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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.”¹

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

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1. Ronald S. Lauder, Chairman of the Commission for Art Recovery, as quoted at COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org> (last visited Mar. 20, 2011).

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.² Estimates place the percentage of art confiscated by the Nazis as between one fourth and one third of the total artworks in Europe.³ The Nazis passed special laws to regularize confiscation of

2. Some of the most notable publications on the history of looting during World War II and on governmental returns after the war include NANCY H. YEIDE, *BEYOND THE DREAMS OF AVARICE: THE HERMANN GOERING COLLECTION* (2009); JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* (2007); WOJCIECH KOWALSKI, *ART TREASURES AND WAR: A STUDY ON THE RESTITUTION OF LOOTED CULTURAL PROPERTY* (1998); *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Elizabeth Simpson, ed., 1997); LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994); MICHAEL J. KURTZ, *NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945-1955* (1985).

3. David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 39, 40 (2004).

artworks or even entire galleries from Jewish owners.⁴ 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.⁵ The best documented of these commando groups, the Einsatzstab Reichsleiter Rosenberg, took more than 22,000 artworks from museums and private collections across Europe.⁶ An estimated half of these looted artworks were never returned to their pre-war owners.⁷ There is still no knowledge as to the location of over 100,000 of these works.⁸

For several decades after the war, relatively few claimants used the courts to attempt to recover lost artworks.⁹ 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.¹⁰ The increasing digitalization of such archives, as well as the archives of museums and other large

4. MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945* (2008); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 243-44 (2006) [hereinafter *Avoidance and Resolution of Cultural Heritage Disputes*]; Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-looted Art Claims*, 43 HOUS. L. REV. 193, 196 (2006). See generally HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997) (describing the Nazi confiscation of five art collections); Center for Advanced Holocaust Studies USHMM 2003, *CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933-1945, NEW SOURCES AND PERSPECTIVES* (2003).

5. Wissbroecker, *supra* note 3, at 40-41; Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. INT'L L. ANN. 1, 1-2 (1998) ("The Fuhrer aspired to centralize and to consolidate artistic property in order to establish Germany as the cultural capital of the Western World"); JOHN E. CONKLIN, *ART CRIME* 218 (1994).

6. *Activity of the Einsatzstab Reichsleiter Rosenberg in France*, C.I.R. No.1 (Aug. 15, 1945), available at http://www.lootedart.com/MN51H4593121_showwholedoctree;1; FELICIANO, *supra* note 4, at 35.

7. Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 170 (2005).

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

9. Alexis Derrossett, *The Final Solution: Making Title Insurance Mandatory for Art Sold in Auction Houses and Displayed in Museums That Is Likely to Be Holocaust-looted Art*, 9 T.M. COOLEY J. PRAC. & CLINICAL L. 223, 232 (2007); Laura Fielder Redman, *The Foreign Sovereign Immunities Act: Using a "Shield" Statute as a "Sword" for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT'L L.J. 781, 783 (2008).

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.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.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.¹³ Finally, increases in art prices made the expenses of research and the legal process seem justified.¹⁴ All of these factors led to a sharp increase in restitution claims.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.¹⁶ Of around 170 claims listed (litigations, settlements, and negotiations), only eighteen of the claimed artworks were held by private collectors and

11. Kiesha Minyard, Comment, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT'L L.J. 115, 117 (2007).

12. Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 88 (1999) (describing impact of books on Nazi art theft published in the 1990s).

13. *Alsdorf v. Bennigson*, No. 04 C 5953, 2004 WL 2806301, at *1–*2, *11 (N.D. Ill. Dec. 3, 2004); Minyard, *supra* note 11, at 118; Julian Radcliffe, *The Work of the International Art and Antiques Loss Register*, in *THE RECOVERY OF STOLEN ART* 189, 191 (Norman Palmer ed., 1998).

14. Kelly Crow, *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, *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, *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, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 178–79 (2007).

15. Thus, Sotheby’s reported auctioning thirty-eight restituted works in 2006, as opposed to none a decade earlier. Crow, *supra* note 14.

16. *Resolved Stolen Art Claims*, HERRICK, FEINSTEIN LLP (2009), <http://www.herrick.com/sitecontent.cfm?pageID=29&itemID=12567>.

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.*

18. Mary Jo Palumbo, *At War Over Art*, BOS. HERALD, June 3, 1997, at 35; David Bonetti, *Pilfered Painting Returns to Talk of Larger Issue: Repatriation of Art Debated as Mola Stolen in Paris after WWII Shows in S.F.*, S.F. EXAMINER, Feb. 24, 1995, at D1.

19. Stevenson Swanson, *Amicable Resolutions in Disputes of Ownership are Rare in Art World*, CHICAGO TRIBUNE, June 28, 1998, at 4; John Marks, *How Did All That Art End Up in Museums?* U.S. NEWS & WORLD REP., Jun. 8, 1998; Palumbo, *supra* note 18, at 35.

20. Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 CONN. J. INT'L L. 297, 303 (2001) [hereinafter *Recovering Nazi-Looted Art*]; Ron Grossman, *Tracing Histories: How a Family's Degas Traveled from Their Estate to the Center of Controversy*, CHI. TRIB., Jan. 28, 2001, at C1; Marilyn Henry, *Holocaust Victims' Heirs Reach Compromise on Stolen Art*, JERUSALEM POST, Aug. 16, 1998, at 3; Charles Leroux, *Boston Museum Settles Holocaust-era Art Claim*, CHI. TRIB., Oct. 21, 2000, at N24.

21. *Recovering Nazi-Looted Art*, *supra* note 20; *Recovery and Return of Stolen Property: Seattle and German Museums Return Looted Art and New York Museum Settles*, 15.8 INT'L ENFORCEMENT L. REP. (1999).

22. *Recovering Nazi-Looted Art*, *supra* note 20; Marilyn Henry, *North Carolina Museum Returns Painting Stolen by Nazis*, JERUSALEM POST, Feb. 6, 2000 [hereinafter Henry, *North Carolina Museum Returns Painting*].

23. Susannah Dainow, *Princeton Reaches Deal on Disputed Painting*, CHRON. HIGHER ED., June 29, 2001, at A26; *Entertainment Briefs*, ASSOCIATED PRESS, June 14, 2001; Marilyn Marks, *Art Museum Reaches Agreement to Keep Painting Taken During Nazi Era*, NEWS AT PRINCETON (June 13, 2001), <http://www.princeton.edu/main/news/archive/A97/94/04520/index.xml>.

24. *Museum Sues Over Looted Art It Returned*, ASSOCIATED PRESS, Aug. 23, 2003, available at <http://cpprot.te.verweg.com/0237.html>; *Museum Files \$3 Million Suit*, CNN.COM, Aug. 23, 2003, available at <http://replay.waybackmachine.org/20030824163459/http://www.cnn.com/2003/LAW/08/23/art.suit.ap/index.html> (accessed through the Internet Archive Index).

25. *Yale to Lend Disputed Painting*, N.Y. TIMES, Oct. 25, 2001, at D4; *Yale University, Gustave Courbet Painting Donated to Yale University Art Gallery*, PRESSWIRE, Oct. 24, 2001, at M2.; Patricia Grandjean, *A Nazi Cloud Hangs Over a Painting on Loan at Yale*, N.Y. TIMES, Mar. 18, 2001, at 14CN; Walter V. Robinson, *Art from Collector with a Nazi Past Puts Yale on Spot*, BOSTON GLOBE, Jan. 22, 2001, at A1.

County Museum of Art;²⁷ the Detroit Institute of Arts;²⁸ the Utah Museum of Fine Arts;²⁹ the Virginia Museum of Fine Arts;³⁰ the Metropolitan Museum of Art;³¹ the Minneapolis Institute of Arts;³² the Solomon R. Guggenheim Foundation;³³ the Museum of Modern

26. Patricia Johnson, 'A Soul-Searching Experience': *Inquiry Resolves Questions Over Art Looted During Nazi Occupation*, HOUS. CHRON., Jan. 24, 2002, available at <http://www.chron.com/cs/CDA/story.hts/metropolitan/1224235>; *Nazi-Robbed Matisse Painting to Stay in Houston*, DEUTSCHE PRESSE-AGENTUR, Jan. 24, 2002.

27. Christopher Knight, *Wartime Loot Gets a Too-Hasty Boot*, L.A. TIMES, Mar. 8, 2002, available at <http://articles.latimes.com/2002/mar/08/entertainment/et-knight8>; Suzanne Muchnic, *Museum to Return Artwork Looted by Nazis*, L.A. TIMES, Mar. 7, 2002, available at <http://articles.latimes.com/2002/mar/07/local/me-linen7>.

28. Press Release, Detroit Institute of Arts, *Looted Painting Enters DIA Collection. Owners Compensated 60 Years After Confiscation* (Sept. 5, 2002), available at <http://replay.waybackmachine.org/20030226134758/http://www.dia.org/information/looted.htm> (accessed through the Internet Archive Index).

29. Alexandra Sage, *Utah Museum Returns Painting Looted by Nazis to NYC Heirs*, BOS. GLOBE, Apr. 1, 2004, available at <http://www.lootedart.com/news.php?r=MFSOMT29270>.

30. Roy Proctor, *Painting Was Stolen by Nazis*, RICHMOND TIMES-DISPATCH, May 21, 2004, at A-1; Press Release, Holocaust Claims Processing Office, Governor Announces Second Holocaust-Era Art Recovery in One Month, Painting Returned to Rightful Heir (May 21, 2004), available at <http://www.claims.state.ny.us/pr040521.htm>; Press Release, Ministry of Foreign Affairs of the Republic of Poland, *Jan Mostaert- Portrait of a Courtier* (Dec. 20, 2005), available at <http://www.msz.gov.pl/Jan,Mostaert,Portrait,of,a,Courtier,3883.html>; Press Release, Virginia Museum of Fine Arts, VMFA to Return Painting Looted by Nazis to Descendant of Rightful Polish Owners (Sept. 22, 2005), available at <http://replay.waybackmachine.org/20100115160504/http://www.vmfa.museum/mostaert.html> (accessed through the Internet Archive index).

31. Press Release, New York State Banking Department, *Looted Drawing Returned to Heirs of Original Owner*, (Oct. 30, 2007), available at <http://www.banking.state.ny.us/pr071030.htm>.

32. Mary Abbe, *MIA Sends Nazi 'Loot' Home to Paris*, STAR TRIB., Oct. 30, 2008, available at <http://www.startribune.com/entertainment/stageandarts/33551004.html?>

33. Larry Neumeister, *Picasso Paintings to Stay in New York Museums Following Settlement*, THE GUARDIAN, Feb. 2, 2009, available at <http://www.guardian.co.uk/artanddesign/2009/feb/02/picasso-guggenheim-moma-new-york-nazi>; Randy Kennedy, *Museums and Heirs Settle Dispute Over Picasso*, N.Y. TIMES, Feb. 3, 2009, available at http://www.nytimes.com/2009/02/03/arts/design/03arts-MUSEUMSHEIRS_BRF.html.

Art;³⁴ the Seattle Art Museum,³⁵ and the Hearst Castle in San Simeon, Calif.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 1942.³⁷ The Nazis placed the confiscated works in a German storage facility, the Treuhandstelle, in Prague.³⁸ In 1943, for unknown reasons, a large part of the collection was sent to the Jewish Museum of Prague.³⁹

Freund's sisters made the first claim for the paintings in 1949, from their residence in the United States.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.⁴¹ The

34. Press Release, Herrick, Feinstein, LLP, Settlement Reached on Monet's Garden at Argenteuil (Aug. 22, 2001), *available at* <http://www.herrick.com/sitecontent.cfm?pageID=26&itemID=9063>.

35. *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029, 1031 (W.D. Wash. 1999) (proceeding as a third-party claim by the Seattle Art Museum against the art dealer after the museum returned the painting to the heirs); see Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 171-76 (2000).

36. Steve Chawkins, *Hearst Castle to Return Artworks Seized by Nazis*, L.A. TIMES, Apr. 9, 2009, *available at* <http://www.latimes.com/news/local/la-me-hearst-castle-art9-2009apr09,0,4101365.story>.

37. Bazylar, *supra* note 35.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

Freund collection was returned to the Jewish Museum in 2000, whose curators began to track down Freund's heirs.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.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.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 1935.⁴⁵ 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.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.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.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

42. *Id.*

43. THE JEWISH MUSEUM IN PRAGUE NEWSLETTER (2008), available at <http://www.jewishmuseum.cz/doc/zpravodaj/084.pdf>; *Stolen Czech Jewish Art to be Returned*, INT'L HERALD TRIB., Sep. 24, 2008, available at <http://replay.waybackmachine.org/20080928200344/http://www.iht.com/articles/ap/2008/09/24/europe/EU-Czech-Jewish-Restitution.php> (accessed through the Internet Archive index); *Freund art collection auctioned in Prague*, PRAGUE DAILY MONITOR, Apr. 27, 2009, available at <http://replay.waybackmachine.org/20090430155245/http://praguemonitor.com/2009/04/27/v-aluable-freund-art-collection-auctioned-prague> (accessed through the Internet Archive index).

44. Rebecca Trounson, *After Circuitous Journey, Painting Lost to Nazis Finds a Home in Israel*, L.A. TIMES, Feb. 19, 2000, <http://articles.latimes.com/2000/feb/19/news/mn-522>.

45. *Id.*

46. *Id.*

47. *Id.*

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.⁵² 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.⁵³

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

49. Press Release, Herrick, Feinstein LLP, Breakthroughs on Major Holocaust Claim (Mar. 14, 2005); Lien Heyting, *Erven Goudstikker Breiden Zoektocht Schilderijen Uit*, NRC HANDELSBLAD, Mar. 14, 2005; G. M. Kohnen von Huub, *New York: Ein Degas aus der Sammlung Goudstikker bei Sotheby's*, WELT ONLINE, Apr. 30, 2005; Marilyn Henry, *Reclaiming A Legacy*, ARTNEWS, May 2005, at 78.

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.

51. Jeremy Lovell, *Nazi Looted Relics Returned to Former Owner's Heirs*, REUTERS (June 20, 2008), available at <http://www.reuters.com/article/latestCrisis/idUSL30343606>; Press Release, The Commission for Looted Art in Europe, Restitution of Three Nazi Looted Gold-Glass Medallions from the Israel Museum Jerusalem to the Heirs of Dzialy ska Collection (July 1, 2008).

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.

55. E.g., Daniel Range, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 658 (2004).

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 owning 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

56. John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. R. 339, 340 (1989).

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.

64. Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of the Artist-Dealer Relationship*, 8 VILL. SPORTS & ENT. L.J. 99, 119 (2001).

65. Merryman, *supra* note 56, at 355–61.

66. *Id.* at 355.

not destroying the physical artwork.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.”⁶⁸ Finally, “access” means that artworks should be accessible to scholars and enjoyed by the public.⁶⁹

Merryman recognizes that those principles will often conflict.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.⁷¹ Accordingly, Merryman ranks the “considerations,” arguing that preservation of artwork is the most important, followed by truth, with access in the last place.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.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

67. *Id.* at 355–56.

68. *Id.* at 359.

69. *Id.* at 360–61.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 361.

the work of the Jewish Impressionist painter Pissarro.⁷⁴ 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.⁷⁵ For instance, even though the AAM bases its recommendations to its members on the belief that museums hold their collections in the public trust,⁷⁶ the AAM recommends the restitution of Nazi-looted art.⁷⁷ 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.⁷⁸

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

74. Mission Statement of the Jewish Museum in Prague Foundation, <http://www.jewishmuseum.cz/en/anadstatut.htm> (last visited Apr. 1, 2011); James S. Snyder, *Director's Welcome*, ISRAEL MUSEUM IN JERUSALEM, http://www.english.imjnet.org.il/htmls/page_1477.aspx?c0=14909&bsp=14393 (last visited Apr. 1, 2011).

75. See *supra* notes 18–36 and accompanying text.

76. AAM Board of Directors, *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ASS'N OF MUSEUMS 7 (2001), http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf.

77. *Id.*

78. *There's No Point Trying to Duck*, SPIEGEL ONLINE INT'L, Dec. 3, 2008, <http://www.spiegel.de/international/germany/0,1518,594232,00.html>.

than private holders.⁷⁹ 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.⁸⁰ 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, 2010.⁸¹ 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.⁸²

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.⁸³

79. See *supra* Part I.

80. There are more general statutes that address World War II as a whole, such as the Holocaust Victims Redress Act (HVRA, Pub. L. No. 105-158, 112 Stat. 15 (1998)). However, this Act does not create a private right of action. See *Adler v. Taylor*, No. CV 04-8472-RGFK (FMOx), 2005 U.S. Dist. LEXIS 5862, at *16 (C.D. Cal. Feb. 2, 2005) (dismissing plaintiffs' suit for failure to state a claim), *aff'd sub nom.* *Orkin v. Taylor*, 2007 U.S. App. LEXIS 11623 (9th Cir. May 18, 2007), *cert denied*, 2007 U.S. LEXIS 11852 (Oct. 29, 2007). Another important (and controversial) federal statute prevents the judicial seizure of culturally important artworks while on loan to non-profit institutions for exhibitions of national interest. 22 U.S.C. § 2459 (1965). See also *Deutsch v. Metropolitan Museum of Art*, No. 0100902/2004, slip op. at 55 (N.Y. Sup. Ct. July 21, 2004) (applying the statute to dismiss an heir's attempt to seize an El Greco painting on loan to an exhibition at the Metropolitan Museum of Art). When New York's Museum of Modern Art returned two Egon Schiele paintings to their foreign owner instead of holding them for the resolution of two American families of claimants, the families were highly critical of the Museum's response. "The Museum of Modern Art is washing its hands of this matter based on a narrow, tight response to the situation. . . . They are saying, 'Let the courts decide,' and that's not enough. The museum must make a moral determination on this." Judith H. Dobrzynski, *Modern Refuses To Detain 2 Schieles*, N.Y. TIMES, Jan. 5, 1998, available at <http://www.nytimes.com/1998/01/05/arts/modern-refuses-to-detain-2-schieles.html?scp=3&sq=jaray%20bondi&st=cse>.

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).

83. See generally Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041 (2005); Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549

As an initial step, the plaintiff must prove his or her legal standing to bring a claim.⁸⁴ This is difficult, especially since the claimant is usually an heir of the original owner, not the owner himself.⁸⁵ 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.⁸⁶ Reliance on faded photographs or vague records can lead to the confusion with similar paintings.⁸⁷ Another difficulty inherent in these heirs' claims is that different heirs may dispute their degree of ownership.⁸⁸

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.⁸⁹ Replevin allows the claimant to repossess wrongfully taken personal property.⁹⁰ 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.⁹¹ Thus, the court will award the artwork to a claimant who proves ownership, right to

(1999); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1 (1999); Barbara J. Tyler, *Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II*, 30 RUTGERS L.J. 441 (1999); Jennifer Anglim Kreder, *The Choice between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199 (2005) [hereinafter *Civil and Criminal Remedies in Stolen Art Litigation*]; Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955 (2001).

84. *Avoidance and Resolution of Cultural Heritage Disputes*, *supra* note 4, at 256.

85. *Id.*

86. *Id.*

87. See Shirley Foster, *Prudent Provenance—Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 163 (2001).

88. *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *31 (S.D.N.Y. Apr. 12, 2002).

89. *Civil and Criminal Remedies in Stolen Art Litigation*, *supra* note 81, at 1240.

90. *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 306 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008); BLACK'S LAW DICTIONARY 1325 (8th ed. 2004).

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).

93. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS* 422 (2d ed. 2008).

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").

95. 77 AM. JUR. 3D *Proof of Facts* § 42 (2008); Shira T. Shapiro, Note, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1174 (2008).

96. Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 16–17 (1998) [hereinafter *Nazi Art Theft Problem*]; see, e.g., *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806 (N.D. Ohio 2006).

97. Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2455 (1994); *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

98. Stephen E. Weil, *The American Legal Response to the Problem of Holocaust Art*, 4 ART ANTIQUITY & L. 285, 291 (1999).

has made a demand for return and the possessor has refused to return.⁹⁹ This rule favors the plaintiff because it gives the plaintiff more time in which to find the current holder of the claimed work.¹⁰⁰ The demand and refusal rule, as applied by courts, does not require due diligence in locating the current holder of the work.¹⁰¹ However, a defendant can still point to the plaintiff's lack of due diligence when arguing laches.¹⁰² 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.¹⁰³

Many looted art cases have been dismissed because the statute of limitations expired.¹⁰⁴ However, the vast majority of these dismissed

99. *E.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 807 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967), *rev'd*, 298 N.Y.S.2d 979 (1969) (applying the demand and refusal rule to find that statute of limitations had not expired); *Golden Budha Corp. v. Canadian Land Co. of Am.*, 931 F.2d 196, 201 (2d Cir. 1991); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 427 (N.Y. 1991). The other option is a "discovery rule." 77 AM. JUR. 3D *Proof of Facts* § 29 (2008). See *Ashton Hawkins et al., A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 51 (1995); *Minyard*, *supra* note 11, at 119.

100. See 77 AM. JUR. 3D *Proof of Facts* § 29; *Solomon R. Guggenheim Found.*, 569 N.E.2d at 430–31 (justifying plaintiff-friendly demand and refusal rule by reference to New York's cultural influence); *Hoelzer v. City of Stamford, Conn.*, 933 F.2d 1131, 1137–38 (justifying rule because of the extreme difficulty of recovering stolen art).

101. *Hoelzer*, 933 F.2d at 1138; *Solomon R. Guggenheim Found.*, 569 N.E.2d at 430.

102. *Republic of Turk. v. Metro. Museum of Art*, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990) (holding that defendant's complaint of plaintiff's lack of due diligence goes solely to the issue of laches, but is not a statute of limitations defense).

103. *E.g.*, *Wertheimer v. Cirker's Hayes Storage Warehouse Inc.*, No. 105575/00, slip op. (N.Y. Sup. Ct. Sept. 28, 2001), *aff'd*, 300 A.D.2d 117 (N.Y. App. Div. 2002) (applying Arizona's laches rule to dismiss claim because the heirs had done nothing since early 1950s to discover the painting's location). See *Alexandra Minkovich, Note, The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 *COLUM. J.L. & ARTS* 349, 349 (2004); *Lauren F. Redman, A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 *UCLA ENT. L. REV.* 203, 216 (2008). For an overview of the different statute of limitations rules, see *Stephanie Cuba, Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, *CARDOZO ARTS & ENT. L. J.* 447 (1999).

104. *E.g.*, *Adler v. Taylor*, No. CV 04-8472-RGFK (FMOx), 2005 U.S. Dist. LEXIS 5862, at *13 (C.D. Cal. Feb. 2, 2005), *aff'd sub nom. Orkin v. Taylor*, 2007 U.S. App. LEXIS 11623 (9th Cir. May 18, 2007), *cert denied*, 2007 U.S. LEXIS 11852 (Oct. 29, 2007) (finding that claimants should have discovered painting's whereabouts due to publication of images of painting, with ownership information, beginning in 1970); *Memorandum of Decision and Order in Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097-RWZ (D. Mass. 2009) (finding that claimants should have discovered painting's whereabouts due to almost continuous display at this museum since 1973 and various publications).

cases were brought against private owners.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

Another type of ethical decision further impacts museums' liabilities—the decision to ensure public access to artworks and information about these works.¹⁰⁸ 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.

106. See Association of Art Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945)*, available at <http://www.aamd.org/papers/guideln.php> [hereinafter *AAMD Task Force Report*]; HELEN J. WECHSLER, *MUSEUM POLICY AND PROCEDURES FOR NAZI-ERA ISSUES* (Institute of Art and Law 2001); N. E. PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* (Institute of Art and Law ed., 2000). For use of the affirmative defense of the statute of limitations by museums, see *Toledo*, 477 F. Supp. 2d at 809; *Solomon R. Guggenheim Found.*, 569 N.E.2d at 431; *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007).

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>.

108. See *AAM Recommended Procedures for Providing Information to the Public About Objects Transferred in Europe During the Nazi Era* (2000), <http://www.aamus.org/museumresources/prov/procedures.cfm>.

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

109. Catherine Hickley, *Vienna Psychotherapist Tackles Nazi-Era Claims at Museum Founded by Father*, BLOOMBERG NEWS, Aug. 18, 2010, available at <http://www.bloomberg.com/news/2010-08-17/vienna-psychotherapist-tackles-nazi-era-claims-at-museum-founded-by-father.html>.

110. *Id.*

111. *Collections Management Policy*, METRO. MUSEUM OF ART, 6 § IV.D.2.a-c (Nov. 2008), available at http://www.metmuseum.org/works_of_art/collection_database/collections_mgmt_policy.pdf.

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).

114. *About AAMD*, ASS'N OF ART MUSEUM DIRS., <http://www.aamd.org/about/> (last visited Apr. 8, 2011).

museums be proactive on the issue of Nazi-looted art.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.¹¹⁶ Any claims which do emerge should be, according to the Task Force, resolved “in an equitable, appropriate, and mutually agreeable manner.”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.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.”¹¹⁹ The AAM has also promulgated *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.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.”¹²¹

115. *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945)*, ASS’N OF ART MUSEUM DIRS. § II (1998), available at <http://www.aamd.org/papers/guideln.php>.

116. *Id.* at §§ II.A, II.B, II.C.

117. *Id.* at §§ II.E.1, II.D.2, II.E.3.

118. *Id.* at §§ II.D, II.E.

119. *Code of Ethics for Museums*, AM. ASS’N OF MUSEUMS (2000), available at <http://www.aam-us.org/museumresources/ethics/coe.cfm>.

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).

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

122. *Code of Ethics*, INT’L COUNCIL OF MUSEUMS, at ii, 3, 10 (2006), available at http://icom.museum/code2006_eng.pdf (requiring due diligence in determining provenance and prompt cooperation in restitution claims); Int’l Council of Museums, Press Release, Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners (Jan. 14, 1999), available at <http://icom.museum/worldwar2.html> (also recommending provenance research and “actively address[ing] the return” of Nazi-looted art).

123. *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, *4-5 (E.D. Mich. Mar. 31, 2007).

124. *Id.*

125. *Id.* at *5.

126. *Id.* at *6.

127. *Id.*

128. Press Release, Museum of Fine Arts, Museum of Fine Arts, Boston, Asserts Rightful Ownership of Kokoschka Painting, *Two Nudes (Lovers)* (Jan. 24, 2008), available at http://www.mfa.org/dynamic/sub/ctr_link_url_5980.pdf.

129. *Id.*

Museum successfully argued for dismissal of the case based upon the expiration of the statute of limitations.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.”¹³¹

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.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.”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

130. *Museum of Fine Arts v. Seger-Thomschitz*, 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).

131. Follain, *supra* note 50.

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 . . .”).

133. Crow, *supra* note 14.

belonged to my family.”¹³⁴ Similarly, another family described a claimed painting as “all that remained of the[ir] murdered parents.”¹³⁵

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.”¹³⁶ 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,”¹³⁷ and that the exhibition will tell the world “about a historical injustice put right.”¹³⁸

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.¹³⁹

134. The Jewish Channel, *Week in Review*, YOUTUBE (Mar. 13, 2009), http://www.youtube.com/watch?v=zX7a_0p6Fz4&eurl=http://newsdesk.tjctv.com/.

135. Warren Hoge, *The Saturday Profile: A Curator of Lost Memories*, N.Y. TIMES, May 25, 2002, at A4.

136. Ben Bamsey, *Maria Altman*, ARTWORKS MAG., Jan. 9 2009, available at <http://artworksmagazine.com/2009/01/maria-altmann/>.

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://oww>.

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

lootedart.com/web_images/pdf/ORPHANED%20ART_FINAL%20RELEASE%5B1%5D.pdf.

140. Sarah K. Mann, *What's a Survivor to Do? An Inquiry into Various Options and Outcomes for Individuals Seeking Recovery of Nazi-Looted Art*, 52 LOYOLA U. CHICAGO INT'L L. REV. 191, 196 (2008).

141. Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 11, 26 (1999) [hereinafter *Schiele Paintings*].

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

143. Thomas Adcock, *The Art Theft Experts: Herrick, Feistein Duo Has Long, Distinguished Career in Recovering Looted Works*, N.Y. L.J., Feb. 24, 2006, available at <http://herrick.com/siteFiles/News/3779C3969ACBEFF7A19FCF33CEE4D45D.pdf>; *Recovering Nazi-Looted Art*, *supra* note 19, at 312.

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."¹⁴⁴ Similarly, Larry Kaye, a lawyer for the heirs of Jacques Goudstikker called the case "[a] great story with a happy ending."¹⁴⁵ 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."¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸

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.

147. For example, the four attorneys who practice art law at the firm of Herrick, Feinstein in New York have produced a long list of publications, the more recent of which are: Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657 (1999) [hereinafter *Looted Art: What Can and Should Be Done*]; Howard N. Spiegler & Lawrence M. Kaye, *Looted Art Carries Its Own Set of Problems*, N.Y. L.J., May 24, 2004; Howard N. Spiegler & Lawrence M. Kaye, *The Rescue Artist: A True Story of Art, Thieves, and the Hunt for a Missing Masterpiece*, NEW YORK LAW JOURNAL, 2005; Howard N. Spiegler & Mari-Claudia Jiménez, *Litigation against a Foreign Sovereign in the United States to Recover Artworks on Temporary Loan: The Malewicz Case*, JURISTE INT'L (2007); Howard N. Spiegler & Mari-Claudia Jiménez, *Surviving War and Peace: The Long Road to Recovering the Malevich Paintings*, J. OF ART CRIME (2009).

148. E.g., Herrick has obtained letters of support for the heirs of Baron Herzog, who are seeking to recover forty paintings from the Hungarian government, from Senator Clinton, Senator Lautenberg, Senator Kennedy, and Congresswoman Nita Lowey. *Commission for Art Recovery—Baron Herzog Collection*, HERRICK (2008), available at <http://herrick.com/sitecontent.cfm?pageID=21&itemID=870>.

“doing the right thing.”¹⁴⁹ 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.”¹⁵⁰

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.¹⁵¹

Similarly, several scholars advocate entirely abandoning the statute of limitations defense in Holocaust-era claims cases.¹⁵²

149. *Recovering Nazi-Looted Art*, *supra* note 19, at 297-98. *See also* Press Release, Madonna and Child Painting to Return to North Carolina: NC Museum of Art to Purchase Cranach Painting after Returning Ownership to Austrian Family (July 25, 2000). Spiegler was not involved in this claim.

150. The American museums “did not force the Goudstikker heir to prove her claim in court, did not defend on the ground that the statute of limitations barred the claim, and did not argue that returning the paintings would open the floodgates to myriad claims against museums about their collections.” *Avoidance and Resolution of Cultural Heritage Disputes*, *supra* note 4, at 252.

151. Sarah K. Mann, *What’s a Survivor to Do? An Inquiry into Various Options and Outcomes for Individuals Seeking Recovery of Nazi-Looted Art*, 5.2 LOYOLA U. CHI. INT’L L. REV. 191, 207 (2007-2008). The idea that the law, as it normally exists, is unfit for dealing with Holocaust issues has long roots; *see, e.g.*, Arendt criticizing the law for failing to prevent, and even for encouraging, German war crimes: “[Eichmann] did his duty, as he told the police and the court over and over again; he not only obeyed orders, he also obeyed the law.” HANNAH ARENDT, *EICHMANN IN JERUSALEM* 135 (1963).

152. *See, e.g.*, Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 444 (2003); Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 450-61 (1999); Raymond J. Dowd, *Federal Courts and Stolen Art: Our Duty to History*, 55.6 FEDERAL LAWYER 4, 9 (2008) (“It is to be hoped that district courts will interpret equitable doctrines such as laches in light of the mass extermination of an entire people . . . and will strike down any statutes of limitations that violate our nation’s duty under international law to provide a meaningful remedy”); *Nazi Art Theft Problem*, *supra* note 96, at 15 (“the Holocaust was an event so catastrophic that established legal concepts do not clearly resolve the issues at hand.”).

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.”¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸

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.

154. Burris & Schoenberg, *supra* note 83, at 1049.

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.

157. Crow, *supra* note 14.

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.¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹

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.¹⁶² 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.¹⁶³ The influential private foundation, the Commission for Art Recovery (affiliated with the World Jewish Congress), describes its mission as

159. *Looted Art: What Can and Should Be Done*, *supra* note 147, at 667.

160. Follain, *supra* note 50.

161. *Id.* (quoting the researcher as saying “You can’t imagine how many boxes of photographs labeled ‘landscape with river and bridge’ I went through.”).

162. CAL. CIV. PROC. CODE § 354.3 (West 2006). *See also supra* pp. 112–13.

163. 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 CLAIMS PROCESSING OFFICE, HOLOCAUST CLAIMS PROCESSING REPORT 2007 (detailing the recovery of Franz Xaver Winterhalter’s “Mädchen aus den Sabiner Bergen” from the collector Maria-Luise Bissonnette in 2007).

bringing “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

164. *About*, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/about> (last visited Mar. 22, 2011).

165. Crow, *supra* note 14. Attorneys’ fees are generally not recoverable in replevin actions. M. L. Cross, *Annotation, Recovery of Attorneys’ Fees As Damages by Successful Litigant in Replevin or Detinue Action*, 60 A.L.R. 2d 945 (1958). Some commentators have suggested that arbitration would be less expensive than litigation for Nazi-looted art claims, but given the large amounts of research into the work’s ownership history needed for either litigation or arbitration, the cost difference is probably not significant. See ISABELLA FELLRATH GAZZINI, *CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES* 57–58 (2004); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT’L L. & COM. 1, 16 n.113 (1997) (stating that drawn-out settlement negotiations can “become more expensive than had parties initially started with traditional litigation”); Owen C. Pell, *Using Arbitral Tribunals To Resolve Disputes Relating to Holocaust-Looted Art*, in *RESOLUTION OF CULTURAL PROPERTY DISPUTES, PAPERS EMANATING FROM THE SEVENTH PCA INTERNATIONAL LAW SEMINAR*, May 23, 2003 at 307, 324 (2004).

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.”).

167. Souren Melikian, *Work by Kazimir Malevich sold for record \$60 million*, N.Y. TIMES, Nov. 6, 2000, available at <http://www.nytimes.com/2008/11/06/arts/06iht-melik5.html>.

further three hundred million dollars worth of restituted art.¹⁶⁸ The majority of these auctioned works enter private collections.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.”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.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.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.¹⁷³ This conference, attended by representatives of forty-four nations, formulated guidelines for the resolution of Nazi-looted art claims.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.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.¹⁷⁶ Thus it

168. Crow, *supra* note 14.

169. *Id.*

170. *Nazi Art Theft Problem*, *supra* note 96, at 41.

171. *Id.* at 35–40.

172. *Id.*

173. *Creation of an International Tribunal*, *supra* note 92 at 169–71.

174. *Id.*

175. Proceedings, Washington Conference Principles on Nazi-Confiscated Art, App. G. (1998), ¶¶ 1–11, at 971–72, available at <http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf> [hereinafter *Washington Conference Proceedings*].

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.¹⁷⁷ He outlines several types of settlements that would allow parties to share this value.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.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.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.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.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.¹⁸⁸

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

Stevenson Swanson, *Amicable Resolutions in Disputes of Ownership are Rare in Art World*, CHI. TRIB., Jun. 28, 1998, at 4; John Marks, *How Did All that Art End Up in Museums?*, U.S. NEWS & WORLD REP., Jun. 8, 1998, reprinted at <http://www.museum-security.org/reports/03398.html>; Palumbo, *supra* note 18, at 35.

183. *Museum Sues Over Looted Art It Returned*, NEWSDAY.COM, Aug. 23, 2003, reprinted at <http://www.lootedart.com/news.php?r=MFSOMU50317>; *Museum Files \$3 Million Suit*, *supra* note 24.

184. Charles Leroux, *Boston Museum Settles Holocaust-era Art Claim*, CHI. TRIB., Oct. 21, 2000, at N24.

185. For example, in 2001 the Metropolitan Museum of Art of New York entered into a confidential monetary settlement with the heirs of the former owner of Claude Monet's *The Garden of Monet's House in Argenteuil* (1874). Press Release, Herrick, Feinstein, LLP, Settlement Reached on Monet's Garden at Argenteuil (Aug. 22, 2001).

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.¹⁹⁰ The lender, Vienna's Leopold Museum, was sued by the heirs of Lea Bondi Jaray.¹⁹¹ The heirs claimed that the Leopold Museum's founder, Rudolf Leopold, had visited Bondi Jaray in London in 1953.¹⁹² 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.¹⁹³ The painting had been confiscated and sent to the Belvedere, Austria's national museum.¹⁹⁴ 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.¹⁹⁵

The case turned on whether the Leopold Museum was aware that the painting was stolen property when it entered the United States.¹⁹⁶ If so, the painting was properly confiscated under the National Stolen Property Act.¹⁹⁷ In 2009, the federal district court ruled that the painting had indeed been stolen by the Nazi regime in Austria.¹⁹⁸ A jury trial for the issue of the Leopold Museum's knowledge of this history was scheduled when a settlement was reached.¹⁹⁹

Under the settlement, the painting was exhibited in New York's Museum of Jewish Heritage for three weeks.²⁰⁰ This museum, which describes itself as a "living memorial to the Holocaust," surrounded the painting with signage and public events explaining its place in

<http://replay.waybackmachine.org/20040313233115/http://www.theartnewspaper.com/news/article.asp?idart=4830>; Robinson, *supra* note 25.

190. United States v. Portrait of Wally, 663 F. Supp. 2d 232, 235 (S.D.N.Y. 2009) (denying motions for summary judgment and ordering trial).

191. *Id.* at 236.

192. *Id.* at 243.

193. *Id.*

194. *Id.* at 241.

195. *Id.* at 243.

196. United States v. Portrait of Wally, 105 F. Supp. 288, 290–91 (S.D.N.Y. 2000) (granting a motion to dismiss).

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

198. United States v. Portrait of Wally, 663 F. Supp. 2d at 276. David Bario, *Heirs of Jewish Art Dealer Win \$19M Settlement Over Schiele Painting Looted by Nazis*, THE AM. LAW., July 26, 2010, available at <http://www.law.com> (search for the title of the article).

199. *Id.*

200. *Id.*

Jewish history.²⁰¹ 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.²⁰² The painting must now be displayed with a statement agreed upon by the Museum and the heirs.²⁰³ The statement describes the painting's history, including the New York court case, and its fate during the Nazi era.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ Thus, instead of the

201. MUSEUM OF JEWISH HERITAGE, <http://www.mjhnyc.org/> (last visited Mar. 22, 2011).

202. *Id.* 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-settleme_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.

203. 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).

204. 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).

205. 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>.

206. At least one commentator seems to think that the public display of looted art, even when its history has been made known, is not acceptable:

Displaying looted art, once it is known to be such, is not just an invasion of privacy and a demonstration that wrongdoers may indeed profit from their crimes; it is also putting on show something that the owners never

“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.²⁰⁷ 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

meant to be seen in such circumstances. It has ceased to be an object of beauty and one that museums can be proud of or use for educational and aesthetic aims. The spectator cannot look at it without seeing the pain and betrayal that led it to be situated there in a national museum. It taints the spectators who knowingly take advantage of the presence of the picture there and it speaks to them of loss and war, not creativity and insight.

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.

207. *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999), *mot. for recons. granted*, 70 F. Supp. 2d 1163 (W.D. Wash. 1999), *vacated on recons.*, 124 F. Supp. 2d 1207 (W.D. Wash. 2000).

issue and to museums' practices of making information more publically available.²⁰⁸ 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."²⁰⁹ But we must try.

208. See, e.g., Dowd, *supra* note 152, at 4, 8 ("the caseload should soon increase"); Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES, Mar. 28, 2007, available at <http://www.nytimes.com/2007/03/28/arts/artsspecial/28law.html> (discussing "a climate newly sensitive to [repatriation] claims").

209. John Henry Merryman, *supra* at 56, 340-41.
