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

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Alongside their campaign of physically exterminating the Jewish population of Europe, the Nazis carried out a highly organized plan of cultural genocide which involved the confiscation or forced sale of hundreds of thousands of pieces of art. Although a sizable number of these works were returned to their owners or their heirs by the Allied forces after the war, many had disappeared into the hands of private possessors. Many remain hidden in private collections, but 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 artworks. This paper examines one little-examined, but ethically problematic aspect of these claims: the fact that the vast majority of them are made against public institutions rather than private collectors.

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1 Ronald S. Lauder, as Chairman of the Commission for Art Recovery, quoted on homepage of the Commission, at http://www.commartrecovery.org/.
The paper begins with a short survey of the history of World War II art looting and current legal responses, making 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 then discusses the public interest in keeping art in museums, followed by Part III, an analysis of the practical reasons which explain 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.

Part I: Jewish Claimants, Jewish Museums

The scale and organization of the looting of art during World War II was astounding. Estimates place the percentage of art confiscated by the Nazis as between one forth and one third of the total artworks in Europe. Special laws were passed to regularize confiscation of artworks or even entire galleries from Jewish owners. Commando groups were created to locate and

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remove artworks, which were either sold to fund the war or retained to be used to create a
planned Führermuseum in Hitler’s hometown. The best documented of these commando groups,
the Einsatzsab Reichsleiter Rosenberg, took more than 22,000 artworks from museums and
private collections across Europe. An estimated half of these looted artworks were never
returned to their pre-war owners. There is no sign of the location of over 100,000 of these
works.

For several decades after the war, relatively few claimants used the courts to attempt to
recover lost artworks. Beginning in the late 1980’s, this changed. Classified governmental
archives of documents relating to the war in Washington, Switzerland, and Germany opened to
the public, and survivors and heirs could at last discover the fate of their families’ artworks.

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) (hereinafter
“Feliciano”); Center for Advanced Holocaust Studies USHMM 2003, CONFISCATION OF JEWISH
PROPERTY IN EUROPE, 1933–1945, NEW SOURCES AND PERSPECTIVES (2003); Martin Dean,
ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945
(2008).

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. J. INT’L L. 1,
1–2 (1998) (“Hitler 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).

Activity of the Einsatzstab Reichsleiter Rosenberg in France, C.I.R. No.1 (15 August 1945),
available at http://www.lootedart.com/MN51H4593121_showwholedoctree;1; Feliciano, supra
note 2, at 35.

Sue Choi, The Legal Landscape of the International Art Market After Republic of Austria v.

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

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, 784–85 (2008); 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, 231 (2007); Kaye, Avoidance
and Resolution of Cultural Heritage Disputes, supra note 4, at 255–56.
increasing digitalization of such archives, as well as the archives of museums or other large holders of art, have also made research significantly easier.\(^\text{10}\) Additionally, an increase in scholarly and journalistic publications about World War II looting alerted potential claimants to histories that their parents or grandparents, the immediate survivors of the war, may not have wanted to discuss.\(^\text{11}\) The growth of foundations or other organizations dedicated to the issue of Nazi-looted art has also had an effect on the growth 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.\(^\text{12}\) Finally, increases in art prices made the expenses of research and the legal process seem justified.\(^\text{13}\) All of these factors led to a sharp increase in restitution claims.\(^\text{14}\)

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\(^{14}\) Thus, Sotheby reported auctioning thirty-eight restituted works in 2006, as opposed to none a decade earlier. Crow, supra at note 13, at W1.
The majority of these claims for restitution are made against public institutions. This fact is clear from the list of claims for art stolen during World War II maintained by the firm Herrick, Feinstein LLP. Of the just under 170 claims listed (litigations, settlements, or negotiations), only 18 of the claimed artworks were held by private collectors and only 13 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 15 resulted in litigation; in other words, more than 120 heirs received works from public institutions without instituting a lawsuit. The United States museums which have surrendered Nazi-looted art include the Fine Arts Museum, San Francisco; the Wadsworth Atheneum, Stanford, CT; the Art Institute of Chicago; the Seattle Art Museum; the North Carolina Museum of Art, Raleigh; 

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15 Claims for Art Stolen During the Nazi Era and World War II, Including Nazi-Looted Art and Trophy Art (2009), http://herrick.com/siteFiles/LegalServices/A509D2F79A206B3E1874858CFD50413D.pdf.  
17 Stevenson Swanson, Amicable Resolutions in Disputes of Ownership are Rare in Art World, CHICAGO TRIBUNE, Jun. 28, 1998 at 4; John Marks, How Did All that Art End Up in Museums? U.S. NEWS & WORLD REPORT, Jun. 8, 1998; Palumbo, supra note 16, at 35.  
19 Isaac, supra note 18; Spiegler, Recovering Nazi-Looted Art, supra note 18; Johnston & Clark, supra note 18, at 294; Recovery and Return of Stolen Property: Seattle and German Museums Return Looted Art and New York Museum Settles, 15.8 INT’L ENFORCEMENT LAW REPORTER (1999).  
20 Isaac, supra note 18; Spiegler, Recovering Nazi-Looted Art, supra note 18; Johnston & Clark, supra note 18, at 294; Museum Buys Back Nazi Painting, ASSOCIATED PRESS ONLINE, Jun. 2,
the Princeton University Art Museum;\textsuperscript{21} the Springfield Art Museum (MA);\textsuperscript{22} the Vizcaya Museum, Miami, FL;\textsuperscript{23} the Yale University Art Museum, New Haven, CT;\textsuperscript{24} the Menil Collection, Houston, TX;\textsuperscript{25} the Los Angeles County Museum of Art;\textsuperscript{26} the Detroit Institute of Art.

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R. Guggenheim Foundation;\textsuperscript{33} the Museum of Modern Art;\textsuperscript{34} the Seattle Art Museum,\textsuperscript{35} and the Hearst Castle, San Simeon, CA.\textsuperscript{36}

There is little sustained discussion of the problems inherent in the recovery of stolen art from public museums, which in most cases have come into possession of the works long after the war and from owners far removed from the Nazis or looters who removed the works from their original owners. This situation involves two conflicting sets of ethical goods. First is the right of heirs to recover a personal benefit to compensate for their personal losses caused by the Holocaust. Second is the right of the public to retain the public good of art displayed in museums.

The conflict of these two ethical principles can be clearly seen in the several cases where claims have been made against institutions devoted to the welfare of Judaism as a whole. Thus, in 2009, Jewish Museum of Prague conceded ownership of 32 paintings, including works by Paul Signac, Andre Derain, and Maurice Utrillo, to the heirs of Emil Freund. Fruend was a Jewish art collector whose Prague-based collection had been confiscated by the Nazis upon his deportation to the Jewish ghetto in Lodz, Poland, where he died in 1942. The Nazis placed


\textsuperscript{34} Id.


confiscated works in a German storage facility, Treuhandstelle, in Prague. In 1943, for unknown reasons, a large part of the collection was sent to the Jewish Museum of Prague.

Freund’s sisters made the first claim for the paintings in 1949, from their residence in the United States. They were not successful, perhaps because of the then Communist government in power in Czechoslovakia. In 1950, the Jewish Museum was nationalized, and all of its works were removed to the Czech National Gallery. The Freund collection was returned to the Jewish Museum in 2000, whose curators began to track down Freund’s heirs. There was no litigation once the heirs were located. Instead, the Jewish Museum gave the majority of works to the heirs. The Czech Culture Ministry declared the remainder, thirteen paintings, part of the Czech Republic’s national heritage. These were purchased from the heirs by the state.37

Similarly, the Israel Museum of Jerusalem has returned works to heirs in at least three cases. In 2000, after negotiations but no litigation, the Museum conceded ownership of Camille Pissarro’s “Boulevard Montmartre, Spring” (1897) to Gerta Silberberg.38 She is the sole heir to a German-Jewish businessman and art collector, her father-in-law, who was forced by the Nazis to sell the painting in 1935.39 The Israel Museum had known that the painting had been owned by this businessman, but learned of the conditions of its forced sale only from Silberberg’s attorneys, who had done research in archives in the former East Germany.40 Joachim and Lionel Pissarro, great-grandsons of the artist (who was also Jewish), and experts on his work, helped

40 *Id*. 
identify the painting in question as one of the 143 works in the forced sale of the art collection.\textsuperscript{41} Silberberg is currently allowing the painting to be displayed in the Israel Museum on a long term loan, with a placard identifying its role in the history of Nazi persecutions.\textsuperscript{42}

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 litigation.\textsuperscript{43} The drawing had been donated by a Museum patron, and the Museum had no idea where it had been after it left Degas’ studio. Von Saher sold the drawing on the art market in order to fund her continuing search for other works from her family’s lost collections.\textsuperscript{44}

Finally, in 2008 the Israel Museum conceded ownership of three ancient gold-glass medallions to the heirs of the Dzialyńska Collection of the Goluchow Castle, Poland.\textsuperscript{45} The medallions, two of which featured Jewish symbols such as torah scrolls, were looted by the Nazis in 1941, and were sent to Austria. At the end of the war, they were again looted by locals. The Israel Museum purchased the medallions from the antiquities market in Vienna in the 1960s, with no information about their provenance. The heirs contacted the Museum, and after several years of negotiation, the Museum conceded ownership without litigation. One of the medallions

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{44} John Follian, \textit{Trader of the Lost Art}, LONDON SUNDAY TIMES, Sep. 24, 2006, available at http://www.timesonline.co.uk/tol/life_and_style/article638800.ece (hereinafter “Follian”).
was repurchased by the Museum, and another was purchased by a patron of the Museum and is now on long term loan to the Museum.

Part II: Museums and the Public Good

Few scholars have attempted to lay out a 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. Only a few commentators have noted that removing restituted art from public access is problematic.

With these specific examples of art given up by Jewish institutions in mind, the conflict between several ethical goods involved in art and art law becomes clearer. Of those few who have attempted to provide a theory that will cover many questions about the ethics of art, John Merryman’s treatment of the issue remains the most convincing and influential.

Merryman proposes that the way we treat artworks should be motivated by the importance that art has for society as a whole. Merryman begins by surveying the different types of values art can present. Merryman points 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. Merryman also discusses the educational, aesthetic, and monetary values of artworks.

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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 & David Throsby eds., 2008) (hereinafter “Hutter & Shusterman”.)
Other scholars have also analyzed the different values of art. Some have pointed to the moral or religious values of art, such as art’s “power to edify and spiritually uplift”. Others look at art’s social and political value, such as its ability to inspire social movements. The value of the experience that art produces in its viewers has also been addressed, whether this experience is entertainment, shock, or aesthetic pleasure. Finally, there are the financial values of artworks – both the monetary value and the cultural cache of owning a work which can signal the collector’s taste and social place.

But unlike these other thinkers, who have discussed different values of art, Merryman presents a theory for ranking the importance of these values. Merryman proposes three “considerations” which he believes need to come into any decision about the fate of an important artwork: preservation, truth, and access. Preservation means not destroying the physical artwork. 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.” Finally, “access” means that artworks should be accessible to be studied by scholars and enjoyed by the public.

Merryman realizes that the principles will often conflict; for example, the preservation of a watercolor often prohibits it from being exposed to the light of a public gallery. Thus, Merryman suggests that the “considerations” be made in order of importance when decisions are made about the treatment of art. In his opinion, preservation of artwork is the most important consideration, followed by truth, with access following in the last place.

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50 Hutter & Shusterman, supra note 49, at 197.
51 Hutter & Shusterman, supra note 49, at 198.
Although Merryman does not suggest prohibiting the private ownership of important works of art, it is clear that public institutions such as museums are the best able to provide preservation, truth, and access, and are thus the best places to house art in order that its values may be enjoyed by the public. 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 this idea of 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 Museums of Prague and Jerusalem. These museums have a mission of continuing to educate the public about ethnic 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 the work of the Jewish Impressionist painter Pissarro. Even more importantly, these museums remind the public of what happened during World War II. I thus argue that such museums should be benefit from the discovery that the provenance of works in their collections contain histories of looting or forced sale, since this history is precisely what they are trying to bring to public education.

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

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

By “moral responsibility,” Neumann was referring to a responsibility to return Nazi-looted art. But is it not true that offering art to the public is a moral responsibility as well, and thus that the decision of which moral good to prioritize is a more difficult question than commentators have tended to assume?

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

As has been stated, above, the vast majority of claims for the return of World War II looted art are made against public institutions rather than private holders. A large part of the practical explanation for this choice of defendants is that the United States legal system gives claimants many reasons to pursue claims against public institutions.

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55 *Id.*

There is little explicit statutory law addressing the issue of claims of Nazi-looted art. One exception is California Civil Procedure Code § 354.3, a 2002 law which provides that an owner, or heir or beneficiary of an owner, may bring an action to recover Holocaust-era artwork from a museum or gallery, in a California state court without having the claim dismissed because of the statute of limitations, if the action is commenced on or before December 31, 2010. The text of the statute does not specify whether the extension applies to claims brought against individuals, and a California district court held in 2005 that the extension does not, in fact, apply to claims against individuals.

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

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As an initial step, the plaintiff must prove his or her legal standing to bring a claim.\textsuperscript{60} This is difficult, especially since the claimant is usually a heir of the original owner, not the owner himself.\textsuperscript{61} 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.\textsuperscript{62} Reliance on faded photographs or vague records can led to the confusion of similar paintings.\textsuperscript{63} Another difficulty inherent in the bringing of claims by heirs rather than original owners is that different heirs may dispute their degree of ownership.\textsuperscript{64}

If the heirs can prove their family’s past ownership of a work and have located the current holder of the work, they can initiate a replevin action. Replevin allows the claimant to repossess wrongfully taken personal property.\textsuperscript{65} Such replevin actions are possible because, in the United States, no one, not even a good faith purchaser, can acquire good title to stolen property.\textsuperscript{66} Thus, the court will award the artwork to a claimant who proves ownership, right to

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  \item[60] Kaye, Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 256.
  \item[61] Id.
  \item[62] Id.
  \item[63] Shirley Foster, Prudent Provenance - Looking Your Gift Horse in the Mouth, 8 UCLA ENT. L. REV. 143, 163 (2001).
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possession, detention of the property by the defendant, a demand for return made by the plaintiff and a refusal by the defendant, along with damages and theft.

However, the statute of limitations constrains when claimants can seek to recover works. A plaintiff’s replevin claim will fail if good title has vested in the good-faith purchaser of a stolen work upon the expiration of the statute of limitations on the initial theft expires. 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 begin cases before the passage of time decreases 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. Proof of Facts 3d “Proof of a Claim Involving Stolen Art or Antiquities” § 2 (2008). For a general discussion of the reasoning behind legal systems which favor original owners vs. those that favor subsequent good-faith purchasers, see Patricia Youngblood Reyhan, A Chaotic Palette: Conflict of Laws in Litigation between Original Owners an Good-Faith Purchasers of Stolen Art, 50 DUKE L.J. 955 (2000-2001).

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 (2001) (hereinafter “Kreder, Creation of an International Tribunal”); 66 Am. Jur. 2d Replevin § 1 (2001); Tyler, supra note 59, at 456–57. E.g., Autocephalous, 917 F.2d at 290 (plaintiff must prove right to possession along with wrongful possession and unlawful detention by the defendant). Nazi-looted art cases sometimes use conversion as an alternative theory to replevin. Conversion, which allows plaintiffs to recover the monetary value of the 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. Patty Gerstenblith, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 422 (2d ed. 2008); 77 Am. Jur. Proof of Facts 3d “Proof of a Claim Involving Stolen Art or Antiquities” § 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”).


the availability of and quality of evidence. Another is to give repose to purchasers, who do not need to worry about original owners claiming property beyond the limitations period.

Different jurisdictions have different rules for when the statute of limitations begins to toll. New York hosts many repatriation claims, since it has a plaintiff-friendly demand and refusal rule: the statute of limitations does not begin to run until the original owner has made a demand for return and the possessor has refused to return. This rule is favorable to the plaintiff, since it allows the plaintiff more time in which to find the current holder of the claimed work. Due diligence in locating the current holder is not required when the court applies the demand and refusal rule.

However, a defendant can still point to the plaintiff’s lack of due diligence when arguing laches. The defendant may claim that the plaintiff’s unreasonable delay in bringing a claim

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74 Hoelzer, 933 F.2d at 1138; Guggenheim, 569 N.E.2d at 430.

prejudiced the defendant, and thus that it would be unfair for the court to allow this claim, even if the statute of limitations has not yet expired.\textsuperscript{76}

Many looted art cases have been dismissed because of expiration of the statute of limitations.\textsuperscript{77} However, the great majority of these dismissed cases were brought against private owners. By contrast, it has been the policy of influential museum groups since the late 1990s to not use merely technical defenses, such as the expiration of the statute of limitations, in Holocaust-era claims cases.\textsuperscript{78} Given the difficulty of overcoming the statute of limitations, this


ethical choice on the part of museums is a huge incentive for heirs to make claims against museums rather than private owners.\textsuperscript{79}

Another type of ethical decision further impacts museums’ liabilities. This is the decision to ensure public access to artworks and information about these works.\textsuperscript{80} 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.

Another benefit of making a claim on a public institution is that museums are reluctant to undergo the reputational harm which they think is likely will follow from disputing the rights of the heir of a Holocaust victim.\textsuperscript{81} For example, the director of Austria’s Leopold Museum has

\textsuperscript{79} There has been some debate over whether the fiduciary duties of museum trustees would require these trustees to vigorously defend all claims against the museum’s property and thus prohibit 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, 7C U.L.A. 606. 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, \textit{The Fiduciary Duties of Museum Trustees}, 8 COLUM.-VLA J.L. & ARTS 175, 176 (1983); Range, supra note 47, at 657; Emily A. Graefe, \textit{The Conflicting Obligations of Museums Possessing Nazi-Looted Art}, 51 BOSTON COLLEGE L.R. 473 (2010). In practice, the many restitutions 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, \textit{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); Lauren McBrayer, \textit{The Art of Deaccession: An Ethical Perspective}, in ALI-ABA, \textit{COURSE OF STUDY: LEGAL PROBLEMS OF MUSEUM ADMINISTRATION} (2005); Ass’n of Art Museum Dirs., \textit{Art Museums and the Practice of Deaccessioning} at 2 (Nov. 2007) (position paper) available at http://www.aamd.org/papers.


\textsuperscript{81} 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
publicly stated that its disputing of restitution claims against it “have damaged the reputation of the museum,” even though the museum’s position is that it is “unambiguously” the owner of the claimed works. According to the director, 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.

The current position of many museum Codes of Ethics is similar - to aid heirs in making valid claims. The Association of Art Museum Directors, a long-standing and influential group, maintains professional standards for museums. In 1998, an AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933–1945) recommended that museums be proactive on the issue of Nazi-looted art. 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 should then disseminate this information to the

their acquisition policies. For example, the Metropolitan Museum of Art changed its Collections Management Policy, to require additional research if the provenance information offered by the work’s donor or seller is incomplete. 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.” Metro. Museum of Art, Collections Management Policy 6 § IV.D.2.a-c (Nov. 2008). 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.” Id. at § VI.A.5. See also Ass’n of Art Museum Dirs., Art Museums and the Identification and Restitution of Works Stolen by the Nazis at 2–3 (May 2007) (position paper), available at http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf (checklist for member museums listing steps to ensure they are reseaching provenance and responding to claims).


Id.


public." Any claims which do emerge should be, according to the Task Force, resolved “in an equitable, appropriate, and mutually agreeable manner”. 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.

A parallel organization, the American Association of Museums, 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.” The AAM has also promulgated Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, whose goal is 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. Like the AAMD, the AAM specifically recommends consideration of

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86 Id. at §§ II.A, II.B, II.C.
87 Id. at §§ II.E.1, II.D.2, II.E.3.
88 Id. at §§ II.D, II.E.
90 Am. Ass’n of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, (1999, amended 2001), http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf. 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, 477 F. Supp. 2d at 803, 804 n.1, 805. On the AAM’s website initiative in general, see Elizabeth Olson, Web Site Goes Online To Find Nazi-Looted Art, N.Y. TIMES, Sept. 8, 2003, at E4.
waiving of “technical” defenses such as the statute of limitations if this would help reach an “equitable and appropriate resolution.”

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 much the same guidelines as the AAMD in terms of proactive research and cooperation with claimants.

Although the AAMD and ICOM recommendations are fairly recent, the history of claims against museums shows 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, *The Diggers*, claimed by the heirs of Martha Nathan. In the 1930s, she had transferred some of her late husband’s art collection to Switzerland, and though she was forced by the Nazis to “donate” some of her art which remained in Germany, the Van Gogh was safe in Switzerland. She later sold this painting to a dealer, who then sold it to a Detroit collector, who donated it to the Institute. In 2004, Martha Nathan’s heirs asserted an ownership claim to the Van Gogh. Only in the face of the clear record of voluntary sale did the Institute go to court instead of returning the painting.

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Similarly, the Museum of Fine Arts, Boston filed a declaratory judgment action against the claimant of an Oskar Kokoschka painting, since the Museum’s research had convinced it that the claim was without merit. The claimant argued that the owner of the painting had forced to sell it in 1939 by the Nazis, but the Museum’s research showed that the 1939 sale was voluntary. The court agreed.

But 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.”

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95 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, 549 F. Supp. 2d at 544; Toledo, 477 F. Supp. 2d at 803, 809.
96 Follian, supra note 44. An example of a case with an unclear record, where a private owner disputed the claim but a museum probably would not have, is the suit, currently on appeal, concerning Egon Schiele’s Seated Woman, a gouache-and-black-crayon drawing. It is clear that the drawing belonged to the Viennese Jewish entertainer Franz Grünbaum, who was deported to the concentration camp at Dachau in 1938, where he died in 1941. It is also clear that the drawing was in the possession of a Swiss gallery, Gutekunst & Klipstein, by 1956, when the gallery sold it to a Jewish collector and art dealer, Otto Kallir, who then sold it to its current owner, Boston philanthropist David Bakalar, in 1963. What happened between 1938 and 1956 is very unclear. Bakalar, the current owner, believes the Swiss gallery’s statement, that it bought the drawing from Franz Grünbaum’s sister-in-law, with whom it had had extensive prior dealings. By contrast, the heirs think that the drawing, along with other works from Grünbaum’s collection, was stolen by the shipping company Schenker & Co. AG in 1938. Schenker was a Nazi-controlled company, and the heirs have an export permit showing that Grünbaum’s wife deposited approximately 420 works of art with the shipping company in preparation for export. These works disappeared. Initially, both the claimant and the current owner had assumed that the drawing in question was among these works, and if a museum were the current owner, it likely would have conceded ownership. However, the private owner chose to fight the claim, and is so far successful, since the district court held that the heirs failed to produce any evidence that Seated Woman was among the works of art that are only listed be category (e.g., “drawings”) on
Part 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 lead to success 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.\(^97\) Thus, one heir of the painter Kashmir Malevich said that the most important thing about her family’s attempts to recover Malevich’s 1915 “Black Square” 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.”\(^98\) 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 belonged to my family.”\(^99\) Similarly, another family described a claimed painting as “all that remained of the[ir] murdered parents.”\(^100\)

This focus on the importance of the works to family history has little to do with a choice of parties to make claims against or a choice of methods of making the claim. The reality is that

\(^97\) E.g., "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..." quoted in James Auer, 15th-Century Masterpiece May Go Home After 60-year Odyssey, MILWAUKEE J. SENTINEL, Apr. 2, 2000, at 1E.
\(^98\) Crow, supra at note 13, at W1.
most current owners are good-faith holders, unconnected with 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 which had belonged to her aunt after a prolonged suit against the Republic of Austria, which included a case before the Supreme Court, sold the recovered work to Ronald Lauder because he promised to donate it to the Neue Gallerie in New York, saying that “[i]t was very important for the heirs and for my aunt Adele that the painting be displayed in a museum.”101 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 which is currently touring museums, explaining that they “are hoping this show will symbolize his connoisseurship as a dealer… People have forgotten him. We want the public to recognize his legacy,” and that the exhibition will tell the world “about a historical injustice put right.”102

Given these goals of 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.103

102 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.’” Quoted in Sharon Waxman, A Homecoming, in Los Angeles, for Looted Klimts, N.Y. TIMES, Apr. 6, 2006, at E1.
103 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 53 of the over 2000 pieces of unreturned looted art it holds to the Israel Museum of
Are attorneys likely to agree with this thought – that recovered works should go into museums? The answer seems to be both yes and no – yes because of their proclaimed ideologies, but no because of the realities of the legal system under which the majority of these lawyers work.

Many of these attorneys share 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”; 104 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”; 105 and that the “guiding principle” of Holocaust repatriations is that “cultural property wrongfully taken from its rightful owners should be returned.” 106 One prominent lawyer for 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. 107


106 Kaye, Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 244.
Second, the attorneys often mention the personal emotional impact of representing heirs. Thus, the lawyer for Maria Altman has said that “it’s been the greatest case of my career and a tremendous honor to represent Maria. It’s incredibly fulfilling to see the paintings come to the United States, taking the same path its owners took.”108 Similarly, a lawyer for the heirs of Jacques Goudstikker has called the case “[a] great story with a happy ending”.109 Perhaps most eloquently, Larry Kaye, another lawyer for the Goudstikker heirs, 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 point of view 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.”110

Kaye’s quote is illustrative of the fact that many of the heirs’ lawyers have extraordinary levels of dedication to the cause of reclaiming looted art in general. For example, many of these lawyers produce scholarly publications which attempt to clarify the law and advise potential claimants and owners of works with suspicious provenance.111 They also go to creative lengths

109 Kaye, Avoidance and Resolution of Cultural Heritage Disputes, supra note 4, at 249.
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.\textsuperscript{112}

One important effect of the ideological beliefs in the justness of the heirs’ cause is that the lawyers fully accept 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 also for not arguing about the statute of limitations, calling the Museum’s actions “doing the right thing”.\textsuperscript{113} Similar praise was given by lawyers to the American museums who returned works to the Goudstikker heirs, while criticizing European institutions that have not yet returned works as “coming up with reasons and excuses to avoid the issue.”\textsuperscript{114}

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:

\begin{quote}
Looted Art Carries Its Own Set of Problems, NEW YORK LAW JOURNAL, May 24, 2004; Lawrence M. Kaye, A Quick Glance at the Schiele Paintings, 10 DePaul-LCA J. ART & ENT. L. 11 (1999); Lawrence M. Kaye, The Recovery of Stolen Cultural Property: A Practitioner's View - War Stories and Morality Tales, 5 VILL. SPORTS & ENT. L. FORUM 5 (1998); Lawrence M. Kaye, Art Wars: The Repatriation Battle, 31 N.Y.U. J. INT'L L. & POL. 79 (1998).\textsuperscript{112} 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 (2008), available at http://herrick.com/sitecontent.cfm?pageID=21&itemID=870.\textsuperscript{113} Spiegler, Recovering Nazi-Looted Art, supra note 18, 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.\textsuperscript{114} 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 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.” Kaye, Avoidance and Resolution of Cultural Heritage Disputes, supra note 4.
\end{quote}
Perhaps certain issues are so socially important as to go beyond strict application of the rules; how else can one resolve the mainly plaintiff-oriented holdings in cases of this nature? Courts implicitly recognize the necessity of making a social statement in regard to those victimized during the Holocaust by crafting their holdings to achieve desirable social policy results. Similarly, several influential scholars advocate entirely abandoning the statute of limitations defense in Holocaust-era claims cases.

Despite praising museums for “doing the right thing,” few of the lawyers in this field think that the museums are blameworthy; for example, Larry Kaye 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.” And yet, even with this recognition of the clean hands of most museums, lawyers are

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115 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. CHICAGO INT’L L.R. 191, 207 (2007-2008). The idea that the law, as it normally exists, is unfit for dealing with Holocaust issues has long roots; see, for example, 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).

116 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”); Lerner, *Nazi Art Theft Problem*, supra note 69, at 41 (“the Holocaust was an event so catastrophic that established legal concepts do not clearly resolve the issues at hand”).

117 Crow, supra at note 13, at W1. 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.” Howard Spiegler, quoted in Thomas Adcock, *The Art Theft Experts: Herrick, Feistein Duo has Long, Distinguished Career in Recovering Looted Works*, N.Y. LAW JOURNAL, February 24, 2006, available at http://herrick.com/siteFiles/News/3779C3969ACBEFF7A19FCF33CEE4D45D.pdf. The same lawyers usually acknowledge that museums no longer acquire works with dubious provenances.
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.\textsuperscript{118}

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.\textsuperscript{119} 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 they retained to recover their art.\textsuperscript{120} One sign that money has an influence in lawyers’ decisions is that the number of lawyers representing, or seeking to represent, heirs has risen in proportion to the rise of prices in the art market – in other works, more lawyers became interested in the field when the market value of claimed art rose high enough to lead to lucrative fees.\textsuperscript{121}

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 cases. For example, Larry Kaye has proposed that governments should declare an

\textsuperscript{118} Burris & Schoenberg, supra note 59, at 1049.

\textsuperscript{119} Crow, supra at note 13, at W1 (“Industrywide, fees can range from 20% to 50% of the art's value; a one-third cut is standard”).

\textsuperscript{120} Carol Vogel, \textit{Recovered Artworks Heading to Auction}, N.Y. TIMES, February 22, 2007, available at http://www.nytimes.com/2007/02/22/arts/design/22heir.html?_r=2&oref=slrolin (“News of the three auctions comes just a week after a Dutch court granted Mrs. von Saher permission to ship the 202 paintings from the Netherlands to the United States. Roelof van Holthe tot Echten, a lawyer, had asked the courts to block the release of the art until he was paid the fee he claims for helping to recover the art. The judge, however, ordered Mrs. von Saher to put down a $10.4 million bank guarantee as a security deposit until the lawyer’s fee is settled by the court”).

\textsuperscript{121} Crow, supra at note 13, at W1; Michael Kimmelman, \textit{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).
amnesty period for holders of art with suspicious provenance – a proposal which would help heirs recover works without the generation of any legal fees.\textsuperscript{122}

And 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 50\% 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. For example, one researcher Toussaint hired to help with the Goudstikker case spent 10 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.\textsuperscript{123}

Given that they are working on a contingency basis, where a faster recovery will increase their profits, it makes sense that lawyers for heirs 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. 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, explains its mission in regards to art as helping heirs make claims

\textsuperscript{123} Follian, supra note 44 (the researcher is quoted as saying “You can’t imagine how many boxes of photographs labeled ‘landscape with river and bridge’ I went through”).
against museums. And the influential private foundation the Commission for Art Recovery (affiliated with the World Jewish Congress) describes its mission as bringing “moral suasion” to bear on “museums and other institutions” who hold looted art.

Part 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.

Litigation costs in the area of 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.

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124 New York State Banking Department, Holocaust Claims Processing Office, History and Mission, available at 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, available at http://www.claims.state.ny.us/report07.pdf (detailing the recovery of Franz Xaver Winterhalter’s “Mädchen aus den Sabiner Bergen” from the collector Maria-Luise Bissonnette in 2007).

125 Available at http://www.commartrecovery.org/about.php.

Thus, 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.\textsuperscript{128} And in 2006 alone, Sotheby’s auctioned 38 restituted works, and Christie was responsible for auctioning a further $300 million worth of restituted art.\textsuperscript{129} The majority of these auctioned works enter private collections.

Of those few commentators who have noted the problematic result of successful restitution claims – that the art in question is most often removed from public view – fewer still have suggested a solution to the problem. Ralph Lerner has suggested that claimed artworks should remain in museums, “where they belong”.\textsuperscript{130} 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 show their rights to works on display in museums.\textsuperscript{131} If the claim was successful, the museum would retain ownership of the art, while heirs would be compensated by funds to be collected from various sources, such as governmental contributions, but not from museums.\textsuperscript{132}

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

\textsuperscript{127} Isabella Fellrath Gazzini, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 39, 57–58 (2004); (discussing typical litigation costs in restitution cases); Raymond J. Dowd, Federal Courts and Stolen Art: Our Duty to History, FED. L.AW., July 2008, 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 59, at 444 (“claimants must be prepared to spend at least $100,000 in costs just to begin litigation.”).


\textsuperscript{129} Crow, supra at note 13, at W1.

\textsuperscript{130} Lerner, Nazi Art Theft Problem, supra note 69, at 41 (1998-1999).

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.}
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 arouse, with the Washington Conference on Holocaust-Era Assets.\(^{133}\) This conference, at which forty-four nations were represented, formulated guidelines for the resolution of Nazi-looted art claims.\(^{134}\) 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.\(^{135}\) However, the guidelines are in no way binding, and the members of the conference recognized that the participating nations would resolve claims within their own legal systems.\(^{136}\) Thus it is clear that any governmental-level initiative will be difficult to orchestrate and long in coming.

Another commentator has suggested a solution which depends more on the self-interest of the claimants than on governmental action. Nathan Murphy points out that, since 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.\(^{137}\) He outlines several types of settlement that would allow parties to share this value.\(^{138}\) In the case of a worked claimed from a museum, 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


\(^{134}\) *Id.*


\(^{138}\) *Id.*
work’s ownership history through accompanying signage.\textsuperscript{139} Alternately, 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.\textsuperscript{140}

Although Murphy recognizes the value of the public display of art, he does not point to another way in which litigation costs are reduced for claims made against museums. Museums which have followed their Codes of Ethics by opening their records, making public information about their artworks with dubious provenances, dealing promptly with claims, and forgoing technical defenses such as the statute of limitations, have already reduced the research and litigation costs for any claimants against them.

What should claimants do in recognition both of 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 (Stanford, CT) agreed to return a painting to the Italian government in exchange for Italy’s lending the works for an exhibition.\textsuperscript{141}

\textsuperscript{139} Id at 28.
\textsuperscript{140} Id.
\textsuperscript{141} The painting 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. Stevenson Swanson, Amicable Resolutions in Disputes of Ownership are Rare in Art World, CHICAGO TRIBUNE, Jun. 28, 1998 at 4; John Marks, How Did All that Art End Up in Museums? U.S. NEWS & WORLD REPORT, Jun. 8, 1998; Mary Jo Palumbo, At War Over Art, BOSTON HERALD, Jun. 3, 1997 at 35.
And in 2002, the Springfield (MA) Art Museum returned Jacopo Bassano’s “Spring Sowing” to the Uffizi Museum (Florence, Italy).  

In other cases, the reason that the public does not lose its access to the work is that the claimants and the museum work out a deal. For example, in 2000, the Art Institute of Chicago purchased a partial interest in a 17th century marble bust from the heirs, who then donated the remaining ownership interest to the museum. Most common is the situation in which the museum enters into a monetary settlement with the heirs, in effect buying the painting from them directly.

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, from whose collection it had been looted by the Nazis. The painting was held by the North Carolina Museum of Art in Raleigh, North Carolina. 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.

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Even more creative was the case of 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, but instead 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.\textsuperscript{145}

The recent resolution of the “Portrait of Wally” case 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 an exhibition at the Museum of Modern Art.\textsuperscript{146} The lender, Vienna’s Leopold Museum, was sued by the heirs of Lea Bondi Jaray.\textsuperscript{147} The heirs claimed that the Leopold Museum’s founder, Rudolf Leopold, had visited Bondi Jaray in London in 1953.\textsuperscript{148} 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.\textsuperscript{149} The painting had been confiscated


\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id.
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and sent to the Belvedere, Austria’s national museum. The heirs additionally claimed that
Leopold, instead of presenting Bondi Jaray’s case, had arranged to exchange a painting from his
collection for “Portrait of Wally,” which then became a centerpiece of his collection and,
eventually, the museum that he founded.

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

Under the settlement, the painting was exhibited in New York’s Museum of Jewish
Heritage for three weeks. This museum, which describes itself as a “living memorial to the
Holocaust,” surrounded the painting with signage and public events explaining its place in
Jewish history. After this exhibition, the painting returned to the Leopold Museum’s
permanent collection, in exchange for a payment by the Museum of $19 million to Bondi Jaray’s

150 Id.
151 Id.
152 Id.
153 Id. See also United States v. Portrait of Wally, 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009)
(explaining the case’s procedural history); Shapiro, supra note 68, at 1159.
154 David Bario, Heirs of Jewish Art Dealer Win $19M Settlement Over Schiele Painting Looted
155 Id.
156 Id.
157 http://www.mjhnyc.org/.
Additionally, the painting must be displayed with a statement agreed to by the Museum and the heirs. The statement describes the painting’s history, including the New York court case and its fate during the Nazi era. However, even though the Museum will retain the

\[158\] *Id.* The reactions to the settlement are further evidence of the patterns of thought about museums and Holocaust claims, discussed above. Thus, Lee Rosenbaum, an influential cultural critic, wrote that “the some things about the resolution still don't seem quite right,” namely, that the settlement sends the painting back to reside permanently in 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 saying that “[t]hose who give close study to the relevant history, documentation and witness testimony will thoroughly understand the way in which the collector acted, arriving at the conclusion that he had acquired the work in justifiably good faith.” Rosenbaum is dissatisfied that the settlement allows the Museum to maintain its innocence. Her 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. Lee Rosenbaum, *Portrait of Wally* Settlement: What's Wrong With This Picture?, HUFFINGTON POST, August 17, 2010, http://www.huffingtonpost.com/lee-rosenbaum/portrait-of-wally-settlement_b_684234.html.

\[159\] *U.S. v. Portrait of Wally*, A Painting by Egon Schiele, Stipulation and Order of Settlement and Discontinuance, July 20, 2010 (99 Civ. 9940 (LAP)).

\[160\] The text of the statement is as follows:

Egon Schiele (Tulln 1890–1918 Vienna)
*Portrait of Wally Neuzil*, 1912
Oil on wood, 32.7 x 39.8 cm
Leopold Museum, Vienna

This Painting (“Portrait of Wally” by Egon Schiele) was the personal property of Lea Bondi Jaray, a Jewish art dealer in Vienna, who fled in 1939 to London, where she died in 1969. The Painting subsequently became the subject of court proceedings in New York City from 1998 to 2010, after it was loaned in 1997 to the Museum of Modern Art in New York (MoMA) by the Leopold Museum as part of an exhibition of Schieles from the Leopold Museum’s collection. In 1999, the United States Government commenced a civil forfeiture action in New York, alleging that the Painting was stolen from Lea Bondi Jaray during the Nazi era by a Nazi named Friedrich Welz, and was imported into the United States in 1997 by the Leopold Museum in violation of U.S. law. The Estate of Lea Bondi Jaray asserted a claim to the Painting in the action, and the U.S. Government agreed that upon forfeiture of the Painting, it would transfer to the Estate all right and title to the Painting. Based on the evidence presented during the case, the United States District Court in New York concluded in 2009 that the Painting was the personal property of Lea Bondi Jaray and that it was stolen from her in Vienna in the late 1930’s by Friedrich Welz, who was a member and collaborator of the Nazi party. The Court found that the Painting had been seized from Welz by the U.S. Forces in Austria after the War and delivered in 1947 to the Austrian Federal Office for Preservation of Historical Monuments (“Bundesdenkmalamt”) along with paintings Welz had acquired from Dr. Heinrich Rieger, a Jewish art collector who had
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 $19 million to the heirs.\footnote{161}

perished during the Holocaust. In 1950, the Bundesdenkmalamt delivered artworks to an agent for the Rieger heirs and included the Painting in the delivery. Later that year, the Rieger heirs sold their works to the Austrian National Gallery (the “Belvedere”), and the Painting was included in the delivery of the artworks to the Belvedere. In 1954, the Belvedere traded the Painting to Dr. Rudolf Leopold. In 1994, Dr. Leopold transferred the Painting to the Leopold Museum. Following the court’s findings on these issues, the case was finally resolved in 2010 by the U.S. Government, the Estate and the Leopold Museum. The Leopold Museum agreed to pay the Estate a substantial sum, and, in return, the Estate agreed to release its claim to the Painting and the Government agreed to dismiss the civil forfeiture action and release the Painting to the Leopold Museum. The three parties also agreed that the Painting was to be loaned by the Leopold Museum to this museum for this exhibition.”

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.\(^{162}\) Thus, instead of the winner takes all approach of traditional litigation, the balance of the ethical importance of righting the private wrongs of the Holocaust and of preserving the public interest in art can intersect.

Another way to lessen the blow to the public interest in art 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.\(^ {163}\) 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 purchase, the heirs settled with a part purchase and part donation agreement, with a plaque explaining work’s history).

\(^{162}\) 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 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 UK'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 it thus 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.

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 either cash or a work or works which would be the equivalent of the Matisse.

Arrangements which split the value of the work between claimants and museums are also fair because museums are effectively offering a litigation discount to claimants by such practices as refusing to use the statute of limitations and throwing their records open to the public instead of insisting on discovery requests. Instead of taking advantage of these practices by exclusively pursuing claims against museums instead of against private collectors, claimants should recognize this benefit by offering benefits 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 both to growing awareness of the issue and to museums’ practices of making information more publically available.164 Thus, the conflict between the private and the public goods at play will increase as well. Of course, this proposal in the current article 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…. cultural objects have a variety of expressive effects that can be described, but not fully captured, in logical terms.”165 But we must try.

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