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Nazi-Confiscated Art: Eliminating Legal Barriers to Returning Stolen Treasures

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NAZI-CONFISCATED ART: ELIMINATING LEGAL BARRIERS TO RETURNING STOLEN TREASURES

*Stephanie J. Beach**

World War II ended over three-quarters of a century ago, but there still remain prisoners of war. Before and during the war, the Nazis confiscated approximately 650,000 works of art—an “art theft” orchestrated by Adolf Hitler to rid society of Jewish art and artists and to collect worthy works to build his own art capital. Seventy-five years later, looted Holocaust-era artworks are still either undiscovered or in the possession of museums across the globe without proper ownership attribution or payment to Holocaust survivors or their heirs. There are modern remedies, such as the 1998 Washington Conference on Holocaust Era Assets, the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, the Justice for Uncompensated Survivors Today (JUST) Act of 2017, and the route of litigation, but victories, after prolonged and strenuous processes, are far and few between. The implementation of an adjudication panel and the global cooperation between the art community and the government are necessary steps down a long and winding path toward an effort to finally reach a semblance of justice.

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I. INTRODUCTION

The “greatest art theft in history” was concealed by the largest mass murder in history—the Holocaust.¹ During the course of World War II, the Nazis confiscated approximately 650,000 works of art from Europe—and many of those works were never subsequently recovered.² Before he was the *Führer* who helmed the murder of seventeen million people, Adolf Hitler wanted to become an artist, but “he twice failed the [Vienna Academy of Fine Art’s] admission test [and] his drawing skills were declared ‘unsatisfactory.’”³ So when he engineered ethnic cleansing,⁴ he simultaneously carried out a plan of aesthetic cleansing, which required the systematic destruction “of the *entartete Künstler*, [or] the ‘degenerate artists,’ and their work, which to him included anything that deviated from classic representationalism.”⁵ Hitler “declared ‘merciless war’ on ‘cultural disintegration,’” and viewed the art as “subversive-Jewish-Bolshevik in sensibility and intent and corrosive to the moral fiber of Germany.”⁶ Because Jewish dealers, gallery owners, and collectors dominated the modern-art scene, they had to be “eliminated to get Germany back on the right track.”⁷

This Article will discuss the moral, ethical, and legal need for creating uniform guidelines for adjudicating claims to stolen Holocaust-era artwork in order to rectify still lingering injustices. Part II will provide a history of Nazi cultural confiscation and its lingering impact in the current day. Part III will discuss modern remedies, including the 1998 Washington Conference on Holocaust Era Assets, the Holocaust Expropriated Art Recovery (HEAR) Act of 2016, the Justice for Uncompensated Survivors Today (JUST) Act of 2017, and the role of the courts. Part IV sets forth a recipe for reunification between artwork and their original owners or heirs

1. Alex Shoumatoff, *The Devil and the Art Dealer*, VANITY FAIR (Mar. 19, 2014), <https://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>.

2. *Id.*

3. Peter Schjeldahl, *Hitler as Artist*, THE NEW YORKER (Aug. 12, 2002), <https://www.newyorker.com/magazine/2002/08/19/hitler-as-artist>.

4. “Ethnic Cleansing” has been defined as “the expulsion, imprisonment, or killing of an ethnic minority by a dominant majority in order to achieve ethnic homogeneity.” *Ethnic Cleansing*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ethnic%20cleansing> (last visited Apr. 5, 2020).

5. Shoumatoff, *supra* note 1.

6. *Id.*

7. *Id.*

through the use of an independent adjudication panel and the global cooperation between the art community and the government. Finally, Part V will conclude.

II. HISTORY OF NAZI CULTURAL CONFISCATION

Nazi Germany refers to Germany between 1933 and 1945 when Hitler and the Nazi Party controlled the country through a dictatorship.⁸ Under Hitler's rule, Germany was transformed into a totalitarian state, where the government controlled nearly all aspects of life, including dictating what types of art were unacceptable.⁹ The Nazi Party began formally confiscating art in 1938.¹⁰ The goal was to rid Germany of art that was created during the Weimer Republic—the period between 1924 and 1930—which Hitler viewed as emblematic of “Jewish decadence.”¹¹ The Nazis were focused on eradicating “degenerate art,” such as cubism, expressionism, and impressionism, from public institutions.¹² Instead, “Hitler called for a new art, an art that portrayed the *Volk* and the *Volkgemeinschaft* (*Volk* community) as ‘a realization not of individual talents or of the inspiration of a lone genius, but of the collective expression of the *Volk*, channeled through the souls of individual creators.’”¹³

The initial rounds of Nazi looting began in Austria shortly after the 1938 *Anschluss*—when Austria was annexed into Nazi Germany—and in Poland the following year.¹⁴ Jews who did not leave German-controlled territories were forced to register personal property with the local police.¹⁵ On April 26, 1938, the Nazis issued the “Decree for the Reporting of Jewish-Owned Property,” which required all Jews in Austria and Germany to register any property or assets valued at over 5,000 *Reichsmarks* (approximately \$34,000

8. *Timeline of Events: 1933–1938*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/1933-1938> (last visited Apr. 5, 2020); *Timeline of Events: 1939–1941*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/1939-1941> (last visited Apr. 5, 2020); *Timeline of Events: 1942–1945*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/1942-1945> (last visited Apr. 5, 2020).

9. Anne Rothfeld, *Nazi Looted Art*, NAT'L ARCHIVES: PROLOGUE MAG. (Summer 2002), <https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

today).¹⁶ All property had to be registered, including furniture, artwork, life insurance, and stocks, whether foreign or domestic.¹⁷ Three months later, by the end of July, the Nazis had collected paperwork from 700,000 Jews, totaling seven billion *Reichsmarks*.¹⁸ This helped clear the path for “aryanization,” a state-sanctioned theft deemed “a gigantic, trans-European trafficking operation in stolen goods.”¹⁹ A legal advisor for the Nazi Ministry of Economics even considered this the “forerunner to a complete and definitive removal of Jews from the German economy.”²⁰

According to one scholar, “[t]he robbery part [of Hitler’s decree] is embedded in this ideology that these people are parasites who attach themselves to us, and they live by sucking our blood, and we are entitled to punish them and take it all back.”²¹ The Nazis proclaimed that Jews were particularly wealthy German citizens, despite the fact that the majority of Jewish families were middle class.²² Thus, the 1938 edict would return wealth to non-Jewish citizens, whom Nazis considered to be the rightful owners, and dually force more Jews to leave the country.²³ So, as a result, Jewish art dealers who were forced to flee Germany paved the way for “a group of dealers, not previously considered to be in the top rank, [who] rushed to fill the gaps left by the departure of their Jewish colleagues and to take full advantage of [the fleeing Jews].”²⁴ And for those who did manage to escape, family-owned art collections were liquidated in order to pay for exit visas and taxes.²⁵ Moreover, the Nazis had banned the exportation of paper money, so refugees began to turn their investments into art.²⁶ And further, since the Nazis lacked a useable foreign currency, artwork became a vastly used money-alternative, especially concentrated in the black

16. Lorraine Boissoneault, *A 1938 Nazi Law Forced Jews to Register Their Wealth—Making It Easier to Steal*, SMITHSONIAN MAG. (Apr. 26, 2018), <https://www.smithsonianmag.com/history/1938-nazi-law-forced-jews-register-their-wealthmaking-it-easier-steal-180968894/>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* (second alteration in original).

22. *Id.*

23. *Id.*

24. Rothfeld, *supra* note 9 (alterations in original).

25. *Id.*

26. *Id.*

market.²⁷ By the end of 1938, Jews were only allowed to retain 8 percent of what their *Reichsmarks* were worth in a foreign country; this made it virtually impossible for many to take their savings with them when attempting to find refuge in another nation.²⁸

In 1939, the Nazis auctioned 126 degenerate artworks in order to increase their revenues.²⁹ Soon, art looting became organized governmental policy, and Nazi officers who collected art confirmed their dedication to promoting Nazi ideologies, which provided them with potential promotion in the party.³⁰ In addition, property was redistributed to locals, thus winning popular support for the Nazi Party.³¹ Confiscated artworks were often saved for Nazi and German collections, but some were sold to buyers through other nations, like Switzerland or France, in an attempt to raise additional capital for the Nazi military.³² As the war continued, so did the art confiscations, with the Nazis storing art in salt mines and caves to ensure that they survived Allied bombs.³³

The Nazis' next move was to create the *Einsatzstab Reichsleiter Rosenberg* (ERR), which was "the official Nazi office charged with confiscating prominent, mainly Jewish, art collections in the western Nazi-occupied territories."³⁴ The ERR operated from 1940 through 1944 and was housed in the Jeu de Paume Museum in Paris.³⁵ Starting in January 1940, the ERR was tasked with "loot[ing] Jewish and Masonic cultural treasures, including synagogues, libraries, and archives in western Europe."³⁶ By the autumn, all Jewish art collections were regarded as "ownerless" by Nazi decree.³⁷ Jews across most of Europe were now further labeled as "stateless," thus

27. *Id.*

28. Boissoneault, *supra* note 16.

29. During the Third Reich, the term *Volk* was frequently used in nationalistic political slogans, such as "*Ein Volk, ein Reich, ein Führer*" ("One nation or race, one realm, one leader") and *Volksgemeinschaft* ("people's community"). See David Welch, *Nazi Propaganda*, BBC (Feb. 17, 2011), http://www.bbc.co.uk/history/worldwars/wwtwo/nazi_propaganda_gallery_03.shtml; Rothfeld, *supra* note 9.

30. Rothfeld, *supra* note 9.

31. Boissoneault, *supra* note 16.

32. Rothfeld, *supra* note 9.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

restricting them from having any property rights.³⁸ Over the course of its tenure, the ERR “looted more than twenty-one thousand individual objects from over two hundred Jewish-owned collections.”³⁹ In an effort to foster the German race, Hitler planned two large art collections, and aspired to create a cultural capital to rival Vienna, Austria.⁴⁰ Confiscated artwork remained the main source for the collections.⁴¹

In May 1945, after the war ended, Hermann Voss, whom Hitler had selected as a director of his art-related projects, offered his assistance in locating and recovering some looted art.⁴² He was subsequently arrested and interrogated by the Art Looting Investigation Unit (ALIU).⁴³ Walter Andreas Hofer began his career as a small Berlin art dealer, and by 1937 he became the chief art advisor to Hermann Göring, a key Nazi political military leader, and one of the most powerful figures in the party.⁴⁴ The two had forged an agreement whereby “Hofer [w]ould remain as an independent dealer while acting as Göring’s agent,” and retained “the right to keep an item for himself if Göring did not like the piece.”⁴⁵

The ALIU report on Hofer describes him as “responsible for developing many of the confiscation methods [and using] his status to promise protection to those being persecuted in exchange for artworks that he or Göring desired.”⁴⁶ He also “kept the collection’s records in a meticulous manner by recording the contract of sale for each piece, the piece’s market value, and what the piece was sold or exchanged for.”⁴⁷

38. *Id.*

39. *Id.*

“More than 5,000 pieces arrived from the various Rothschild families, 1,200 from the Alphonse Kann collection, 2,600 from David-Weill of Levy de Benzion, and 550 from Seligmann art merchants. According to ERR’s paperwork, from 1940 to 1944 it confiscated approximately 10,800 paintings and other pictures, 580 sculptures, 2,400 furniture pieces, 5,800 objets d’art, and more than 1,200 Asiatic articles.” *Id.* n.13.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

During the final years of World War II, Allied armies established the Monuments, Fine Arts, and Archives Section unit⁴⁸ to safeguard cultural property in war areas during and after the war.⁴⁹ Three hundred and forty-five men and women from thirteen countries spent 1945 canvassing over “1,000 troves containing an estimated 5 million pieces of artwork and cultural items stolen from wealthy Jews, museums, universities, and religious institutions.”⁵⁰ And even after the German surrender, about sixty so-called Monuments Men continued scouring Europe as “art detectives.”⁵¹ After Paris was liberated, a French museum employee who, unbeknownst to the Nazis, spoke German and had tracked the outgoing shipments of pillaged art, sent the unit to Germany’s Neuschwanstein Castle.⁵² Over the course of six weeks, the Monuments Men recovered approximately 21,000 stolen collectors’ items along with thirty-nine leather-bound photograph albums documenting looted items.⁵³ “These books, some of which [were] presented to Hitler for his birthday, were used as evidence at the Nuremberg Trials.”⁵⁴

By the end of World War II, six million Jews had been murdered.⁵⁵ For those who managed to survive, they lost more than just family members and loved ones; real and personal property had already been transferred to non-Jewish neighbors, liquidated to help support Nazi propaganda, or hidden and transported out of the country. Confiscating property, like artwork, assisted in dehumanizing Jews and stripping them of their culture and religion, all of which helped the Nazis toward their Final Solution.⁵⁶

48. This unit served as the inspiration for the 2014 film *Monuments Men*. See MONUMENTS MEN (Columbia Pictures 2014).

49. Nina Storchlic, *Where the Nazis Hid Their Art: The Castle Behind ‘Monuments Men’*, DAILY BEAST (Feb. 8, 2014, 5:45 AM), <https://www.thedailybeast.com/where-the-nazis-hid-their-art-the-castle-behind-monuments-men> (last updated May 6, 2020).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (“Auguste Rodin’s bronze sculpture *The Burghers of Calais* was found in the woods nearby, abandoned by its Nazi caretakers.”).

54. *Id.*

55. Boissoneault, *supra* note 16.

56. “Final Solution of the Jewish Question” was a term used by Nazi leaders to refer to “the mass murder of Europe’s Jews. It brought an end to policies aimed at encouraging or forcing Jews to leave the German Reich and other parts of Europe. Those policies were replaced by systematic annihilation.” “*Final Solution*”: Overview, U.S. HOLOCAUST MEMORIAL MUSEUM,

III. MODERN REMEDIES

Tragically, it would take decades before the world's governments convened to attempt to right the wrongs of the Nazi Party. The Washington Conference on Holocaust-Era Assets (the "Washington Conference") was held from November 30 to December 3, 1998.⁵⁷ A set of Principles (the "Washington Principles") was released in conjunction with the Conference.⁵⁸ But it would take another eighteen years before the HEAR Act of 2016 was enacted by Congress and signed into law by President Barack Obama.⁵⁹

A. The Washington Conference

The Washington Conference was hosted by the United States Department of State and the United States Holocaust Memorial Museum, and was attended by representatives of forty-four countries and thirteen non-governmental organizations, art museums, and auction houses.⁶⁰ The Conference was conducted in response to an international symposium held in New York City in 1995, entitled "The Spoils of War—World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property."⁶¹ The symposium detailed how artworks were removed at the end of the war and sent to countries of the former USSR where they "disappeared into private collections or were hidden in state repositories, many to be rediscovered nearly fifty years later by Soviet art historians."⁶²

<https://encyclopedia.ushmm.org/content/en/article/final-solution-overview> (last updated Dec. 8, 2006).

57. *Washington Conference on Holocaust-Era Assets, 30 November–3 December 1998*, LOOTEDART.COM, <https://www.lootedart.com/MG8D5622483> (last visited Apr. 5, 2020).

58. *Id.*

59. See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

60. Geraldine Kendall Adams, *The Spoils of War*, MUSEUMS ASS'N (Jan. 3, 2019), <https://www.museumsassociation.org/museums-journal/features/01032019-the-spoils-of-war>.

61. Susan Weber Soros, *Foreword* to THE BARD GRADUATE CTR. FOR STUDIES IN DECORATIVE ARTS, THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 9 (Elizabeth Simpson ed., 1997).

62. Elizabeth Simpson, *Introduction* to THE BARD GRADUATE CTR. FOR STUDIES IN DECORATIVE ARTS, THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 12 (Elizabeth Simpson ed., 1997).

The goal of the Washington Conference was to discuss the loss of Jewish artworks, books, and archives.⁶³ The Washington Conference Principles on Nazi-Confiscated Art was released in connection with the event. It explained that, “[i]n developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.”⁶⁴ It set forth eleven principles for the restoration of stolen artwork:

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

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

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

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

VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken

63. Holocaust Expropriated Art Recovery Act § 2, 130 Stat. at 1524.

64. *Washington Conference on Holocaust-Era Assets*, *supra* note 57, at app. G, 971, https://www.lootedart.com/web_images/pdf2014/Appendices.pdf.

expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not [sic] be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.⁶⁵

In response to the Washington Principles, Philippe de Montebello, the then-director of the Metropolitan Museum of Art, said, “[o]n the issue of the spoliation of art in the World War II/Nazi era, the genie is, at last, out of the bottle . . . and no resistance, apathy, or silence can ever fit it back inside again.”⁶⁶ In the twenty years since the Conference, hundreds of works of art have been reunited with their original owners or their heirs.⁶⁷ In 2018, the German Lost Art Foundation organized a follow-up conference to assess the progress that had been made in the intervening two decades and improve the “just and fair solutions” promulgated by the Washington Conference.⁶⁸ A Joint Declaration between representatives from the United States and German governments stated that,

The Washington Principles elevated the issue of Nazi looted art to international attention and profoundly changed the way in which the art world conducts itself. Now, for artworks that passed through European hands between 1933 to 1945, the Washington Principles have led to extensive

65. *Id.* at 971–72.

66. William D. Cohan, *The Restitution Struggle: Malaise, Indifference, and Frustration*, ARTNEWS (Sept. 11, 2013, 8:00 AM), <http://www.artnews.com/2013/09/11/the-restitution-struggle/>.

67. *Germany-USA Joint Declaration Concerning the Implementation of the Washington Principles from 1998 Dated 26 November 2018*, LOOTEDART.COM, <https://www.lootedart.com/TDRWD3782861> (last visited Apr. 5, 2020).

68. *Id.*

provenance research by museums in our two countries and elsewhere in Europe, leading to the restitution of, and finding just and fair solutions for, tens of thousands of works of art, cultural objects, and books. . . . Thorough provenance research and the publication of the results on the Internet are essential steps to provide the opportunity for families touched by the Holocaust to locate artworks and other cultural objects confiscated by the Nazis.⁶⁹

Provenance originates from “the French word[] *provenir*, meaning ‘to come from’ [and] proves the history of ownership of a specific piece of art. Provenance is the documentation that authenticates a particular art piece,” and “outline[s] details like the work’s creator, history, and appraisal value.”⁷⁰ It is inadvisable in the art world for galleries or museums to purchase or obtain artwork without first verifying provenance, although many times important documentation and paperwork can still be falsified.⁷¹ The Joint Declaration called on auction houses to continue to adhere to the Washington Principles.⁷² It especially noted that, “heirless art provides a particular challenge,” but clarified that “with improved databases, more detailed provenance research, and more readily available genealogical information, additional efforts should be made to locate heirs.”⁷³

But according to experts, the “momentum” to return artwork to its original owners has been replaced with “malaise, indifference, and frustration.”⁷⁴ As of 2013, five European countries—Germany, Austria, Holland, Britain, and France—established “state-mandated advisory committees designed to provide a sanctioned, legal way for victims and other potential claimants to seek restitution of what was stolen.”⁷⁵ Austria responded to the Washington Conference by “pass[ing] art restitution laws and then review[ing] the art collections of every federal museum. More than 250 artworks stolen from the

69. *Id.*

70. *What Every Art Collector Needs to Know About Provenance*, ARTWORK ARCHIVE, <https://www.artworkarchive.com/blog/what-every-art-collector-needs-to-know-about-provenance> (last visited Apr. 5, 2020).

71. *Id.*

72. *Germany-USA Joint Declaration*, *supra* note 67.

73. *Id.*

74. Cohan, *The Restitution Struggle*, *supra* note 66.

75. *Id.*

Rothschild family were [eventually] returned.”⁷⁶ The year after the Washington Conference, the German Culture Minister promised that provenance research would be undertaken at German museums and that the results would be posted on Internet databases; however, hundreds of thousands of artworks and artifacts whose provenances have not been investigated still remain in museums and depositories.⁷⁷ According to the German Culture Minister, other countries also took their own “action”: Sweden established a commission to locate art, France undertook research into the provenance of over 2,000 works, and Italy published a catalogue of art treasures lost during the war, including those from the collections of Holocaust victims.⁷⁸

But over the past decade, the energy has weakened.⁷⁹ Russia is considered to have “perhaps the greatest repository of looted art that has not been restituted” and while it “made a promising start,” it “utterly failed to follow through”—“[l]ittle has been done, no claims process has been established, and the whole project has stalled.”⁸⁰ And other European nations, like “Britain, Italy, Hungary, and Poland[,] do not [even] have restitution laws that permit the return of looted Holocaust-era art and cultural property.”⁸¹

The Presidential Advisory Commission on Holocaust Assets in the United States (PCHA), established by the U.S. Holocaust Assets Commission Act of 1998,⁸² is

charged with conducting original research into the fate of assets taken from victims of the Holocaust that came into the possession of the U.S. Federal government; reviewing research done by others regarding assets that came to private collections and non-Federal government organizations (especially state governments and financial institutions); and advising the President on policies that

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611 (1998).

should be adopted to make restitution to the rightful owners of stolen property or their heirs.⁸³

The PCHA issued its final report in January 2001, which incorporated the agreed-upon standard for disclosure and “recommended the creation of a searchable central registry of the information museums disclose in accordance with the new standard.”⁸⁴

On a private level, the Code of Ethics of the American Alliance of Museums (AAM) states that the “stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.”⁸⁵ The AAM explained that “museums should take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their collections—whether by purchase, gift, bequest or exchange.”⁸⁶ Regarding existing collections, museums “should make serious efforts to allocate time and funding to conduct research on covered objects in their collections whose provenance is incomplete or uncertain.”⁸⁷ Finally, the AAM acknowledged that museums “hold their collections in the public trust” and that “[t]heir stewardship duties and their responsibilities to the public they serve require that any decision to acquire, borrow, or dispose of objects be taken only after the completion of appropriate steps and careful consideration.”⁸⁸ The AAM also created the Nazi-Era Provenance Internet Portal, which allowed users to search for works of art in museum collections.⁸⁹

The Washington Conference, its published Principles, and the follow-up Joint Declaration two decades later may have spurred governments across the globe to commence action aimed at eradicating the personal and universal losses caused by Nazi Germany, but it is clear that, in the time since, there has been an

83. *About the Commission*, PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE U.S., <https://govinfo.library.unt.edu/pcha/aboutpcha.htm> (last visited June 13, 2020).

84. *Unlawful Appropriation of Objects During the Nazi Era*, AM. ALLIANCE OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/> (last visited Apr. 5, 2020).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See The Nazi-Era Provenance Internet Portal Project*, NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org/> (last visited Apr. 5, 2020).

internally comprehensive failure to sustain that impetus and guarantee the successful restitutions that have been promised to survivors and their heirs.

B. The Holocaust Expropriated Art Recovery Act of 2016

The HEAR Act of 2016 is intended to “provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.”⁹⁰ The Act was inspired, in part, by one of the Principles from the Washington Conference, which states that “steps should be taken expeditiously to achieve a just and fair solution” to claims to art that have not been restituted where the owners or their heirs are identifiable.⁹¹ The Act also cites the 1998 Holocaust Victims Redress Act,⁹² which expressed Congress’s view that

all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.⁹³

The HEAR Act acknowledges the vast procedural hurdles faced by litigants in suits brought to recover stolen art.⁹⁴ Significantly, state-imposed statutes of limitations often bar the successful return of artworks, since plaintiffs “must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide,” which presents a “costly process” that is often impossible to complete within the law’s current parameters.⁹⁵

Congress declared the need for federal legislation because the only court that had considered this issue held that the Constitution prohibits states from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art.⁹⁶ It cited to a Ninth Circuit Court of Appeals case,

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

91. *Id.* § 2(3), 130 Stat. at 1524.

92. *See* Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

93. Holocaust Expropriated Art Recovery Act § 2(4), 130 Stat. at 1524.

94. *See id.* § 2(6)–(8), 130 Stat. at 1525.

95. *Id.* § 2(6), 130 Stat. at 1525.

96. *Id.*

Von Saher v. Norton Simon Museum of Art at Pasadena,⁹⁷ in which the court “invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork.”⁹⁸ In doing so, the court held that the law was an unconstitutional infringement on the federal government’s exclusive authority over foreign affairs, which includes the resolution of war-related disputes.⁹⁹ In light of this precedent, the Act explained that, “the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.”¹⁰⁰

Finally, the Act addressed the use of litigation to resolve claims to recover Nazi-confiscated art and concluded that the “private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.”¹⁰¹

The Act’s objectives are twofold: (1) “[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration”; and (2) “[t]o ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”¹⁰² It also includes a statute of limitations, stating that a “civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not

97. 592 F.3d 954 (9th Cir. 2010).

98. Holocaust Expropriated Art Recovery Act § 2(7), 130 Stat. at 1525.

99. *Von Saher*, 592 F.3d at 957.

100. Holocaust Expropriated Art Recovery Act § 2(7), 130 Stat. at 1525. The Terezin Declaration on Holocaust Era Assets and Related Issues “was approved by 47 countries at the conclusion of the Prague Conference and announced a program of activities geared towards ensuring assistance, redress and remembrance for victims of Nazi persecution.” *Terezin Declaration*, WORLD JEWISH RESTITUTION ORG., <https://wjro.org.il/our-work/international-declarations-resolutions/terezin-declaration/> (last visited Apr. 5, 2020).

101. Holocaust Expropriated Art Recovery Act § 2(8), 130 Stat. at 1525.

102. *Id.* § 3, 130 Stat. at 1525–26.

later than [six] years after the actual discovery by the claimant or the agent of the claimant” of “the identity and location of the artwork or other property,” and “a possessory interest of the claimant in the artwork or other property.”¹⁰³

*C. The Justice for Uncompensated
Survivors Today (JUST) Act of 2017*

The JUST Act, a bipartisan bill approved in May 2018, requires “the Department of State to report to Congress assessing the national laws and enforceable policies of covered countries regarding the identification and return of, or restitution for, assets wrongfully seized or transferred during the Holocaust era.”¹⁰⁴ This includes “the return to the rightful owner of wrongfully seized or transferred property, including religious or communal property, or the provision of comparable substitute property or the payment of equitable compensation;” “the restitution of heirless property to assist needy Holocaust survivors;” and “progress on the resolution of claims for U.S.-citizen Holocaust survivors and family members.”¹⁰⁵ “Covered countries” under the Act are those who participated in the 2009 Holocaust Era Assets Conference and are considered “countries of particular concern relative to the restitution of Holocaust-era assets.”¹⁰⁶ And the bill defines “wrongfully seized or transferred” property as including “confiscations, expropriations, nationalizations, forced sales or transfers, and sales or transfers under duress during the Holocaust era or the period of Communist rule of a covered country.”¹⁰⁷

The Act even accounts for so-called “heirless property,” and provides that the property or compensation shall be used “to assist needy Holocaust survivors, to support Holocaust education, and for other purposes.”¹⁰⁸ This provision is indispensable, as many

103. *Id.* § 5(a), 130 Stat. at 1526.

104. Cong. Research Serv., *S.447-Justice for Uncompensated Survivors Today (JUST) Act of 2017: Summary: S.447—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/447> (last visited June 13, 2020); see also The Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288 (2018).

105. Cong. Research Serv., *supra* note 104.

106. *Id.*

107. The Justice for Uncompensated Survivors Today (JUST) Act of 2017 § 2(a)(3), 132 Stat. at 1288.

108. *Id.* § 2(b)(3), 132 Stat. at 1289.

Holocaust-survivors across the globe are impoverished, with many living in “financial distress” up to 150 percent below the federal poverty level.¹⁰⁹ And only one dozen U.S. states mandate Holocaust education as part of their secondary school curricula.¹¹⁰ As such, the Act’s intention is one that may broadly help to not only monitor and supervise foreign countries’ efforts to return looted property, but also to ensure that the non-physical crimes of the Holocaust are not forgotten.

Regrettably, the Act’s passage was met with fervor and protests by the far-right National Movement in Poland, which vowed that “[t]he Jews will not get a penny from us” and compared restitution to “extortion.”¹¹¹ But U.S. Senator Charles E. Schumer, one of the many cosponsors of the bill, summarized the situation well, explaining that “passage of the JUST Act is a drop of justice in what was an ocean of injustice, as it will ultimately help in the restitution of Nazi-confiscated assets stolen during the Holocaust.”¹¹²

D. Judicial Recourse

Another means of reclaiming looted property is through the courts. Litigation is an often-costly procedure, which provides no guarantees of ultimate success. Ethically, these legal issues seem straightforward. In theory, if the work in question is determined to have belonged to a genocide survivor, logic would dictate that it should be promptly returned to the owner. However, in practice, this is not always the eventual result.

One of the earliest cases that brought the issue of Nazi-looted art to the forefront involved Egon Schiele’s *Portrait of Wally* (1912), with litigation that spanned from 1998 to 2010.¹¹³ The painting

109. Adam Reinherz, *One-Third of Holocaust Survivors Live in Poverty*, PITTSBURGH JEWISH CHRON. (Jan. 23, 2020, 9:21 AM), <https://jewishchronicle.timesofisrael.com/one-third-of-holocaust-survivors-live-in-poverty/>.

110. *Where Holocaust Education Is Required in the U.S.*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/teach/fundamentals/where-holocaust-education-is-required-in-the-us> (last visited Apr. 5, 2020).

111. Jewish Telegraphic Agency, *Polish Nationalists Protest Outside US Embassy Against Holocaust Restitution*, THE TIMES OF ISR. (Apr. 26, 2018, 11:16 PM), <https://www.timesofisrael.com/polish-nationalists-protest-outside-us-embassy-against-holocaust-restitution/>.

112. *Justice for Uncompensated Survivors (JUST) Act*, THE BLUE CARD, <http://www.bluecardfund.org/just-act.html> (last visited Apr. 5, 2020).

113. Isaac Kaplan, *3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult*, ARTSY (July 5, 2017, 4:30 PM), <https://www.artsy.net/article/artsy-editorial-3-cases-explain-restituting-nazi-looted-art-difficult>.

belonged to Lea Bondi Jaray, a Jewish art dealer and gallery owner.¹¹⁴ She sold the painting to a Nazi, Friedrich Welz, before escaping to London.¹¹⁵ After the war, the Allied Forces returned the piece to the Austrian authorities, a “standard practice” that involved returning the work to the rightful, often still anti-Semitic, governments as opposed to the rightful heirs.¹¹⁶ The Austrian government subsequently returned the painting to the wrong owners.¹¹⁷ Years later, in 1953, Bondi asked a Schiele expert, Dr. Rudolf Leopold, where her stolen work ultimately landed.¹¹⁸ Leopold informed Bondi that it was in the Österreichische Galerie Belvedere in Vienna, Austria, but that it would be impossible to retrieve, as the museum would never part with it.¹¹⁹ But then, Leopold proceeded to acquire the painting in exchange for other works.¹²⁰ In 1997, Leopold loaned the painting to the Museum of Modern Art (the MoMA) in New York.¹²¹ Not long after the painting arrived in America, the Manhattan District Attorney moved to have the painting seized as stolen property.¹²² Leopold, for his part, contended that this was not motivated by righting a decades long injustice but rather “greed” on the Bondis’ part.¹²³ The MoMA and museum groups filed briefs asserting that the successful seizure of the painting would have a chilling effect on the loaning of art.¹²⁴ In 1999, Leopold and the MoMA triumphed in court, but before long, the United States Attorney filed for the seizure of the same painting.¹²⁵ The ultimate inquiry was whether Leopold knew that the work was stolen when he sent it to the United States for exhibition.¹²⁶ Mere weeks before the trial was set to commence, another twist happened: Leopold died.¹²⁷ This led the Bondi heirs and the Leopold Foundation to reach a settlement for \$19 million in exchange for the painting to remain in

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

Austria.¹²⁸ From 1990 through 1997, only two Holocaust-era restitution cases were filed, but after this case “it seemed possible to pursue looted art in American court.”¹²⁹

Another pivotal case involved a Camille Pissarro painting, valued at approximately \$30 million.¹³⁰ The painting’s owner was Lilly Cassirer, a grandmother looking to obtain a visa that would permit her to escape Germany in 1939, and before she was allowed to leave the country, an official from the Nazi chamber of visual arts searched her home and inquired about purchasing the painting.¹³¹ She accepted a deflated price under coercive circumstances, ultimately allowing her to flee Germany.¹³² Forced sales “made for diminished value under coercive circumstances” were a common way for Nazis to obtain artwork.¹³³ After the war, the painting was declared “missing,” and Cassirer was able to settle with the German government for about \$13,000¹³⁴ on the stipulation “that she would still have a right to it should it resurface.”¹³⁵ Decades later, in 2001, after Cassirer had already passed away, the painting was found in a museum in Madrid, and Cassirer’s grandson, who was alerted of its discovery, sued for its return.¹³⁶ In this case, there “was no question about the work’s history.”¹³⁷ But still, the Spanish authorities “look[ed] at the question from the perspective of a work of art on display for the public, which was not stolen by the government.”¹³⁸

Under the Foreign Sovereign Immunities Act (FSIA), American courts cannot exercise jurisdiction over foreign sovereign governments unless the taking is in violation of international law.¹³⁹ Spain initially claimed that it did not take the painting, but that Germany did, so it was immune from litigation in America; yet

128. *Id.*

129. *Id.*

130. *Id.*; Joel Rubin, *Nearly 80 Years Ago, Nazis Stole a Family’s Painting. Now an American Judge Will Decide if It Should Be Returned*, L.A. TIMES (Dec. 3, 2018, 5:00 AM), <https://www.latimes.com/local/lanow/la-me-nazi-art-trial-20181203-story.html>.

131. Kaplan, *supra* note 113.

132. *Id.*

133. *Id.*

134. Rubin, *supra* note 130.

135. Kaplan, *supra* note 113.

136. *Id.*

137. *Id.*

138. *Id.* (quoting art lawyer and author Nicholas M. O’Donnell, Esq.).

139. *Id.*

American courts disagreed and permitted the case to proceed.¹⁴⁰ But in doing so, the court applied Spanish law, which permits adverse possession, which would require the heirs to have found the painting, even if the museum did not act to find the rightful owner.¹⁴¹

In April 2019, the U.S. District Court for the Central District of California ruled in favor of the museum, permitting it to retain possession of the painting because it lacked “actual knowledge” that the work was stolen.¹⁴² Judge John F. Walter wrote that, “[i]t is undisputed that the Nazis stole the Painting from Lilly. Under California law and common law, thieves cannot pass good title to anyone, including a good faith purchaser.”¹⁴³ But he continued, opining that, “California law and common law do not apply in this case. Instead, the [c]ourt must apply Spanish law. And, under Spanish law, [the museum] is the lawful owner of the [p]ainting.”¹⁴⁴ He concluded that although the “red flags” (“the intentionally removed labels, the minimal provenance information provided, the partial label demonstrating that the [p]ainting had been in Berlin, and the fact that Pissaros were frequently the subject of Nazi looting”) might have been “sufficient” to raise the museum’s suspicions,¹⁴⁵ they fell “short of demonstrating” the museum’s “actual knowledge”—that the museum “had *certain knowledge* that the [p]ainting was stolen, or that there was a high risk or probability that the [p]ainting was stolen.”¹⁴⁶ That is, the judge felt that “although failing to investigate the provenance of the [p]ainting may have been irresponsible under these circumstances . . . it certainly was not criminal.”¹⁴⁷ Judge Walter was critical of the museum, though, and opined that its position was “inconsistent with the Washington Principles,” which encourages governments to find “just and fair” solutions in cases where looted art is identified.¹⁴⁸

140. *Id.*

141. *Id.*

142. Raphael Minder, *Court Rules Spanish Museum Can Keep a Painting Seen as Nazi Loot*, N.Y. TIMES (May 1, 2019), <https://www.nytimes.com/2019/05/01/arts/design/court-rules-spanish-museum-can-keep-a-painting-seen-as-nazi-loot.html>.

143. Cassirer v. Thyssen-Bornemisza Collection Found., CV 05-3459-JFW (Ex), 20 (C.D. Cal. Apr. 30, 2019), <https://www.courthousenews.com/wp-content/uploads/2019/05/CassirerThyssen-JUDGMENT.pdf> (citations omitted).

144. *Id.* (citations omitted).

145. *Id.* at 29.

146. *Id.* (emphasis in original).

147. *Id.*

148. *Id.* at 33–34.

Another prominent case involved the Hungarian-Jewish Baron Mór Lipót Herzog, who had assembled an impressive collection of artwork from some of history's most fabled artists.¹⁴⁹ After Hungary passed laws dispossessing Jewish residents of their property, the family attempted to safeguard their artwork, but it was eventually seized, with some even sent to Adolf Eichmann's headquarters and the rest sent to the Museum of Fine Arts in Budapest.¹⁵⁰ "After the war, a portion of the works were returned to the family in the form of short term [sic] loans, before, under 'relentless harassment,' they gave the pieces to the Museum of Fine Arts in Budapest."¹⁵¹ When "a communist government came to power in Hungary, it became impossible to investigate" the paintings in the collection.¹⁵²

In 2010, three of Herzog's heirs filed suit seeking the return of the collection.¹⁵³ The heirs were up against a proverbial legal mountain, with challenges such as the delay in filing suit, the proper jurisdiction for the litigation, and the question of whether American courts could intervene under the FSIA.¹⁵⁴ The latter inquiry proved especially pivotal, as it would serve as a de facto block to the gates of justice if a court felt that the heirs could not proceed under the law.¹⁵⁵

Here, the court felt that the taking was a violation of international law as "targeting someone economically in what was the prelude to genocide is part of that genocide, which is itself a crime against international law."¹⁵⁶ The FSIA's expropriation exception means that, "if the claims concern rights in property taken in violation of international law, and the defendants are engaged in commercial activity in the United States, they may be sued

149. Kaplan, *supra* note 113.

150. *Id.*; see also Catherine Hickley, *Heirs of Baron Herzog Continue Battle for Nazi-Looted Art Collection Despite US Supreme Court Dismissal*, THE ART NEWSPAPER (Feb. 7, 2019, 10:31 AM), <https://www.theartnewspaper.com/news/fight-goes-on-for-baron-herzog-s-nazi-looted-art-collection> ("A pro-Nazi newspaper boasted that the plunder would help the museum 'become a collection ranking just behind Madrid.'").

151. Kaplan, *supra* note 113.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

notwithstanding the general concept of sovereign immunity.”¹⁵⁷ The U.S. Court of Appeals for the District of Columbia (“D.C. Circuit Court of Appeals”) concluded that Hungary was immune from the jurisdiction of U.S. courts.¹⁵⁸ The circuit court affirmed the district court’s ruling that the Herzog family’s claims satisfied the expropriation exception and remanded to determine whether the claim to recover each piece may proceed under the expropriation exception.¹⁵⁹ But the court dismissed Hungary as a defendant.¹⁶⁰

In January 2019, the U.S. Supreme Court denied certification on the issue of

[w]hether a foreign state itself is immune from suit in the United States in a case in which rights in property taken in violation of international law are at issue, the property is located outside the United States, the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States.¹⁶¹

Today, the collection of over forty paintings, valued at over \$100 million, can still be found in three different museums in Budapest.¹⁶²

In the over twenty years since Bondi’s case involving Egon Schiele’s *Portrait of Wally*,¹⁶³ many cases regarding the rightful ownership of Holocaust-era art have been brought before various courts across the country. Some cases have remained hidden in the shadows, while others have been fortunate enough to attract media and, in some instances, even attention from Hollywood.

Randol Schoenberg was a young boy when he first saw Gustav Klimt’s early twentieth-century painting, often referred to as *The Woman in Gold*, hanging in Vienna’s Österreichische Galerie

157. Nicholas O’Donnell, *Herzog Heirs Win Again in Appeals Court on Jurisdiction over Hungarian Museums*, JD SUPRA (June 27, 2017), <https://www.jdsupra.com/legalnews/herzog-heirs-win-again-in-appeals-court-61074/>.

158. *De Csepel v. Republic of Hung.*, 859 F.3d 1094, 1110 (D.C. Cir. 2017).

159. *Id.*

160. *Id.*

161. *de Csepel v. Republic of Hungary*, SCOTUSBLOG (Jan. 7, 2019), <https://www.scotusblog.com/case-files/cases/de-csepel-v-republic-of-hungary/>.

162. Hickley, *Heirs of Baron Herzog*, *supra* note 150.

163. *See* Kaplan, *supra* note 113.

Belvedere.¹⁶⁴ His mother informed him that the painting once belonged to the family of Holocaust survivor Maria Altmann, a family friend, whose aunt, Adele Bloch-Bauer, was the gold-draped subject of the painting.¹⁶⁵ Approximately three decades later, Schoenberg would represent Altmann in her case against the government of Austria over the ownership of five Klimt paintings.¹⁶⁶ After almost eight years of legal proceedings—including a 2004 United States Supreme Court ruling in Schoenberg’s favor, holding that the case could go forward in U.S. courts and that Austria was not insulated by the FSIA¹⁶⁷—an Austrian arbitration panel ordered the government to return the paintings, worth a jaw-dropping \$200 million.¹⁶⁸ Schoenberg’s and Altmann’s success would become the subject of the 2007 documentary *Stealing Klimt*¹⁶⁹ and the 2015 blockbuster film *Woman in Gold*.¹⁷⁰

In another case that concluded in May 2019, the U.S. Supreme Court refused to hear an appeal from a ruling that allowed the Norton Simon Museum in Pasadena, California to retain possession of two paintings, an *Adam* and an *Eve* by Lucas Cranach the Elder that date back to approximately 1530.¹⁷¹ The plaintiff in that case, Marei von Saher, is the heir of Jacques Goudstikker, who was a Dutch Jewish art collector and dealer who fled the Netherlands in 1940 after the Germans invaded, and whose art dealership was acquired by Göring in a forced sale.¹⁷² In July 2018, the Ninth Circuit Court of Appeals ruled in favor of the museum.¹⁷³ The museum argued that title to the works passed out of Goudstikker’s family in 1966 when the Dutch government restituted them to George Stroganoff-Sherbatoff, an exiled Russian aristocrat.¹⁷⁴ However, Stroganoff-Sherbatoff had laid

164. Anne-Marie O’Connor, *Attorney’s Perseverance Yields a Legal Masterpiece*, L.A. TIMES (Jan. 23, 2006, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2006-jan-23-me-schoenberg23-story.html>.

165. *Id.*

166. *Id.*

167. *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004).

168. O’Connor, *supra* note 164.

169. *See* STEALING KLIMT (Poppy Pictures 2007).

170. *See* WOMAN IN GOLD (BBC Films 2015).

171. Nancy Kenney, *US Supreme Court Declines to Hear Appeal on Nazi-Looted Art*, THE ART NEWSPAPER (May 21, 2019, 4:32 AM), <https://www.theartnewspaper.com/news/us-supreme-court-declines-to-hear-appeal-on-nazi-looted-art>.

172. *Id.*

173. *Id.*

174. *Id.*

claim to the paintings, only to subsequently sell the artworks, worth approximately \$24 million, to the American collector Norton Simon in 1971.¹⁷⁵ Von Saher's initial 1990s claim with the Dutch government was also rejected on the grounds that her family had relinquished its rights after the war.¹⁷⁶

In 1938, Paul Friedrich Leffmann, a German-Jewish businessman, sold Pablo Picasso's painting *The Actor* to fund his escape from Nazi Germany.¹⁷⁷ In June 2019, the Second Circuit Court of Appeals ruled that Leffmann's great-grandniece had left an "unreasonable" delay in demanding the return of the artwork from New York City's Metropolitan Museum of Art (the Met).¹⁷⁸ In 1939, the painting was loaned to the MoMA, then cosigned to a gallery that sold it to an arts patron who donated it to the Met in 1952.¹⁷⁹ The Met's published provenance of the painting formerly listed Leffmann as a previous owner, but recently incorrectly stated that he sold the painting in 1912.¹⁸⁰ The Second Circuit analyzed whether the delay was "unreasonable" and if there was a showing of prejudice, and concluded that the suit was barred by the doctrine of laches.¹⁸¹ The court further opined that, "[t]his is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate" or a case where "the buyers themselves exerted any undue or improper pressure on the sellers."¹⁸²

A few days after the Leffmann decision, New York's Appellate Division, First Department in *Reif v. Nagy*¹⁸³ upheld the return of two Egon Schiele works, *Woman in a Black Pinafore* and *Woman Hiding Her Face*, to the heirs of Fritz Grünbaum, a Jewish-Viennese cabaret performer whose art collection was deposited with a Nazi-

175. *Id.*

176. *Id.*

177. Amy Woodyatt, *Picasso Sold by German Jewish Businessman to Fund Escape from Nazis to Stay at New York's Met*, CNN (June 27, 2019), <https://www.cnn.com/style/article/picasso-nazi-met-museum-intl-scli/index.html>.

178. *Id.*

179. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 192 (2d Cir. 2019).

180. *Id.*

181. *Id.* at 193–97. The doctrine of laches "protect[s] defendants against 'unreasonable, prejudicial delay in commencing suit.'" *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014)).

182. *Zuckerman*, 928 F.3d at 194.

183. 175 A.D.3d 107 (N.Y. App. Div. 2019).

controlled shipping company in 1938.¹⁸⁴ “While [Grünbaum] was imprisoned at Dachau, the Nazis forced him to execute a power of attorney in favor of [his wife,] Elisabeth [Lilly Grünbaum (Elisabeth)].”¹⁸⁵ Four days later, pursuant to the purported power of attorney, Elisabeth was compelled to permit a Nazi official named Franz Kieslinger to inventory Grünbaum’s property, including his art collection, which contained eighty-one pieces by Schiele.¹⁸⁶ After it was inventoried, Grünbaum’s entire art collection was deposited with a Nazi-controlled shipping company and marked for “export,” even though the export license in the name of “Lilly Grünbaum” was devoid of customs stamps, meaning that the art collection never legally left Austria.¹⁸⁷

Grünbaum was murdered at Dachau on June 9, 1941.¹⁸⁸ Elisabeth signed a declaration before an Austrian notary in connection with obtaining her husband’s death certificate, stating, “[t]here is nothing left,” thus asserting that there was no estate.¹⁸⁹ As such, “[b]ecause of a lack of goods or property, there [was no] estate proceeding for inheritance” before the Dachau Probate Court.¹⁹⁰ On or about October 5, 1942, Elisabeth was murdered at Maly Trostinec death camp.¹⁹¹ After a series of transactions,¹⁹² defendant, an art collector, obtained the two relevant Schiele artworks, leading plaintiffs to file an action for replevin and conversion against defendants in 2016, and seek a declaratory judgment that they owned the works.¹⁹³

When the defendant acquired *Woman Hiding Her Face* in 2013, the Art Sale and Transfer Agreement stated that, “the heirs of Fritz

184. *Id.* at 109.

185. *Id.* at 110.

186. *Id.*

187. *Id.* at 111.

188. *Id.* at 113.

189. *Id.*

190. *Id.* (alterations in original).

191. *Id.*

192. *Id.* at 114–15. One of the previous owners’ granddaughter published *Egon Schiele: The Complete Works*, which included mention of the two paintings at issue but listed them without full provenance, stating only that they were part of a “private collection.” *Id.* She did not mention Grünbaum, but while testifying in a related matter, she did concede that they were of Grünbaum provenance. *Id.*

193. *Id.* at 117. Conversion occurs when someone, intentionally and without authority, assumes or exercises control over personal property that belongs to another, interfering what that person’s right of possession. *Id.* at 120. To establish a cause of action for replevin, a plaintiff must show a superior possessory right to property in a defendant’s possession. *Id.*

[Grünbaum] claim ownership of the [p]ainting on the theory that it was stolen from Mr. [Grünbaum] when he was deported to a German concentration camp during World War II.”¹⁹⁴ Defendant agreed that he would have no claim against the seller if title were declared invalid on that basis; he even purchased title insurance for the work, which acknowledged that it was registered as “Lost Art.”¹⁹⁵

In essence, Grünbaum’s heirs sought a ruling stating that there was no voluntary transfer of the artworks out of Grünbaum’s estate and that in New York a thief cannot pass good title.¹⁹⁶ The court agreed, and cited a 2010 Second Circuit case where Grünbaum’s heirs were barred by laches, but where the court stated that “artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.”¹⁹⁷ The New York appellate court also cited to a 2018 case from the D.C. Circuit Court of Appeals, which stood for the proposition that “the sale of art during the Holocaust by a Jewish owner was coerced and under duress, covered by both [HEAR] and a violation of international law such to be an exception to the [FSIA].”¹⁹⁸ In doing so, it acknowledged that “[c]ourts have generally interpreted the HEAR Act liberally, focusing on the purpose for which it was enacted.”¹⁹⁹

In order to reach their ultimate success, plaintiffs had to prove that Grünbaum owned the works prior to World War II and that Grünbaum never voluntarily relinquished the works.²⁰⁰ The court found that plaintiffs met their prima facie burden that the artworks belonged to Grünbaum, and that even if another possessed them during the war, possession is not equivalent to legal title.²⁰¹ Second, the court opined that “to whom [Grünbaum] lost the [a]rtworks is immaterial,” as Grünbaum did not voluntarily relinquish the

194. *Id.* at 118.

195. *Id.*

196. *Id.* at 129–30.

197. *Id.* at 129 (quoting *Bakalar v. Vavra*, 619 F.3d 136, 141 (2d Cir. 2010)).

198. *Id.* (quoting *Philipp v. Fed. Republic of Ger.*, 248 F. Supp. 3d 59, 70 (D.D.C. 2017)).

199. *Id.* at 132 n.34.

200. *See id.* at 120–28.

201. *Id.* at 127.

works.²⁰² The undisputed evidence showed that the art was inventoried; an Aryan Trustee, who could transfer Grünbaum's property at will, was appointed to administer the art collection; and Grünbaum was executed during the Holocaust.²⁰³ The court explained that

[t]here is no evidence in the record that Elisabeth transferred title to the collection. Nor was Elisabeth able to convey good title as [Grünbaum] signed the purported power of attorney while imprisoned in Dachau. We reject the notion that a person who signs a power of attorney in a death camp can be said to have executed the document voluntarily.²⁰⁴

As a result, the court found that plaintiffs established that "the power of attorney signed by [Grünbaum] while under Nazi control is a product of duress, and, therefore, any subsequent transfer of the [a]rtworks did not convey legal title."²⁰⁵ So even assuming that Grünbaum transferred his collection to Elisabeth, this transfer was invalidated.²⁰⁶ The court also discredited any concept of Grünbaum creating an *inter vivos* gift.²⁰⁷

Next, the court dealt with the equitable defense of laches and found it inapposite because the defendant acquired the works in 2013, suffered no change in position, and was aware of Grünbaum's position on the works.²⁰⁸ In addition, no evidence was lost between defendant's acquisition of the works and plaintiffs' demand for their return.²⁰⁹ In the court's conclusion, it discussed the legislative intent behind the promulgation of the HEAR Act, and Congress's hope that potential claimants are not barred unduly by statutes of limitation.²¹⁰

The tragic consequences of the Nazi occupation of Europe on the lives, liberty and property of the Jews continue to confront us today. We are informed by the intent and provisions of the HEAR Act[,] which highlights the context

202. *Id.* at 128.

203. *Id.* at 128–30.

204. *Id.* at 129.

205. *Id.*

206. *Id.*

207. *Id.* at 129–30.

208. *Id.* at 130.

209. *Id.*

210. *Id.* at 131–32.

in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law. We also note that New York has a strong public policy to ensure that the state does not become a haven for trafficking in stolen cultural property, or permitting thieves to obtain and pass along legal title.²¹¹

The plaintiff's attorney said that the two artworks, valued at roughly \$7 million, were set to be auctioned at Christie's in November 2019, which would block further appeals.²¹²

Cases involving Nazi-looted art present a mixed-bag of successes and losses on the merits. Litigations frequently involve epics of David and Goliath proportions, with an individual sparring against a powerhouse world-renown art center. Attorneys are tasked with the Herculean undertaking of deciphering archaic documentation to create a paper trail that links past and present, and the survivor or heir with the subject artwork. And the results provide further evidence that the burden of proving ownership is often not on the museums, galleries, and cultural institutions, but rather on the dispossessed. Moreover, owners and their heirs face procedural battles in the forms of expired statutes of limitations, laches, and jurisdictional barriers. Accordingly, it is apparent that the courts are still not the best routes for survivors and their heirs to embark down the long journey toward recovery.

IV. A RECIPE FOR REUNIFICATION

Now, more than eighty years after World War II began, it is high time for governments and cultural institutions on a worldwide scale to work together to fulfill the presently unmet promises of reuniting survivors and their heirs with the works of art that still rightfully belong to them. This will require the creation of an independent adjudication panel as well as global cooperation of the art community.

211. *Id.* at 132 (citation omitted).

212. William D. Cohan, *Court Says Heirs of Holocaust Victim Can Keep Nazi-Looted Works*, N.Y. TIMES (July 10, 2019), <https://www.nytimes.com/2019/07/10/arts/design/nazi-looted-art-holocaust.html>.

A. Independent Adjudication Panel

The Washington Conference envisioned the creation of a central registry of artwork with ties to Nazi Germany.²¹³ The Washington Principles elucidated that for art confiscated by the Nazis and not subsequently restituted, “steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.”²¹⁴ In cases where an heir cannot be identified, “steps should be taken expeditiously to achieve a just and fair solution.”²¹⁵ The goal was proactive, with nations encouraged to champion survivors’ and heirs’ rights by designing “national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”²¹⁶ So far, five countries, Austria, France, the Netherlands, the United Kingdom, and Germany, have created panels to assess Nazi-looted art claims, and Sweden’s museums have requested that their government follow suit.²¹⁷ But the U.S. State Department did not want to fund a restitution panel, under the belief that federal public money should not be disbursed to private museums.²¹⁸

The implementation of an American independent adjudication panel is one advisable method to assist in reuniting artwork with its proper owners. The HEAR Act sought to ensure “that laws governing claims to Nazi-confiscated art and other property further United States policy” and “that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”²¹⁹ But in reality, litigants are still facing uphill battles due to procedural hurdles that prevent them from rightfully regaining ownership of

213. See *Washington Conference on Holocaust-Era Assets*, *supra* note 57, at app. G, 971–72, https://www.lootedart.com/web_images/pdf2014/Appendices.pdf.

214. *Id.* at 972.

215. *Id.*

216. *Id.*

217. Catherine Hickley, *Swedish Museums Call for Panel to Advise on Nazi-Loot Claims*, THE ART NEWSPAPER (Sept. 25, 2018, 9:44 AM), <https://www.theartnewspaper.com/news/swedish-museums-call-for-panel-to-advise-on-nazi-loot-claims>; see also Catherine Hickley, *Washington Principles: The Restitution of Nazi-Looted Art Is Still a Work in Progress, 20 Years On*, THE ART NEWSPAPER (Nov. 26, 2018, 9:47 AM), <https://www.theartnewspaper.com/amp/news/restitution-of-nazi-looted-art-a-work-in-progress>.

218. Hickley, *Washington Principles*, *supra* note 217.

219. Holocaust Exploited Art Recovery Act of 2016, Pub. L. No. 114-308, § 3, 130 Stat. 1524, 1525–26.

artwork because of the time that accrued between when the works were taken and when the plaintiff filed a claim.²²⁰

Moreover, the Act includes a sunset clause, explaining that it “shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027.”²²¹ Any claim or cause of action “commenced on or after that date to recover artwork or other property described in this Act shall be subject to any applicable Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.”²²²

Thus, prospects seem bleak that, given the parameters and pitfalls of the current legal structures surrounding Holocaust-era art, rightful owners will be reunited with their works. Consequently, it is of great import that immediate action is taken to ease the legal proceedings and allow cases to progress more rapidly. Instead of traditional adversarial channels, an independent adjudication panel, consisting of members of the international legal and art communities, as well as from governmental agencies, would act in harmony to hear cases and resolve issues of ownership. Because of the longstanding issues regarding jurisdiction and choice of law, an objective panel could eliminate the need for prolonged disputes about where a case should be heard or what nation’s law ultimately will govern. In *Reif*, a recent New York state case, the plaintiffs had to prove that the original owner, Grünbaum, owned the works prior to World War II and that he never voluntarily relinquished them.²²³ This two-step process would assist the members of the board in ensuring that a plaintiff has a proper property stake in the artwork. Once plaintiffs meet their burden of showing ownership and lack of transfer—that is, that the defendant did not acquire good title to it—then the onus would properly be on the defendant to dispute the integrity of that contention.

By nature, judges are not experts in the unique specificities that are ubiquitous in art restitution cases. The need for experts with in-depth knowledge of provenance and the process by which art is

220. See, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 193–94 (2d Cir. 2019) (finding that the seventy years between the purported owners’ last possession of a Picasso painting and a suit to recover it constituted an unreasonable delay).

221. Holocaust Expropriated Art Recovery Act § 5(g), 130 Stat. at 1527.

222. *Id.* § 5(g), 130 Stat. at 1527–28.

223. See *Reif v. Nagy*, 175 A.D.3d 107, 120 (N.Y. App. Div. 2019).

verified would undeniably rectify art theft. The HEAR Act anticipated “national processes to implement . . . alternative dispute resolution mechanisms for resolving ownership issues.”²²⁴ In conjunction with the Act, the panel could have its own set of operating procedures and laws, and its founding adjudicators could determine what bright line rules will control. For instance, some jurisdictions have different interpretations of adverse possession, a doctrine that allows wrongful possession spanning over a proscribed time to turn to legal possession.²²⁵ In order to best assist heirs in regaining ownership, the doctrine of adverse possession should not be utilized in board proceedings. Under the law governing real estate transactions, some jurisdictions look to recording statutes differently to determine whether a bona fide purchaser—one who lacks actual, inquiry, or record knowledge of a previous transaction—can rightfully own property.²²⁶ This means that if one lacks actual or constructive knowledge of a previous owner, they can hold superior title.

In cases involving looted art, the concept of mens rea, or knowledge, is inapposite. The burden should be on the defendants to dispute that the plaintiff is the rightful owner. If the defendant cannot do so, the penalty should be one grounded in strict liability. Thus, the mental state of the art collector, gallery owner, or international museum—that is, what they knew when obtaining the art—will be irrelevant in determining who should ultimately own the artwork. The classification of a crime as one deserving of strict liability will undoubtedly be met with detractors, those who believe that it is unfair for a defendant to be held liable for a wrongful action that it did not initially cause. However, this crucially fails to account for the fact that context is imperative in these cases, and that failing to right decades-long wrongs places these institutions on the same footing as the perpetrators of art-related war crimes.

The gates of justice should be wide open to Holocaust survivors and their heirs, and the long and winding pathways to that gate must

224. *Washington Conference on Holocaust-Era Assets*, *supra* note 57, at app. G, 972, https://www.lootedart.com/web_images/pdf2014/Appendices.pdf.

225. *See supra* Section II.D.

226. *See, e.g.*, 66 ROMUALDO P. ECLAVEA, *AMERICAN JURISPRUDENCE* § 45 (2d ed. 2020) (“[N]o general rule, applicable to all jurisdictions, can be stated as to the conveyances and instruments that must be recorded to constitute notice to subsequent purchasers and encumbrancers.”).

be both shortened and cleared from procedurally deficient roadblocks. Only then can our legal system be truly just and warrant that artworks are no longer held hostage at the expense of their rightful owners.

B. Global Cooperation of the Art and Legal Communities

The majority of claims involving Holocaust-era looted art sees survivors on one side of the spectrum and museums on the opposite.²²⁷ One challenge that this creates is that many museums view these cases as mere commercial disputes, rather than complex intricacies with moral and ethical undertones.²²⁸ The inquiry then naturally becomes what should be the appropriate ethical responsibility of museums. Museums consider themselves to be fiduciaries that hold art in the public trust, for the public interest.²²⁹ But the recognized reality is that art museums are not-for-profit—they are specially created entities with tax exemptions, and real estate that is not taxed.²³⁰ As predicated by the AAM, museums across the nation “should strive to foster a climate of cooperation, reconciliation, and commonality of purpose” and “should address claims of ownership asserted in connection with objects in their custody openly, seriously, responsively and with respect for the dignity of all parties involved.”²³¹

Shortly before the Washington Conference, the Association of Art Museum Directors (AAMD) convened a task force that released a 1998 report on its findings.²³² The AAMD reaffirmed “the commitment of its members to weigh, promptly and thoroughly, claims of title to specific works in their collections.”²³³ It further urged the “prompt creation of mechanisms to coordinate full access to all documentation concerning this spoliation of art, especially

227. See, e.g., *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010); *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019).

228. See Cohan, *The Restitution Struggle*, *supra* note 66.

229. *Id.*

230. *Id.*

231. *Unlawful Appropriation of Objects During the Nazi Era*, *supra* note 84.

232. See ASS’N OF ART MUSEUM DIRS., REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1945) 1–5 (1998), <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf>.

233. *Id.* at 2.

newly available information.”²³⁴ In an effort to accomplish this objective, the AMMD argued in favor of creating third-party databases to “complement long-standing American museum policy of exhibiting, publishing and researching works of art in museum collections in order to make them widely available to scholars and to the general public.”²³⁵ It disseminated a series of guidelines to assist museums in carrying out their fiduciary duties.²³⁶ First, it implored museum directors to conduct provenance research regarding their existing collections in order to ascertain if any works were unlawfully confiscated during the war.²³⁷ This should be accomplished via a thorough search of museum records as well as all “archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers.”²³⁸ The AAMD acknowledged that this could be a costly process and vowed that its Art Issues Committee would “address the matter of such research and how to facilitate it.”²³⁹

Second, for future gifts, bequests, and purchases, the AAMD instructed directors to ask donors, executors, and sellers to “provide as much provenance information as possible” with regard to the World War II era.²⁴⁰ If the provenance is deficient for this time period, directors are advised to conduct their own independent research.²⁴¹ If no evidence of unlawful confiscation is unearthed, the work is presumptively valid, and the acquisition is allowed to proceed; but if there is evidence of Nazi-era confiscation without restitution, the museum is directed not to proceed and to take “appropriate further action.”²⁴² In addition, museums should publish all recent gifts, bequests, and purchases, so that there is an accessible display for further research.²⁴³ Museums would also benefit to seek representations and warranties from sellers that they have valid title

234. *Id.*

235. *Id.*

236. *See id.* at 2–5.

237. *Id.* at 2–3.

238. *Id.* at 3.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

and that they hold the work free and clear from any plausible claims.²⁴⁴

Third, access to museum records is a vital aspect of elucidating the provenance of their collections, so it is unsurprising that the AAMD recognized the need for a central registry.²⁴⁵ Fourth, in the event that a member museum determined that it held an illegally confiscated work, it should publicize the information and offer to resolve the matter in an “equitable, appropriate, and mutually agreeable manner” with a legitimate claimant.²⁴⁶ If no legitimate claimant comes forward, the museum’s responsibility does not end there; instead, directors are told to “acknowledge the history of the work of art on labels and publications referring to such a work.”²⁴⁷ Fifth, if a claim is brought against a museum, it should act expeditiously by first requesting evidence of ownership and second determining if the work was illegally confiscated.²⁴⁸ The AAMD recommends the use of mediation “wherever reasonably practical.”²⁴⁹ Sixth, the AAMD clarifies that the same policies should adhere to works that are on loan to a museum, in addition to gifts, bequests, and sales.²⁵⁰ If the propositions behind the guidelines disseminated by the AAMD look familiar, that is no coincidence; they formed the basis of the Washington Principles.²⁵¹

The AAMD also expanded on its ideals for a third-party database, and set forth a list of information that it should cover, including claims and claimants, works of art illegally confiscated during the Nazi-era, and works of art later restituted.²⁵² It encouraged member museums to participate in advisory boards that could provide insight on the establishment of such a database.²⁵³

In 2001, the AADM included an addendum to its report:

244. *Id.*

245. *See id.* at 4–5.

246. *Id.* at 4.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *See* Stephen J. Knerly, Jr., *Selected Issues for American Art Museums Regarding Holocaust Era Looted Art 1* (June 25, 2009), https://res.cloudinary.com/hahn-loeser/raw/upload/f_auto/v1464214050/whkzogrskd1qkghugm2.pdf (paper presented at the 2009 Prague Conference on Holocaust Era Assets on behalf of the Association of the Art Museum Directors).

252. ASS’N OF ART MUSEUM DIRS., *supra* note 232, at 4–5.

253. *Id.*

It should be the goal of member museums to make full disclosure of the results of their ongoing provenance research on those works of art in their collections created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period, giving priority to European paintings and Judaica.²⁵⁴

In May 2007, the AAMD released a paper entitled “Art Museums and the Identification and Restitution of Works Stolen by the Nazis,” recapping the work that museum directors should continue to do toward the goal of reunification.²⁵⁵ The paper admitted that “provenance research is complex” and that “[o]wnership records are often incomplete, wartime documents may have been destroyed, and standards of record keeping have changed over time,” meaning that “research requires the expert physical examination of works of art, and the thorough investigation of museum archives, auction and exhibition catalogues, monographic studies, and catalogues of collections, dealer records, photographic archives, and publications of the wartime activities of dealers and collectors.”²⁵⁶ The AAMD also revealed that each year new documents on provenance research become available—for example, by 2001, 400,000 previously classified pages were released.²⁵⁷ While significant, this still represents a “small percentage of the archival material that remains to be studied.”²⁵⁸

Shortly thereafter, the AAMD released a paper to the Looted Art Working Group of the 2009 Holocaust Era Assets Conference.²⁵⁹ This paper discussed the problems with access to records, as there are typically two threshold issues in connection with a provenance claim: (1) “whether the object was confiscated and not restituted”; and (2) “whether the claimants, if they are not the original owners, have standing to bring the claim.”²⁶⁰ As fiduciaries, museums are

254. *Id.* at 5.

255. See Ass'n of Art Museum Dirs., *Art Museums and the Identification and Restitution of Works Stolen by the Nazis* 1 (May 2007), https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf (unpublished paper).

256. *Id.* at 2.

257. *Id.*

258. *Id.*

259. See Knerly, *supra* note 251, at 1.

260. *Id.* at 8.

obligated to expend time and research into inheritance records and copies of wills, along with other documentation to assure that “the claimants represent the universe of those who could bring an action against the museum.”²⁶¹

In the time since, the AAMD’s website now hosts the Registry of Resolution of Claims for Nazi-Era Cultural Assets, which “provides information on the resolution of formal claims made to AAMD member museums regarding works of art believed to have been stolen by the Nazis between 1933–1945.”²⁶² “The information in the registry has been provided by AAMD’s members in furtherance of the Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1945),” and “lists objects restituted and settlements made since June 4, 1998, the date the report was adopted.”²⁶³ As of July 2019, thirty-nine objects have been posted from seventeen museums.²⁶⁴

But while the AAMD registry hosts resolved formal claims, there still exists the need for an actively updated central registry of all Holocaust-era artwork owned by museums, galleries, and public collections across the globe. “Pursuant to an agreement between AAM, AAMD, and the Presidential Advisory Commission on Holocaust Assets in the United States, AAM created a website known as the Nazi-Era Provenance Internet Portal.”²⁶⁵ “The Portal provides a central, searchable registry of objects in U.S. museums that changed hands in Continental Europe during the period 1933 to 1945.”²⁶⁶ “[O]ver 164 museums have published over 27,000 works on the Portal,” which “links researchers to individual museum websites or staffs, from which users can obtain detailed provenance information, exhibition and publication history, and other information about specific objects.”²⁶⁷ In order to be effective, a registry should also include a list of any Nazi-curated lists of commandeered artwork that can be used by heirs to trace back pieces

261. *Id.* (“The more complete and accurate the information presented to museums by claimants, the more expeditiously a claim can be considered and resolved.”).

262. *Resolutions of Claims for Nazi-Era Cultural Assets*, ASS’N OF ART MUSEUM DIRECTORS, <https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info> (last visited Apr. 5, 2020).

263. *Id.*

264. *Id.*

265. Knerly, *supra* note 251, at 4.

266. *Id.*

267. *Id.*

that may have been owned by their ancestors. By maintaining an operational and user-friendly archive, potential claimants will have the ability to readily search for artwork from a particular time period or country and will serve as a springboard for additional provenance-related research. The International Foundation for Art Research (IFAR) was established in 1969 to verify the integrity in the visual arts and to “research the attribution and authenticity of works of art.”²⁶⁸ But, its Authentication Research Service is only offered to “museums and other institutions, private individuals, art dealers, and other art professionals,” and IFAR “will only examine a work for an owner or an agent officially representing the owner.”²⁶⁹

Further complicating matters is the fact that in the United States the problem with “Nazi-looted art in the hands of the U.S. government” is not as significant as in European nations, which are grappling with their own governments still possessing looted art.²⁷⁰ But this still does not mean that the government should be off the hook.

The legal system and the government must also do their part. A government-funded agency whose purview would be in identifying potentially stolen property, conducting research, and presenting evidence to the institution in possession of the work, would greatly assist in closing the gaps between how the system currently stands and how it ought to be. In the New York state, the Holocaust Claims Processing Office (HCPO) advocates on behalf of Holocaust victims, survivors, and their heirs, whether New York residents or not, by “seeking the just and orderly return of assets to their original owners.”²⁷¹ The HCPO was created in 1997, and “as of December 31, 2017 . . . has facilitated the restitution of over \$176 million in bank accounts, insurance policies, and other material losses and the resolution of cases involving more than 141 works of art.”²⁷²

268. *About IFAR*, INT’L FOUND. FOR ART RES., <https://www.ifar.org/about.php> (last visited Apr. 5, 2020).

269. *Authentication Research Service*, INT’L FOUND. FOR ART RES., <https://www.ifar.org/authentication.php> (last visited Apr. 5, 2020).

270. *Nazi Looted Art: Legal Remedies and Limitations*, THE ART L. PODCAST (Oct. 1, 2018), <http://artlawpodcast.com/2018/10/01/nazi-looted-art-legal-remedies-and-limitations/>.

271. *About the HCPO*, N.Y. ST. DEP’T OF FIN. SERVS., https://www.dfs.ny.gov/consumers/holocaust_claims (last visited Apr. 5, 2020).

272. *Id.*

The HCPO is a no-fee, non-commission based organization that primarily acts as “a bridge between claimants and the various international compensation organizations and/or the current holder(s) of the asset be it a bank account, insurance policy or artwork.”²⁷³ Its purpose is “to advocate for claimants by helping to alleviate any cost and bureaucratic hardships they might encounter in trying to pursue claims on their own.”²⁷⁴ Because restitution claims “range from the purely anecdotal to partially or even fully documented, the HCPO developed a systematic method to handle cases,” which involves three forms of research: “(1) genealogical; (2) archival research for prewar, wartime, and postwar records; and (3) the search for the missing objects, provenance research being one component of this effort.”²⁷⁵ Upon completing the research and locating the missing asset, the HCPO’s “role changes from that of detective to advocate and facilitator.”²⁷⁶ Now, it “submits claim information to the appropriate companies, authorities, museums, or organizations with the request that a complete and thorough search be made.”²⁷⁷ The HCPO contends that its successes are demonstrative of the reality that “candid dialogue between parties can lead to the mutually beneficial resolution of these disputes.”²⁷⁸

The HCPO is a virtuous starting point, but this does not detract from the government’s lingering need to create a national, funded agency that could conduct its own provenance research and negotiate with the holders of illegally obtained artworks to possibly commence the process of deaccession. The agency could save potential claimants vital time and money by assisting in gaining access to documentation that would be a challenge and perhaps even a barrier for lay individuals to obtain and decipher. This process would be a fruitful first step in achieving the non-adversarial righteous return of looted artwork.

V. CONCLUSION

While some families have been victorious in their courtroom battles, those triumphs are as much of an anomaly as they are a

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

pleasant surprise for many in the art law community, and because resources available “for the often lengthy and arduous process of provenance research are limited,” museums should be proactive in offering to return paintings without forcing heirs to devote time and energy toward a lengthy legal fight.²⁷⁹ As Randy Schoenberg, himself successful in seeing the return of a multi-million dollar estate, conceded, “[m]any others have been less fortunate, and still struggle with seemingly endless roadblocks and obstacles to recovery set forth by people who value the artworks more than they value justice. It is time for these last prisoners of war to be returned.”²⁸⁰

The haunting poem, “First they came . . .” by Pastor Martin Niemöller, is a 1946 post-war confession:

First they came for the Communists
And I did not speak out
Because I was not a Communist
Then they came for the Socialists
And I did not speak out
Because I was not a Socialist
Then they came for the trade unionists
And I did not speak out
Because I was not a trade unionist
Then they came for the Jews
And I did not speak out
Because I was not a Jew
Then they came for me
And there was no one left
To speak for me.²⁸¹

Congress has spoken out by fashioning the HEAR Act and the JUST Act, and governments around the world have added their voices to the cacophony by attending the Washington Conference and drafting the Washington Principles. Those in the art world have imparted their own contributions via organizations like the AAM and the AAMD. Now, it is time for those words to turn into actions.

279. Knerly, *supra* note 251, at 17.

280. Randy Schoenberg, *The Last Prisoners of War: Inside the Battle to Recover Nazi-Stolen Artwork*, MSNBC (Apr. 1, 2015, 8:33 AM), <http://www.msnbc.com/msnbc/the-last-prisoners-war-inside-the-battle-recover-nazi-stolen-artwork>.

281. Martin Niemöller, *First They Came*, HOLOCAUST MEMORIAL DAY TR., <https://www.hmd.org.uk/resource/first-they-came-by-pastor-martin-niemoller/> (last visited Apr. 5, 2020).

Universal cooperation on the part of the legal and art worlds through the implementation of an independent adjudication panel will help finally further equilibrate the scales of justice. And a government-funded agency will assist heirs in the grueling and technical work of researching potential claims that can be presented to cultural institutions that can then act on such information without the need for a legal proceeding.

With the vast death and destruction that occurred during the Holocaust and World War II, it may seem puzzling that there is such a focus on restituting art. After all, millions were slaughtered and those fortunate enough to have survived returned to countries that still did not want them, to decimated families, and to continued homelessness, starvation, and illness. But that cannot discount this gargantuan endeavor. The Nazis embarked upon a course of dehumanizing individuals and an entire religion by stripping away their culture and heritage. In order for survivors to piece together the broken fragmentations of their lives, they had to look to a rebuilding process that was so ingrained in reclaiming ownership of not only their artistic works, but in the process, their very sense of self. Moreover, it cannot be ignored that this is only fair, and an attempt at equity for those who have not been given any, or measly, reparations for their forced slavery and torture. It is incumbent that the crossroads between art and the law merge in an effort to finally reach a semblance of justice.

