unreasonable delay in bringing a claim prejudiced the defendant, and that it would therefore be unfair for the court to allow the claim, even if the statute of limitations has not yet expired.

Many looted art cases have been dismissed because the statute of limitations expired. However, the vast majority of these dismissed cases...
cases were brought against private owners. By contrast, museums often choose not to use the statute of limitations to argue for the dismissal of cases. This is because, since the late 1990s, it has been the policy of influential museum groups to not use technical defenses, such as the expiration of the statute of limitations, in Holocaust-era claims cases. Given the difficulty of overcoming the statute of limitations, the museums’ ethical choice is a huge incentive for heirs to make claims against museums rather than private owners.

Another type of ethical decision further impacts museums’ liabilities—the decision to ensure public access to artworks and information about these works. Simply put, a claimant has a greater chance of finding a disputed work if it is in a museum and thus published in the museum’s publically available records and catalogues. Plaintiffs also benefit when making a claim against a public institution because museums are reluctant to risk the reputational harm they think will likely follow from disputing the

105. See Resolved Stolen Art Claims, supra note 16.
107. There has been some debate over whether the fiduciary duties of museum trustees would require these trustees to vigorously defend all claims against a museum’s property and thus prohibit the museums’ current practice of foregoing “technical” defenses, such as the statute of limitations, in cases where the museum believes that the ownership claim is valid, since a trustee has a duty to preserve the trust property. UNIF. TRUST CODE § 809, (2005) (duty of preservation of trust property). Several scholars have argued that the flexibility of trustee fiduciary duties allows trustees to fulfill their duty of care while restituting artworks to heirs with valid ownership claims. See, e.g., Patty Gerstenblith, The Fiduciary Duties of Museum Trustees, 8 COLUM.-VLA J.L. & ARTS 175, 176 (1983); Range, supra note 55, at 657; Emily A. Graefe, Note, The Conflicting Obligations of Museums Possessing Nazi-Looted Art, 51 B.C. L. REV. 473 (2010). In practice, the many restitutions paid by United States museums have yet to raise serious protests of breach of fiduciary duties. For a discussion of deaccessioning artworks from a museum’s collection in general, see Jennifer L. White, Note, When It’s OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses, 94 Mich. L. Rev. 1041 (1996); Ass’n of Art Museum Dirs., Art Museums and the Practice of Deaccessioning, 2 (Nov. 2007) available at http://www.aamd.org/papers.
rights of the heir of a Holocaust victim. For example, the director of Austria’s Leopold Museum has publicly stated that disputing restitution claims against it has “damaged the reputation of the museum,” even though the museum’s position is that it is “unambiguously” the owner of the claimed works. 109 Accordingly, the director announced that the museum would henceforth not “insist on our legal prerogative and say that is the end of the story,” but would rather proactively deal with restitution claims by seeking out heirs. 110

Further evidence of museums’ awareness of the dangers of acquiring new artworks with questionable World War II provenance can be found in major museums’ recent modification of their acquisition policies. For example, the Metropolitan Museum of Art changed its Collections Management Policy (“Policy”) to require additional research if the provenance information offered by the work’s donor or seller is incomplete. 111 Furthermore, this provenance information is made public, and the Policy states that any claims for the work will be reviewed “promptly and responsibly” and settled in an “equitable, appropriate and mutually agreeable manner.” 112 Thus, the Policy allows the restitution of an artwork from the Museum’s collection when the Museum “is ordered to return an object to its original and rightful owner by a court of law; the Museum determines that another entity is the rightful owner of the object; or the Museum determines that the return of the object is in the best interest of the museum.” 113

The current position of many museums’ codes of ethics is similar—to aid heirs in making valid claims. The AAMD, a long-standing and influential group, maintains professional standards for museums. 114 In 1998, an AAMD Task Force recommended that

110. Id.
112. Id.
113. Id. at § VI.A.5. See also Art Museums and the Identification and Restitution of Works Stolen by the Nazis, ASS’N OF ART MUSEUM DIRS. 2–3 (May 2007), available at http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf (providing a checklist for member museums with steps to ensure that they are researching provenance and responding to claims).
museums be proactive on the issue of Nazi-looted art.\textsuperscript{115} Instead of waiting for heirs to bring claims, the Task Force argued that museums should conduct provenance research for all of the works with suspicious provenance in their collections, and then disseminate this information to the public.\textsuperscript{116} Any claims which do emerge should be, according to the Task Force, resolved “in an equitable, appropriate, and mutually agreeable manner.”\textsuperscript{117} The Task Force specifically recommends that member museums, when faced with a restitution claim, should consider waiving “technical” defenses such as the statute of limitations if this would be more equitable to the claimant.\textsuperscript{118}

A parallel organization, the AAM, has a similar set of recommendations for the ethical codes of its members, specifically, that “competing claims of ownership . . . should be handled openly, seriously, responsively and with respect for the dignity of all parties involved.”\textsuperscript{119} The AAM has also promulgated \textit{Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era}, the goals of which are to encourage member museums to research the ownership history of any pieces in their collections that changed ownership between 1932 and 1946, and to make the results of this research public, preferably through a website.\textsuperscript{120} Like the AAMD, the AAM specifically recommends that museums consider waiving “technical” defenses such as the statute of limitations if this would help reach an “equitable and appropriate resolution.”\textsuperscript{121}


\textsuperscript{116} Id. at §§ II.A, II.B, II.C.

\textsuperscript{117} Id. at §§ II.E.1, II.D.2, II.E.3.

\textsuperscript{118} Id. at §§ II.D, II.E.


\textsuperscript{120} Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, AM. ASS’N OF MUSEUMS (2001), available at http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf [hereinafter AAM Guidelines]. These recommendations have been adopted by many museums, with real results. For instance, the Toledo Museum of Art posted artworks with suspicious or unknown Nazi-era provenance on its website, leading to a claim to a Paul Gauguin painting by heirs who recognized the work and alleged that the painting had been sold under duress in 1938. Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 804 n.1, 805 (N.D. Ohio 2006). See also Elizabeth Olson, Web Site Goes Online To Find Nazi-Looted Art, N.Y. TIMES, Sept. 8, 2003, at E4 (providing more general information on AAM’s website initiative).

\textsuperscript{121} AAM Guidelines, supra note 120, at 7.
This willingness of museums to cooperate with restitution claims is not limited to the United States. The International Council of Museums (“ICOM”), the premiere global organization of museums, has recommended guidelines similar to AAMD in terms of proactive research and cooperation with claimants.\(^{122}\)

Although the AAMD and ICOM recommendations are fairly recent, the history of claims against museums show that museums have always been reluctant to enter the courtroom for restitution claims. In fact, museums generally allow the lawsuit to proceed only when they are convinced that the work in question was not looted. For example, the Detroit Institute of Arts brought a successful action to quiet title of a Van Gogh painting, *The Diggers*, claimed by the heirs of Martha Nathan.\(^{123}\) In the 1930s, Ms. Nathan had transferred some of her late husband’s art collection to Switzerland, and although she was forced by the Nazis to “donate” some of her art which remained in Germany, the Van Gogh was safe in Switzerland.\(^{124}\) She later sold this painting to a dealer, who then sold it to a Detroit collector, who donated it to the Institute.\(^{125}\) In 2004, Ms. Nathan’s heirs asserted an ownership claim to the Van Gogh.\(^{126}\) Only in the face of the clear record of voluntary sale did the Institute go to court instead of returning the painting.\(^{127}\)

Similarly, the Museum of Fine Arts in Boston filed a declaratory judgment action against the claimant of an Oskar Kokoschka painting, because the Museum’s research had convinced it that the claim was without merit.\(^{128}\) The claimant argued that the owner of the painting was forced to sell it in 1939 by the Nazis, but the Museum’s research showed that the 1939 sale was voluntary.\(^{129}\) Accordingly, the


124. *Id.*

125. *Id.* at *5.

126. *Id.* at *6.

127. *Id.*


129. *Id.*
Museum successfully argued for dismissal of the case based upon the expiration of the statute of limitations.\textsuperscript{130}

When the record is less clear, museums often return a claimed work, even if they do not fully believe that the claimant is entitled to it. Thus, a critic of one of the most well-known restitution specialists, Clemens Toussaint, has said that “[h]is restitution tactics are almost like blackmail because museums are so afraid of the bad publicity, they feel they have no choice.”\textsuperscript{131}

\textbf{IV. What Claimants and Their Attorneys Think About Their Goals and Methods}

It is clear that there are practical reasons why claiming a work from a museum is more likely to succeed than claiming one from a private collector. But what do heirs think about the parties who possess the works they seek?

Heirs often see the issue as one whose main importance is the unity of their families. They describe the artworks as symbols of the ancestors who once owned them.\textsuperscript{132} For example, a heir of Kashmir Malevich said that the most important thing about her attempts to recover one of his paintings was that it reunited her family: “Thanks to this case, we’ve discovered all of the family. We were divided by war, but now we are united.”\textsuperscript{133} Charlene von Saher, granddaughter of the art dealer Jacques Goudstikker, has commented that the restitution of the works looted from his collection is not “really about” the monetary value: “For me, what it’s really about is my grandparents. The paintings are exquisite, but it’s about what

\textsuperscript{130} Museum of Fine Arts v. Seger-Thomsschitz, No. 08 Civ. 10097 (RWZ), slip op. at 18 (D. Mass. May 28, 2009) (noting that “there is no evidence that [the original owner’s family] believed the transfer was not legitimate”). For other cases of museums similarly filing for declaratory judgments, see Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543, 544 (S.D.N.Y. 2008); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006).

\textsuperscript{131} Follain, supra note 50.

\textsuperscript{132} E.g., James Auer, 15th-Century Masterpiece May Go Home After 60-year Odyssey, MILWAUKEE J. SENTINEL, Apr. 2, 2000, at 1E (quoting one heir as saying “I know, when I saw it at the Louvre, it was a very emotional experience, because I’d heard stories about Andre’s flight to America . . . ”).

\textsuperscript{133} Crow, supra note 14.
belonged to my family.”

Similarly, another family described a claimed painting as “all that remained of the[ir] murdered parents.”

This focus on the importance of the works to family history has little to do with the choice of whom to make claims against or the choice of methods when making the claim. The reality is that most current owners are good-faith holders, unconnected to the looters of World War II, and few heirs have an explicit desire to claim works from museums. Indeed, several heirs have explicitly recognized the importance of museums. Marie Altman, who recovered a Klimt painting that had belonged to her aunt, sold the recovered work to Ronald Lauder because he promised to donate it to the Neue Gallerie in New York. She explained her decision by saying that “[i]t was very important for the heirs and for my aunt Adele that the painting be displayed in a museum.” Similarly, the heirs of Jacques Goudstikker, the art dealer whose gallery and collections were looted by the Nazis, arranged an exhibition of the recovered works that is currently touring museums, explaining that they “are hoping this show will symbolize his connoisseurship as a dealer. . . . People have forgotten him. We want the public to recognize his legacy,” and that the exhibition will tell the world “about a historical injustice put right.”

Given these goals of the heirs—educating the public about the Holocaust in general, and about esteemed ancestors in particular—the best home for a recovered work may be a public institution.


137. Carol Vogel, Recovered Artworks Heading to Auction, N.Y. TIMES, Feb. 22, 2007, at E1, available at http://www.nytimes.com/2007/02/22/arts/design/22heir.html?_r=2&oref=slogin. Of course, not all heirs are supportive of museums. One claimant, when asked if she would loan the artworks that she had successfully claimed back to the museum that had possessed them, replied, “[T]hey asked, ‘Would you loan them to us again?’ And I said, ‘We loaned them for 68 years. Enough loans.’” Sharon Waxman, A Homecoming, in Los Angeles, for Looted Klimts, N.Y. TIMES, Apr. 6, 2006, at E1.

138. Id.

139. Public institutions, which hold art with dubious provenance but no known claimants, also sometimes use this art for educational purposes. For example, in 2008, the French Government lent fifty-three of the over two thousand pieces of unreturned looted art it holds to the Israel Museum of Jerusalem for use in an exhibition called “Looking for Owners: Custody, Research and Restitution of Art Stolen in France during World War II.” See Press Release, The Israel Museum Jerusalem, Orphaned Art: Looted Art from the Holocaust in the Israel Museum (Jan. 2, 2008), available at http://www.
The question remains of whether heirs’ attorneys are likely to agree that recovered works should end up in museums. The answer seems to be both yes and no. A number of heirs’ attorneys have stated ideologies agreeing with the disposition of recovered works in public institutions. However, the realities of the legal system under which these lawyers work make it difficult to obtain this result.

Many of these attorneys share the heirs’ ideological commitment to righting historical wrongs. First, the attorneys speak in general terms of the justness of the heirs’ claims. Thus, for example, attorneys have written that the “common theme” in WWII art repatriation cases is “the application of principles of equity and conscience to right past wrongs”;140 that the “question of how effectively we are addressing the need to do something about Nazi-plundered art has taken on great legal and ethical significance”;141 and that the “guiding principle” of Holocaust repatriations is that “cultural property wrongfully taken from its rightful owners should be returned.”142 One prominent lawyer for these heirs often explains his career choices by quoting in his lectures and essays the art historian Eric Gibson’s statement that:

The Nazis weren’t simply out to enrich themselves. Their looting was part of the Final Solution. They wanted to eradicate a race by extinguishing its culture as well as its people. This gives these works of art a unique resonance, the more so since many of them were used as barter for safe passage out of Germany or Austria . . . The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.143

Second, the attorneys often discuss the personal emotional impact of representing heirs. The lawyer for Maria Altman has said that “it’s
been the greatest case of my career and a tremendous honor to represent Maria. It’s incredibly fulfilling to see the paintings come to the United States, taking the same path its owners took.”

Similarly, Larry Kaye, a lawyer for the heirs of Jacques Goudstikker called the case “[a] great story with a happy ending.” And even more eloquently, Kaye has linked the personal and the professional sides of such claims: “As a Jew, obviously, developments like this are very important to me and they are emotional; as a lawyer. . . . I look at it from the viewpoint as being able to do something through the rule of law that assists the victims of past crimes, and that’s a good feeling as well.”

Kaye’s quote is illustrative of the fact that many of the heirs’ lawyers have extraordinary levels of dedication to the general cause of reclaiming looted art. Many of these lawyers produce scholarly publications which attempt to clarify the law and advise potential claimants and owners of works with suspicious provenance. They also go to creative lengths to recover works. For example, lawyers have educated politicians on Holocaust claims issues and have obtained letters of support from these politicians in support of specific repatriation claims.

One important effect of a commitment to the heirs’ cause is that the lawyers fully support museums’ efforts to make recoveries easier. For example, one lawyer praised the North Carolina Museum of Art, for “not forc[ing] the heirs to prove their claim in court” and for not arguing about the statute of limitations, stating that the Museum was

144. Bamsey, supra note 136.
145. Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 249.
146. The Jewish Channel, supra note 134.
“doing the right thing.” Similar praise was given by lawyers to the American museums who returned works to the Goudstikker heirs, who simultaneously criticized European institutions that have not yet returned works as “coming up with reasons and excuses to avoid the issue.”

Perhaps most striking is one scholar’s statement that not only should defendants recognize the justice of heirs’ claims, but that courts as well are so persuaded of heirs’ need for justice that they bend the rules in their favor:

Perhaps certain issues are so socially important as to go beyond strict application of the rules; how else can one resolve the mainly plaintiff-oriented holdings in cases of this nature? Courts implicitly recognize the necessity of making a social statement in regard to those victimized during the Holocaust by crafting their holdings to achieve desirable social policy results.

Similarly, several scholars advocate entirely abandoning the statute of limitations defense in Holocaust-era claims cases.
Despite praising museums for “doing the right thing,” few of the lawyers in this field think that the museums are blameworthy. Larry Kaye, for example, has been quoted as saying “[i]n the past, people tried to say we were on a mission, but we’re not,” since he is “not fighting Nazis, but dispassionately sorting through a postwar landscape that may no longer include bad guys.”

Although lawyers recognize most museums’ clean hands, they are still willing to take advantage of possible public confusion about the responsibility of the defendant museum. One lawyer in the field has said that:

In . . . negotiations, we aim to convince the defendant gallery . . . of the value of settling without having to endure the cost and negative publicity of being sued as the holder[] of Holocaust Art and as the possessor[] of stolen property seized at the behest of the Nazi authorities.

Ideology aside, another motivation for lawyers who represent claimants is the fees. These lawyers typically enter into contingency arrangements, typically receiving one third of the value of the recovered artworks. Thus, the Goudstikker heirs face legal fees of at least $10.4 million—and this is the amount claimed by only one of the several law firms that they retained to recover their art. One sign that money has an influence in lawyers’ decisions is that the number of lawyers representing, or seeking to represent, heirs has risen in proportion to the rise of prices in the art market. In other words, more lawyers became interested in the field when the market value of claimed art rose high enough to lead to lucrative fees.

Of course, fees are not a major concern for many legal professionals involved in Holocaust-era cases. Many have advocated solutions which would reduce or even abolish legal fees for such

153. Crow, supra note 14. However, many lawyers do criticize—justly—museums for their history of questionable acquisition policies: “It was not considered abnormal for there to be a don’t-ask-don’t-tell policy in the art world . . . something without authorization is stealing. That’s a concept that’s been a long time coming.” Adcock, supra note 143 (quoting Howard Spiegler). The same lawyers usually acknowledge that museums no longer acquire works with dubious provenances.


155. Crow, supra note 14, (“Industrywide, fees can range from 20% to 50% of the art’s value; a one-third cut is standard”).

156. Vogel, supra note 137.


158. Crow, supra note 14; Michael Kimmelman, Klimts Go to Market; Museums Hold Their Breath, N.Y. TIMES, Sept. 19, 2006, at E1 (charting the rise in number of restitution cases and criticizing the behavior of claimants and their lawyers).
cases. For example, Larry Kaye has proposed that governments should declare an amnesty period for holders of art with suspicious provenance—a proposal that would help heirs recover works without the generation of any legal fees.\footnote{Looted Art: What Can and Should Be Done, supra note 147, at 667.}

Even the lawyers who are famous for their high fees in restitution suits have valid arguments for the price. The prominent European restitution expert Clemens Toussaint reportedly charges a fifty-percent contingency fee, but explains the amount as fair given the time it takes to research the claims—ten years for his work for the heirs of Kashmir Malevich—and the staff he must hire.\footnote{Follain, supra note 50.} For example, one researcher Toussaint hired to help with the Goudstikker case spent ten hours a day for three years at the Netherlands Institute for Art History in the Hague, to which Goudstikker had given photographs of the works in his gallery.\footnote{Id. (quoting the researcher as saying “You can’t imagine how many boxes of photographs labeled ‘landscape with river and bridge’ I went through.”).}

Given that these lawyers work on a contingency basis, where a faster recovery will increase their profits, it makes sense that they will gladly take advantage of the concessions offered by museums, even if they have no reason to think of museums as “bad guys.” However, it seems that the advantages of pursuing claims against museums have led lawyers and legal organizations to direct their recovery efforts entirely on public institutions, ignoring the possibility of recovering from private owners. For example, the California statute, discussed above, limits its extension of the statute of limitations to claims against museums and galleries, not private owners.\footnote{CAL. CIV. PROC. CODE § 354.3 (West 2006). See also supra pp. 112–13.} Additionally, the New York State Banking Department’s Holocaust Claims Processing Office, created in 1997 to provide assistance to individuals seeking to recover Holocaust-looted assets, including looted art, explains its mission as helping heirs make claims against museums.\footnote{Holocaust Claims Processing Office, History and Mission NEW YORK STATE BANKING DEPARTMENT, http://www.claims.state.ny.us/hist.htm. This statement of focus is not fully in accord with the Office’s actions, since it has assisted in the recovery of works held by individuals. NEW YORK STATE BANKING DEPARTMENT, HOLOCAUST CLA

The influential private foundation, the Commission for Art Recovery (affiliated with the World Jewish Congress), describes its mission as
brining “moral suasion” to bear on “museums and other institutions” that hold looted art.164

V. A Proposal: Heirs, Lawyers, and Museums Working Together

The idealized picture of Holocaust art claims may be that the works are returning to the family, but in reality, successful claimants often sell the works at auction or to dealers in order to cover litigation costs.165

Litigation costs in cases involving Nazi-looted art can be even more prohibitive than in other replevin cases, partially because of the expense of researching the work’s ownership history.166 Such costs are undoubtedly a factor in the decision of many heirs to sell works soon after recovery. For example, the heirs of Kashmir Malevich almost immediately sold their ancestor’s painting “Suprematist Composition” after recovering it in 2000 from the Museum of Modern Art, New York.167 In 2006 alone, Sotheby’s auctioned thirty-eight restituted works, and Christie was responsible for auctioning a


166. GAZZINI, supra note 165 at 39, 57–58 (discussing typical litigation costs in restitution cases); Dowd, supra note 152, at 4, 8 (“[I]t has become extremely expensive to research these questions, involving, as it does, hiring expensive historians in multiple jurisdictions to search for the needle in the proverbial haystack.”); Tyler, supra note 83, at 444 (“claimants must be prepared to spend at least $100,000 in costs just to begin litigation.”).

further three hundred million dollars worth of restituted art.\textsuperscript{168} The majority of these auctioned works enter private collections.\textsuperscript{169} Of those few commentators who have noted the problematic result of successful restitution claims— that the art in question is most often removed from public view—fewer still have suggested a solution to the problem. Ralph Lerner has suggested that claimed artworks should remain in museums, “where they belong.”\textsuperscript{170} In order to accomplish this, he proposes the creation of a registry for stolen art claims or an international commission, which would receive claims and award financial compensation to heirs who could prove their rights to works on display in museums.\textsuperscript{171} If the claim was successful, the museum would retain ownership of the art while heirs would be compensated by funds collected from various sources, such as governmental contributions, but not from museums.\textsuperscript{172}

Lerner’s proposal is attractive in theory, but it relies on governmental action and funding. Previous attempts to orchestrate a solution to Holocaust claims on a governmental level have shown how complex and unreliable this type of solution can be. For example, it was not until 1998 that the first truly international effort to address the issue of Nazi looting arose, with the Washington Conference on Holocaust-Era Assets.\textsuperscript{173} This conference, attended by representatives of forty-four nations, formulated guidelines for the resolution of Nazi-looted art claims.\textsuperscript{174} Notably, the guidelines encouraged nations to aid the resolution of such claims through the creation of tools such as central registries of looted art and public awareness campaigns.\textsuperscript{175} However, the guidelines are not binding, and the members of the conference recognized that the participating nations would resolve claims within their own legal systems.\textsuperscript{176} Thus it

\textsuperscript{168}. Crow, supra note 14.
\textsuperscript{169}. Id.
\textsuperscript{170}. Nazi Art Theft Problem, supra note 96, at 41.
\textsuperscript{171}. Id. at 35–40.
\textsuperscript{172}. Id.
\textsuperscript{173}. Creation of an International Tribunal, supra note 92 at 169–71.
\textsuperscript{174}. Id.
\textsuperscript{176}. Creation of an International Tribunal, supra note 92 at 171; Washington Conference Proceedings, supra note 175, at ¶¶ 1–11, at intro & ¶ 11 (“among participating nations there are differing legal systems”). See also Arabella Yip, Stolen Art: Who Owns It Often Depends on Whose Law Applies, 1.1 Spencer’s Art L.J. (2010).
seems that any governmental-level initiative will be difficult to orchestrate and long in coming.

Another commentator has suggested a solution that depends more on the self-interest of the claimants than on governmental action. Nathan Murphy argues that, because claimants of Nazi-looted art face enormous litigation costs, their most economically efficient course of action is almost always to share the value of the claimed artwork by settling.\(^\text{177}\) He outlines several types of settlements that would allow parties to share this value.\(^\text{178}\) For works claimed from museums, Murphy proposes that the claimant could allow the museum to retain the artwork for display if the claimant is satisfied with requiring the museum to indicate the work’s ownership history through accompanying signage.\(^\text{179}\) Alternatively, the museum could transfer ownership to the claimant, but the claimant could allow the museum to display the work through an extended loan, a special exhibition, or through retaining the rights for the work’s reproduction.\(^\text{180}\)

Although Murphy recognizes the value of the public display of art, he does not point to the several ways in which litigation costs are reduced for claims made against museums. Museums are required by their codes of ethics to provide information about artworks with dubious provenances, deal promptly with claims, and forego technical defenses such as the statute of limitations.\(^\text{181}\) All of these factors reduce the research and litigation costs for any claimants.

What should claimants do in recognition of both the public value of access to art and the private good of reduced litigation costs offered to them by museums? Some forward-thinking claimants have already taken these values into consideration when settling their claims. Sometimes this is because the claimant is itself a public institution who recognizes the value of public display. For example, in 1998, the Wadsworth Atheneum in Stamford, Conn. agreed to return a painting to the Italian government on the condition that Italy lent the works for an exhibition.\(^\text{182}\) And in 2002, the Springfield Art

\(^{177}\) See generally Nathan Murphy, Splitting Images: Shared-Value Settlement in Nazi-Era Art Restitution Claims, 3 FLA. ENT. L. REV. 41 (2009).

\(^{178}\) Id.

\(^{179}\) Id. at 28.

\(^{180}\) Id.

\(^{181}\) See supra pp. 117–21.

\(^{182}\) The painting at issue was Jacopo Zucchi’s “Bath of Bathsheba” (c. 1570) (now in the Galleria Nazionale d’Arte Antica, Rome), image available at http://www.wga.hu/frames-e.html?/html/z/zucchi/jacopo/bathsheb.html (last accessed Mar. 22, 2011);
Museum in Massachusetts returned Jacopo Bassano’s *Spring Sowing* to the Uffizi Gallery in Florence, Italy.\(^{183}\)

In other cases, the public does not lose its access to the work because the claimants and the museum work out a deal. For example, in 2000, the Art Institute of Chicago purchased a partial interest in a seventeenth century marble bust from the heirs, who then donated the remaining ownership interest to the museum.\(^{184}\) More frequently, museums enter into a monetary settlement with the heirs, in effect buying the painting from them directly.\(^{185}\)

In a few cases, the heirs have cushioned the blow to the public interest even further. For example, *Madonna and Child in a Landscape* by Lucas Cranach the Elder (1518), was claimed by Marianne and Cornelia Hainish, the grandnieces of Philipp von Gomperz, whose collection had been looted by the Nazis.\(^{186}\) The painting was held by the North Carolina Museum of Art in Raleigh, North Carolina.\(^{187}\) In 2000, the heirs made an arrangement with the Museum, whereby the Museum paid a much below-market price in return for a pledge to use the history of the painting as an educational vehicle.\(^{186}\)

Even more creative was Eric Weinmann’s 2001 claim of a painting jointly possessed by an art collector and the Yale University Art Museum, Gustave Courbet’s *Le Grand Pont* (1864). There was no litigation; instead parties reached a settlement in which the collector donated his interest to the Museum and the Museum lent the painting to Weinmann for ten years, in return for clear title to the work.\(^{189}\)


\(^{186}\) *Recovering Nazi-Looted Art*, supra note 22, at 298.

\(^{187}\) *Id.*

\(^{188}\) *Id.*

\(^{189}\) *Yale to Lend Disputed Painting*, supra note 25; *Gustave Courbet Painting Donated to Yale University Art Gallery*, supra note 25; Grandjean, *supra* note 25; David D’Arcy, *Yale and the Nazi Storm Trooper*, ART NEWSPAPER, Mar. 2, 2001, available at...
The recent resolution of the *Portrait of Wally* is another example of a compromise between private justice and the public interest in art. The legal dispute over this 1912 painting by the Austrian artist Egon Schiele began in 1998, when the Manhattan district attorney seized the painting while it was on loan to the Museum of Modern Art. The lender, Vienna’s Leopold Museum, was sued by the heirs of Lea Bondi Jaray. The heirs claimed that the Leopold Museum’s founder, Rudolf Leopold, had visited Bondi Jaray in London in 1953. Bondi Jaray asked for help recovering the *Portrait of Wally*, which she had been forced to leave behind when she fled Austria during World War II. The painting had been confiscated and sent to the Belvedere, Austria’s national museum. The heirs also claimed that instead of presenting Bondi Jaray’s case, Leopold had arranged to exchange a painting from his collection for *Portrait of Wally*, which then became a centerpiece of his collection and, eventually, the museum that he founded.

The case turned on whether the Leopold Museum was aware that the painting was stolen property when it entered the United States. If so, the painting was properly confiscated under the National Stolen Property Act. In 2009, the federal district court ruled that the painting had indeed been stolen by the Nazi regime in Austria. A jury trial for the issue of the Leopold Museum’s knowledge of this history was scheduled when a settlement was reached.

Under the settlement, the painting was exhibited in New York’s Museum of Jewish Heritage for three weeks. This museum, which describes itself as a “living memorial to the Holocaust,” surrounded the painting with signage and public events explaining its place in


191. *Id.* at 236.

192. *Id.* at 243.

193. *Id.*

194. *Id.* at 241.

195. *Id.* at 243.


197. *Id.* See also Shapiro, supra note 95, at 1158–59.


199. *Id.*

200. *Id.*
Jewish history.\footnote{MUSEUM OF JEWISH HERITAGE, http://www.mjhnyc.org/ (last visited Mar. 22, 2011).} After this exhibition, the painting was returned to the Leopold Museum’s permanent collection in exchange for a payment by the Museum of nineteen million dollars to Bondi Jaray’s estate.\footnote{Id.} The painting must now be displayed with a statement agreed upon by the Museum and the heirs.\footnote{Lee Rosenbaum, an influential cultural critic, wrote that “some things about the resolution still don’t seem quite right,” pointing to the fact that the painting would return to Austria, “the country that Bondi Jaray had fled and the one from which she had vainly attempted to have her cherished painting returned,” and that the Leopold Museum issued a statement reiterating its belief that Leopold had acquired the work in good faith. Lee Rosenbaum, ‘Portrait of Wally’ Settlement: What’s Wrong With This Picture?, HUFFINGTON POST (Aug. 17, 2010, 9:36 PM), http://www.huffingtonpost.com/lee-rosenbaum/portrait-of-wally-settlement_b_684234.html. Rosenbaum’s attitude is another sign both that disputes in Holocaust art cases are “about” many more things than just the art itself, and that the public as a whole is concerned in these cases, not just the claimants and the holders.} The statement describes the painting’s history, including the New York court case, and its fate during the Nazi era.\footnote{Stipulation and Order of Settlement and Discontinuance at 4, U.S. v. Portrait of Wally, No. 99 Civ. 9940 (MBM), 2002 WL 553532 (S.D.N.Y. July 20, 2010).} However, even though the Museum will retain the painting, the settlement is not ideal for the public interest in seeing works of art, since the Museum plans to auction off other works of art in its collections in order to pay the nineteen million dollars to the heirs.\footnote{The text of the statement can be located at the Museum of Jewish Heritage’s website. Portrait of Wally Neuzil, available at http://www.mjhnyc.org/wally/Schiele_PortraitofWally.pdf; similarly, the directors of the Israel Holocaust Memorial and the Israel Museum have proposed that museums should be allowed to retain works as long as theft during the Holocaust is labeled as such. See Israeli Experts Propose Museums Keep Looted Art, MUSEUM-SECURITY.ORG, http://www.museum-security.org/00/042.html#6 (last visited Mar. 22, 2011).}

Considering these innovative agreements, which satisfy both the public and the private good, I propose that the attorneys who pursue claims on behalf of heirs should recommend this type of arrangement to their clients, where the work remains on public display, ideally with an accompanying text explaining its history.\footnote{Catherine Hickley, Vienna Psychotherapist Tackles Nazi-Era Claims at Museum Founded by Father, BLOOMBERG NEWS (Aug. 18, 2010, 4:00 PM). http://www.bloomberg.com/news/2010-08-17/vienna-psychotherapist-tackles-nazi-era-claims-at-museum-founded-by-father.html.} Thus, instead of the
“winner takes all” approach of traditional litigation, the balance of the ethical importance of righting the private wrongs of the Holocaust and of preserving the public interest in art can intersect.

Another way to lessen the blow to the public interest may be to ensure that museums are able to recover their costs. Thus, in a few cases, museums have recovered damages from third parties for their loss incurred by returning a work to an heir. For example, the Seattle Art Museum sued the gallery that had sold a Henri Matisse painting to a museum patron who had bequeathed it to the museum. After the court held that it had jurisdiction over the gallery to hear the museum’s claims that the gallery had committed an intentional tort by misrepresenting the painting’s Holocaust-era provenance to the museum patron, the parties settled. The gallery agreed to pay the museum’s legal costs and to provide an equivalent to the Matisse, either in cash or other art.

Arrangements which split the value of the work between claimants and museums are also fair. In these cases, museums are effectively offering a litigation discount to claimants by electing not to use the statute of limitations, throwing their records open to the public, and other practices beneficial to plaintiffs. Instead of taking advantage of these practices by exclusively pursuing claims against museums rather than private collectors, claimants should recognize these benefit by conceding other things in return, namely, a much-discounted purchase price of the work to the museum.

The consensus among observers is that the amount of Nazi-looted art restitution claims will increase, due to growing awareness of the

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Baroness Deech, in the House of Lords Second Reading of the U.K.’s Holocaust (Return of Cultural Objects) Bill, 10 July 2009. This argument is true only if a work of art can be only one thing at a time—either an object of beauty or a looted object; either speaking of “loss and war” or of “creativity and insight.” However, artworks have long meant different things to different people, or even different things at different moments of observation by the same person, and thus, it is not self-evident why a looted artwork cannot continue to be used for “educational and aesthetic aims” even if the museum displaying it refuses to acknowledge its history, much less if this history is highlighted.

issue and to museums’ practices of making information more publically available. Thus, the conflict between the private and the public goods at play will increase as well. Of course, this proposal goes only a small way towards addressing the ethical issues at play. Indeed, Merryman suggests that this type of logical analysis may be near worthless when it comes to art: “We cannot resolve cultural policy questions on rational grounds alone. . . . [c]ultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms.” But we must try.

