
ESSAY

GUARDING THE HISTORICAL RECORD FROM THE NAZI-ERA ART LITIGATION TUMBLING TOWARD THE SUPREME COURT

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When the modern wave of claims against museums to recover paintings “displaced” during the Nazi era began, I, as an academic, approached the claims cautiously because I assumed that our esteemed institutions would not have knowingly profited from the spoliation of property belonging to millions of persecuted refugees. I was wrong. I have come to understand, based on objective, historically sound records, that a significant number of our museums during and in the aftermath of the Holocaust actively acquired art that they knew or should have recognized likely came from Jewish homes and businesses. These museums acquired this exquisite art despite widespread knowledge of Nazi looting and governmental warnings about the infection of the art market.¹ Now, museums are using American courts to shut down inquiries into such art’s history by blocking claims on technical grounds,² contrary to their own ethics guidelines³ and U.S. executive policy.⁴

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¹ See Raymond J. Dowd, *Federal Courts and Stolen Art: Our Duty to History*, FED. LAW., July 2008, at 4, 4-6 (discussing a 1950 U.S. State Department bulletin on reports of stolen art).

² See also Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public*

The Supreme Court is poised to review multiple writs for certiorari this year in Nazi-looted-art cases.⁵ It has requested the Solicitor General to weigh in on one pending petition concerning the California legislature's ability to insure that its courts welcome survivors and heirs seeking to recover their art.⁶ More petitions have been filed,⁷ and more are possible. The museums that have fought claims in U.S. federal courts include, among others, the Museum of Modern Art (MoMA) the Museum of Fine Arts in Boston, the Norton Simon Museum, the Detroit Institute of Arts, and the Toledo Museum of Art.⁸ I focus on museums because museums are breaking their own ethics codes and causing the U.S. government to break its international commitments by invoking our courts to resolve Holocaust-era-art claims on technical grounds rather than on the merits. Although some collectors, auction houses, and dealers have also acted unethically, it is not necessary to delve into claims implicating those entities to make my point.

Some nations have fought similar claims in our courts concerning art indisputably stolen from Jews, including Austria⁹, Spain,¹⁰ Hun-

Trust?, 88 OR. L. REV. 37, 56-75 (2009) (describing museums filing declaratory judgment actions to preempt heirs' claims).

³ See *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ASS'N OF MUSEUMS (Nov. 1999), http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm (directing museums to address claims of ownership "openly, seriously, responsively, and with respect for the dignity of all parties involved"); *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era*, ASS'N OF ART MUSEUM DIRECTORS (June 4, 1998), <http://www.aamd.org/papers/guideln.php> (recommending that member museums resolve claims in an "equitable, appropriate, and mutually agreeable manner").

⁴ See *infra* Part II.

⁵ See Jennifer Anglim Kreder, Chart of Dismissed Federal Holocaust-Era Art Claims Since 2004 (Feb. 23, 2011) (unpublished chart) [hereinafter Chart], available at <http://ssrn.com/abstract=1636295> (noting recent federal appellate decisions and pending certiorari petitions in Nazi-looted-art cases).

⁶ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 131 S. Ct. 379, 379 (2010).

⁷ See Chart, *supra* note 5.

⁸ *Id.*

⁹ See *Republic of Austria v. Altmann*, 541 U.S. 677, 686 (2004) (discussing Austria's claim of sovereign immunity). Since its Supreme Court loss in 2004, Austria has significantly improved its restitution record. See Kreder, *supra* note 2, at 53-55 (discussing Austrian legislation transferring ownership of looted art to the Austrian Jewish community). However, one is still left to wonder about the controversy surrounding the painting *Dead City III*, which was seized at MoMA along with the painting *Portrait of Wally* in 1998. See William D. Cohan, *Unraveling the Mystery of "Dead City,"* ARTNEWS, Apr. 2008, at 114 (describing the seizures and resulting litigation).

gary,¹¹ and Switzerland.¹² Most of the claims are still in the courts, with petitions for certiorari pending in several of the cases.¹³ Ironically, on December 13, 2010, Poland, which has had a poor restitution record,¹⁴ was the beneficiary of a civil forfeiture action filed by the U.S. government to recover a painting that had been stolen from a Polish museum during World War II.¹⁵ Perhaps these actions suggest a new hope for restitution in eastern Europe.

I. CORE HISTORICAL BACKGROUND

It is commonly estimated that the Nazis stole twenty percent of all of the art in Europe.¹⁶ According to Ronald Lauder, former U.S. ambassador to Austria and former MoMA chairman, based on information known in 1998, “more than 100,000 pieces of art, worth at least \$10 billion in total, are still missing from the Nazi era.”¹⁷ “[B]ecause of these large numbers, every institution, art museum and private collection has some of these missing works.”¹⁸ We know that the Nazis targeted Jews personally, but many do not know that the Nazis also specifically targeted their art and other assets.¹⁹ These losses of family

¹⁰ See, e.g., Complaint at 1-2, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (No. 05-3459) (alleging a Madrid museum’s failure to return a seized work).

¹¹ See, e.g., Complaint at 2, *de Csepel v. Republic of Hungary*, No. 10-01261 (D.D.C. filed July 27, 2010) (alleging that a Budapest museum wrongfully possesses a collection of over forty works).

¹² See, e.g., *Orkin v. Swiss Confederation*, No. 09-10013, 2011 WL 167840, at *1 (S.D.N.Y. Jan. 13, 2011) (discussing the plaintiff’s allegation of wrongful possession of a painting by a Swiss art collector).

¹³ See Chart, *supra* note 5.

¹⁴ See Dariusz Stola, *The Polish Debate on the Holocaust and the Restitution of Property* (describing the difficulties associated with restitution in Poland), in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 240, 248-51 (Martin Dean et al. eds., 2007).

¹⁵ See Complaint at 5-8, *United States v. One Julian Falat Painting Entitled “Off to the Hunt,”* No. 10-09291 (S.D.N.Y. filed Dec. 13, 2010) (alleging that a painting offered for sale by a U.S. auction house was wrongfully removed from Poland).

¹⁶ E.g., Judy Dempsey, *Roadblocks Remain in Case of Paintings Lost to Nazis*, N.Y. TIMES, Oct. 28, 2010, <http://www.nytimes.com/2010/10/29/arts/29iht-loot.html> (citing the Commission for Art Recovery for the twenty-percent figure).

¹⁷ Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 U. SEATTLE L. REV. 631, 660 (2000) (quoting Lauder).

¹⁸ *Id.*

¹⁹ See generally GÖTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* (Jefferson Chase trans., 2005) (discussing which parties profited from the Aryanization of Jewish-owned property); HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* (2d ed. 1997) (highlighting some of the targeted and seized assets); JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* (1996) (same); LYNN H. NICHOLAS, *THE RAPE OF*

heirlooms, cultural artifacts, and valuable assets compound the tragic loss of life and are just one reason why restitution is so important.

Those unschooled in the intricacies of the Nazi schemes to take Jewish property have difficulty today understanding why a painting sold pursuant to a signed contract actually was a theft or duress sale. The explanation requires a certain level of historical understanding. From the very first weeks of the regime in early 1933, law and practice in Nazi Germany were engineered to make involuntary transactions appear ordinary and legal.²⁰ Hitler immediately imposed crippling boycotts on Jews, implementing the Nazi Party platform stating that to buy from or sell to a Jew was to be a traitor to the German people.²¹ Artists Hitler hated were boycotted, exiled and shunned.²² Massive “Aryanization” occurred.²³ Moreover, “sale” proceeds were paid into blocked accounts.²⁴

It would be a gross distortion of historical reality for anyone to suggest that the financial despair of Jews in 1933—during widespread, sporadic boycotts and until the passage of the first of the Nuremberg laws in 1935—resulted from a series of isolated private setbacks brought about by generalized, severe financial conditions akin to the Great Depression. But as is illustrated in Part IV below, that is exactly what museums have alleged in our courts.

Additionally, starting in April 1938, Nazis forced Jews to inventory all of their property and sign off on “legal” expropriations.²⁵ The U.S. Consul General in Vienna, writing immediately after the German annexation of Austria in March 1938, documented the twisted irony of this practice: “There is a curious respect for legalistic formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his

EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994) (same).

²⁰ See MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945*, at 33-50 (1st ed. 2008) (describing the legal changes behind denaturalization of German Jews and confiscation of their property).

²¹ See *id.* at 31-32 (describing these boycotts and their effects on people who did not obey them).

²² See PETROPOULOS, *supra* note 19, at 53-55 (detailing the antimodernist stance of the Third Reich).

²³ See Avraham Barkai, *Ariesierung* (describing the “term used to denote the transfer of Jewish-owned independent economic enterprises to ‘Aryan’ German ownership throughout the Third Reich and the countries it occupied”), in 1 *ENCYCLOPEDIA OF THE HOLOCAUST* 84-87 (Israel Gutman ed. 1990).

²⁴ See DEAN, *supra* note 20, at 4, 61.

²⁵ *Id.* at 88-89.

resistance.”²⁶ Another potent example of the Nazi obsession with legality is that they left receipts when expropriating property from apartments of Jewish families that had fled.²⁷

When the remaining Jews within the Reich had little or no property left, the focus turned to “cost-efficient” mass murder in the death camps of occupied Poland.²⁸ The “legalized” grand larceny became a means of financing the mass murder.²⁹ Compliance with law is what comforted the Nazis and German people as they persecuted the Jews. As discussed below, the United States and its allies committed to reversing Aryanizations, forced sales, and duress sales, initially via restitution of “readily identifiable” works directly to theft victims.³⁰ Ability to follow through on the commitment fell short as attention understandably turned to the Marshall Plan and to preventing Soviet expansion of its sphere of influence to the Atlantic.³¹ Thus, the job was left largely to the victims themselves—survivors and heirs of the dead—to finish the search on an ad hoc basis.³² The victims have largely lacked the tools until now, and they still lack access to key information.

II. CAN AN ALMOST SEVENTY-YEAR-OLD CLAIM REALLY BE VIABLE?

In light of the history documented above, the presumption that claims to Holocaust-era assets almost seventy years old cannot be viable is contrary to (1) common law doctrine that one cannot get title

²⁶ See NICHOLAS, *supra* note 19, at 39.

²⁷ See *Menzel v. List*, 267 N.Y.S.2d 804, 806 (Sup. Ct. 1966) (relating that Nazis took a Marc Chagall painting left by the plaintiff in her Brussels apartment and left a receipt indicating their appropriation of the painting for “safekeeping”), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev’d on other grounds*, 246 N.E.2d 742 (N.Y. 1969).

²⁸ DEAN, *supra* note 20, at 173-74.

²⁹ *Cf. id.* at 395.

³⁰ See, e.g., *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957-58 (9th Cir. 2010) (citing PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE UNITED STATES, PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS’ ASSETS SR-142 (2000)).

³¹ See Michael J. Kurtz, *Resolving a Dilemma: The Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625, 626 (1998) (“Though the commitment to restore cultural property was supposedly absolute and unconditional, the political failure of the Allied Control Council (‘ACC’) in Germany and the onset of the Cold War in Eastern Europe raised significant barriers to a successful cultural restitution effort.”).

³² The *von Saher* panel completely failed to understand that civil litigation has remained a key component of restitution since the War. See *von Saher*, 592 F.3d at 962-63 (evinced a preference for state-sponsored programs rather than restitution through litigation).

from a thief;³³ (2) nearly universally applicable discovery rule principles, my focus in Part III; and (3) executive policy, my focus in this Part.

U.S. diplomats began laying the groundwork for postwar restitution during the war. In the landmark London Declaration of January 5, 1943, the United States and its allies warned against looting by “declar[ing] invalid any transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.”³⁴ Second, the United States appointed Army officers known as the “Monuments Men” to protect cultural property throughout Europe during the War and to secure stolen art for later restitution—officers whose efforts were tremendous and became legendary.³⁵ In spite of these intentions and actions, the Army could not sustain those efforts. Accordingly, President Truman “adopted a policy of ‘external restitution,’ under which the looted art was returned to the countries of origin—not to the individual owners.”³⁶

The end of direct restitution did not mark a change in the executive’s support of restitution in any way. Renowned State Department Fine Arts & Monuments Adviser Ardelia R. Hall issued this statement on August 27, 1951: “For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered.”³⁷ In May 1952, as private litigants started to press claims in U.S. courts after the war, Jack B. Tate, the Acting Legal Adviser for the U.S. Department of

³³ See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 818 n.138 (2001) (“The general rule in America is that a bona fide purchaser cannot acquire title from a thief.”). Other doctrines may nonetheless preclude the claimant’s recovery. See, e.g., Alexandra Minkovich, Note, *The Successful Use of Laches in World War-II Era Art Theft Disputes: It’s Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 361 (2004) (explaining that defendants can use statute of limitations or laches-based arguments to retain artworks).

³⁴ *Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory*, 8 DEP’T ST. BULL. 21, 21-22 (1943) (quoted in *Alumann v. Republic of Austria*, 327 F.3d 1246, 1246-47 (9th Cir. 2003) (citing the declaration as an indication disfavoring immunity for expropriating paintings), *aff’d on other grounds*, 541 U.S. 677 (2004)).

³⁵ See ROBERT M. EDEL with BRET WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY 2* (2009) (describing the mission of the Monuments Men and introducing their story).

³⁶ *Von Saher*, 592 F.3d at 958 (citing REPORT OF THE AM. COMM’N FOR THE PROT. AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS 148 (1946), commonly known as the Roberts Commission Report).

³⁷ Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP’T ST. BULL. 337, 339 (1951).

State, clarified executive policy concerning individuals seeking to invoke the power of U.S. courts to obtain restitution:

1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls. . . .
3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.³⁸

The U.S. executive branch operated on a parallel track in Europe. The International Military Tribunal at Nuremberg declared the plunder of art a war crime³⁹ and convicted and sentenced to death Alfred Rosenberg, head of the “Einsatzstab Rosenberg” art-looting unit.⁴⁰ A military regulation adopted in 1947 mandated that Germany and Austria repudiate all spurious “transactions” from the entire Nazi era.⁴¹ Much more recently, U.S. diplomats played a leading role in securing multilateral public commitments by scores of countries to implement effective and fair resolutions of Nazi-looted-art claims based on the merits and not on legal technicalities.⁴² Finally, the executive branch seized thousands of stolen art objects in the wake of World

³⁸ *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Jack B. Tate, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 DEP’T ST. BULL. 592, 592-93 (1949)).

³⁹ See Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 284, 286-88 (defining “plunder of public or private property” as a war crime).

⁴⁰ See Judgment of the Int’l Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Sept. 30 & Oct. 1 1946, at 94-96 (1946) (finding Rosenberg guilty of war crimes for organizing the Einsatzstab group).

⁴¹ See Restitution of Identifiable Property, 12 Fed. Reg. 7983 (Nov. 29, 1947) (establishing a presumption that “transactions” between 1933 and 1945 were confiscations requiring restitution).

⁴² See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 196-203* (2003) (discussing the Washington Conference and its efforts to reach an agreement on returning confiscated works); *Prague Holocaust Era Assets Conference: Terezin Declaration*, U.S. DEP’T OF STATE, (June 30, 2009), available at <http://www.state.gov/p/eur/rls/or/126162.htm> (urging simple resolution of property claims and recommending that participating states implement programs to return property); *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE (Dec. 3, 1998), available at <http://www.state.gov/p/eur/rt/hlclst/122038.htm> (encouraging efforts to locate heirs and reach just and fair resolutions of ownership issues).

War II,⁴³ and more recently, it seized paintings in 1998 and December 2010, including a painting titled *Portrait of Wally*.⁴⁴ From wartime declarations to recent seizures, executive policy in the United States has been to examine the merits of each case and, wherever possible, return looted art to its rightful owner or country.

III. JUDICIAL MISAPPLICATION OF TIME-BAR DOCTRINES IS DISTORTING THE HISTORICAL RECORD

The battle for the historical record is being fought in the federal courts, where the desire for efficiency all too often unwittingly reinforces postwar trafficking in Nazi-looted art. For example, in *Detroit Institute of Art v. Ullin*, a federal court in Michigan efficiently ruled that the statute of limitations on one claim ran in 1938—before the Allies even landed on the beaches of Normandy, much less liberated survivors from camps.⁴⁵ Moreover, the case was a declaratory judgment action filed by The Detroit Institute of Arts against the heirs of Martha Nathan, who had not yet resorted to judicial process.⁴⁶ The heirs had approached the museum about their newly discovered evidence that Ms. Nathan's sale of *The Diggers* by Vincent van Gogh had been made under duress.⁴⁷ The museum responded by filing suit, contending that the sale of the painting, which was located in Switzerland in 1938—after Ms. Nathan had fled Germany for Paris—was voluntary because it occurred prior to the Nazi occupation of France.⁴⁸

The *Ullin* court never considered the fact—not commonly known by those who are not Holocaust scholars—that the Nazis often forced fleeing Jews to transfer property located in Switzerland back to the Reich, often as a means to secure safe passage of other family members held hostage.⁴⁹ The number of Jews subjected to persecution

⁴³ See Milton Esterow, *Europe Is Still Hunting Its Plundered Art*, N.Y. TIMES, Nov. 16, 1964, at 1 (noting the recovery of nearly 4000 pieces of art by the State Department between 1945 and 1962).

⁴⁴ See *supra* notes 9 & 15, and accompanying text.

⁴⁵ See *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *3 (E.D. Mich. Mar. 31, 2007) (finding that conversion occurred in 1938 when the painting at issue was sold and that the statute of limitations barred any claims brought more than three years later, in accordance with Michigan law).

⁴⁶ *Id.* at *1.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010) (identifying an ordinance requiring Jews to register assets with an aim to appropriate those assets held extraterritorially).

from afar could be small because the wealth at stake had to merit the Nazis' time and effort to steal in less convenient ways. Nonetheless, it happened, and our courts should not be utilized to quash evidence that it did. A consequence of the suit is that the painting remains on display as if Ms. Nathan had been perfectly free to engage in fair commercial transactions while on the run from a genocidal regime.

In 2006, the Toledo Museum of Art also brought suit against the Nathan heirs to quiet title to Paul Gauguin's *Street Scene in Tahiti*, which had been transferred as part of the same 1938 sale.⁵⁰ The United States District Court for the Northern District of Ohio held that the statute of limitations, as modified by the discovery rule, had expired some undefined time in the past, thereby barring the heirs' counterclaims for conversion and restitution.⁵¹ The court held that the claim should have been discovered earlier because the painting had been openly displayed since its acquisition in 1939—contemporaneous with the approach of the Holocaust's zenith—with public acknowledgment of Ms. Nathan's prior ownership.⁵² As proof that Ms. Nathan knew she lacked a valid claim to the Gauguin, the court noted that she had pursued other Aryanized and looted property prior to her death in 1958, but not this painting.⁵³ Nor did the accounting trustee of her estate claim the painting.⁵⁴

Most problematic for heirs of Holocaust victims and refugees is the Ohio court's statement that

the public debate surrounding Nazi-era assets should have led the Nathan heirs to inquire into the location of her former assets. Based upon Martha Nathan's own previous claims, as well as those of her estate, the heirs knew she was persecuted by the Nazis and sustained wartime losses. This knowledge would have led a reasonable person to make further inquiries.⁵⁵

In other words, Holocaust victims' heirs were negligent if they did not pay close attention to litigation concerning a painful, historical tragedy and realize it may have had particular relevance to them, even though they were not parties to that litigation.

Recent case law applying discovery rule principles in stolen art cases effectively, incorrectly, and seemingly unintentionally dictates something akin to a *de facto* due diligence search rule coupled with

⁵⁰ Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 803 (N.D. Ohio 2006).

⁵¹ *Id.* at 806-08.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 805, 807.

⁵⁵ *Id.* at 807.

an unfounded assumption that a present-day possessor suffers prejudice in her ability to defend the suit simply because of the amount of time that has passed.⁵⁶ Why should the museums get the benefit of the doubt as to what hypothetical long-lost evidence may have shown? It is more likely that the evidence would have favored the claimant in the “typical” Holocaust-era-art case. The relevant inquiry is supposed to be highly fact-sensitive and should turn on what would be reasonable under the circumstances—*all* of the circumstances. A 1995 stolen-art case not relating to the Holocaust, wherein the theft victims were not art-world insiders, illustrates this point well:

[T]he balance of equities weighs in [the claimants’] favor. [The subsequent purchasers] purchased the Painting without inquiring as to the painting’s prior ownership or the identity of the consignor, or making any inquiry of art or law enforcement agencies, and with the knowledge that the Painting was in five pieces—suspicious circumstances to say the least. They took the risk that an original owner could appear at any time.⁵⁷

Why would a reasonable person who had been persecuted to the ends of the earth look interminably for a needle in a haystack? In fact, many survivors after the war were quite leery of state authority figures.⁵⁸ How could Ms. Nathan have known, particularly before 1958, to search here in the United States to discover her trafficked property? Why do we demand that she have foreseen the Information Age and have directed her heirs to perpetually search for property she probably never imagined would resurface and become recoverable?

Courts’ reliance on the fact that Holocaust victims died before they could justify (and afford) the expense of a search plays right into the hands of the persecutors and profiteers. A haunting testimonial relaying a statement by Heinrich Himmler, attributed in multiple sources to Rabbi Israel Singer, leader of the World Jewish Congress, makes the point: “Himmler said you have to kill all the Jews because if you don’t kill them, their grandchildren will ask for their property back”⁵⁹

⁵⁶ See generally John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1152 (1980) (identifying a multifactor approach that modern courts should employ in discovery-rule cases).

⁵⁷ *Erisoty v. Rizik*, No. 93-6215, 1995 WL 91406, at *14 (E.D. Pa. Feb. 23, 1995).

⁵⁸ See e.g., BOAZ KAHANA ET AL., HOLOCAUST SURVIVORS AND IMMIGRANTS 75 (2005) (noting that feelings of victimization among survivors can cause mistrust of strangers, particularly those in positions of authority).

⁵⁹ MICHAEL J. BAZLYER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 295 (2003); see also John L. Allen Jr., *Victims No More*, NAT’L CATHOLIC REP., May 7, 1999, at 3, 7, available at http://natcath.org/NCR_Online/

IV. MUSEUMS' TRAMPLING ON HISTORY TO CAPITALIZE ON FADING MEMORIES

Since the 1990s, legal scholarship and media coverage of the Holocaust-era-art problem has often implied that the problem was virtually unknown to art world insiders, who were caught unawares in 1998 and have consistently done “the right thing” upon being notified.⁶⁰ This is simply false. Nazi looting and the persecution of Jews was front-page news as early as 1933,⁶¹ and it stayed in the news as art filtered deeper into the market.⁶² The U.S. executive branch also issued warnings to museums and dealers to be on the lookout for loot.⁶³ Thus, art world insiders buying European art during or after the War without ownership records were actually operating in highly suspicious circumstances. Additionally, because museums usually received the art in question via donation means that they have enjoyed the benefit (and so has the general public) solely at the victims' expense.

In my previous work, I have illustrated that the impetus for present-day possessors of art to shut down inquiry into the merits—in an effort to secure their stakes—is understandable but wrong:

In December 1938, a year and a half after emigrating to Paris, [Ms. Nathan] sold *Street Scene in Tahiti* and *The Diggers*—for approximately \$6,000 and \$9,360, respectively—to a group of three prominent Jewish art dealers who had known her for many years. In May 1939 [with persecution of Jews almost at its zenith], the Toledo Museum of Art bought *Street Scene in Tahiti* from Wildenstein & Company for \$25,000. In 1969, the Detroit Institute of Arts received *The Diggers* as a donation from collector Robert H. Tannahill, who bought it in 1941 for \$34,000. *Street Scene in Tahiti* is currently estimated to be worth between \$10 and \$15 million.

archives2/1999b/050799/050799a.htm (detailing Bayer Corporation's legal battle over liability for IG Farben, a predecessor company deeply involved in the operation of concentration camps).

⁶⁰ See, e.g., Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 99-100 (1999) (“Claims of this type present a real threat to museums, auction houses and private collectors who have spent significant amounts of money on good faith purchases of what is later discovered to be ‘dubious’ art. As a result, it is no surprise that museums have begun to scour their collections for art of questionable title.”).

⁶¹ See, e.g., Otto D. Tolischus, *Hitler Will Seize Property of Foes*, N.Y. TIMES, July 15, 1933, at 1; *German Fugitives Tell of Atrocities at Hands of Nazis*, N.Y. TIMES, Mar. 20, 1933, at 1.

⁶² See, e.g., Janet Flanner, *The Beautiful Spoils* (pts. 1-3), NEW YORKER, Feb. 22, 1947, at 31, Mar. 1, 1947, at 33, Mar. 8, 1947, at 38; Francis Henry Taylor, *Europe's Looted Art: Can It Be Recovered?*, N.Y. TIMES, Sept. 19, 1943 (Magazine), at 18.

⁶³ See, Letter from Department of State to Universities, Museums, Art Dealers, and Booksellers (Dec. 11, 1950) (on file with author); Letter from The American Commission For The Protection and Salvage of Artistic and Historic Monuments in War Areas to Museums, Art and Antique Dealers and Auction Houses (1945) (on file with author).

The Diggers is estimated at \$15 million.⁶⁴

One can surmise that museums' reluctance to allow objective evaluation of claims on the merits arises from fear of losing such valuable assets, in addition to the stain such restitution leaves on the reputations of the dealers and donors in the ownership chain. Other art objects similarly passed through their hands, and increased scrutiny may open up other objects to claims.

Reputations and tremendous amounts of money were also on the line in litigation filed by MoMA and the Solomon R. Guggenheim Foundation against Julius Schoeps, heir to Paul von Mendelssohn-Bartholdy, a prominent German banker and art collector.⁶⁵ This dispute was a heated contest concerning the interpretation of a purported 1927 transfer of two Pablo Picasso paintings, *Boy Leading a Horse* (1906) and *Le Moulin de la Galette* (1900), from Mendelssohn-Bartholdy to his wife, who was Aryan.⁶⁶ The heirs contended that the purported transfer was backdated to make it appear that the property was in Aryan hands before the Nazis' rise to power; in reality, the transfer was made after the Nazis were in control.⁶⁷ This method of backdating contracts to attempt to insulate property from Nazi expropriation was used often enough that the German language has a specific term for it: *Verfolgten-Testament*.⁶⁸ The painting passed through the hands of a very well-known Jewish art dealer, Justin Thannhauser.⁶⁹ Schoeps alleged:

Thannhauser trafficked in stolen and Nazi-looted art during his career as a dealer. Both during and after World War II, Thannhauser partnered with art dealers such as Nazi Cesar Mange de Hauke and Albert Skira, both of whom the U.S. State Department and others identified as traffickers in Nazi-looted art.⁷⁰

⁶⁴ Kreder, *supra* note 2, at 62-63.

⁶⁵ See Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461, 463 (S.D.N.Y. 2009).

⁶⁶ *Id.* at 464.

⁶⁷ *Id.*

⁶⁸ See Schoeps v. Andrew Lloyd Webber Art Found., No. 116768-06, 2007 WL 4098215, at *1 (N.Y. Sup. Ct. Nov. 19, 2007) (describing the practice as "a last will set up in order to protect property from the Nazis, in the hope that it would pass on to successor heirs if and when the regime would have come to an end").

⁶⁹ Schoeps, 594 F. Supp. 2d at 463-64.

⁷⁰ Counterclaim ¶ 40, Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07-11074), 2008 WL 1982812 (citing Maureen Goggin & Walter v. Robinson, *Murky Histories Cloud Some Local Art*, BOSTON GLOBE, Nov. 9, 1997, at A1).

The dispute is one of a number in which Mr. Thannhauser's name appears in the provenance.⁷¹ For example, Mr. Thannhauser was one of the three prominent art dealers who bought and sold Ms. Nathan's paintings described above. After the war, he (and his archives) helped many Jews recover art that had been expropriated from his gallery. His family is thus certainly sensitive to these accusations and would deny them. Still, seemingly no litigation filed to date has even attempted to resolve whether Mr. Thannhauser was a friend or foe of fleeing Jews, a fact that is extremely important in determining whether many paintings that he bought and sold during and after the war, which have made their way into other museums and collections, should be restituted. The *MoMA-Guggenheim-Schoeps* litigation certainly will not help in this regard as it settled on the eve of litigation, and that settlement remains confidential despite the prodding of the court to make it public (to which the museums ultimately agreed).⁷²

I will make one final point here about the *Schoeps* litigation. The MoMA/Guggenheim Complaint asserts:

The facts and circumstances establish that both von Mendelssohn-Bartholdy and his wife were free to decide whether or not to sell their artwork, were free to move artwork in and out of Germany without discrimination, were not under financial pressure to sell as the Paintings represented a negligible percentage of their net worth, and neither the German State nor the Nazi party played any role in directing, urging or otherwise threatening any adverse consequences if the Paintings were not sold to Thannhauser. . . . The allegation that the Nazi government would force von Mendelssohn-Bartholdy and his wife to sell the Paintings to the Jewish art dealer Thannhauser, whom they knew and with whom they had done business for years, is completely implausible, as is the claim that they had to sell the Paintings because Nazi persecution had left them impoverished.⁷³

Esteemed institutions, informed by knowledgeable provenance researchers who know better, should not use our courts to hide behind racial stereotyping and extremely biased portrayals of historical reality as a substitute to investigating true human behavior.

⁷¹ See also *United States v. One Oil Painting Entitled "Femme en Blanc" By Pablo Picasso*, 362 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005) (noting that the painting was being held by Thannhauser when it was looted by Nazis); Goggin & Robinson, *supra* note 70, at B12 (noting Thannhauser's "associat[ion]" with Cesar Mange de Hauke).

⁷² See *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 674-75 (S.D.N.Y. 2009) (observing that while the museums no longer objected to a public settlement, the plaintiffs insisted that it remain confidential).

⁷³ Complaint for Declaratory Relief ¶ 55, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07-11074), 2007 WL 5161566.

In applying seemingly neutral legal doctrine in Holocaust-era-art cases, courts have failed to take into account the fact that prospects for restitution immediately after the War were grim.⁷⁴ It is true that some tenacious families, including some with large art collections identified and located in Allied sectors, met with success, but most others had to move on to build new lives as refugees in new lands. As the survivors' heirs now approach those who currently possess their art, they are (understandably) met with defensiveness from current possessors because art patrons' reputations are questioned and valuable assets are on the line. Few people seem to want to discover what actually happened as the Nazis rose to power and embarked on a mission of ever-increasing persecution of European Jews. Those who did not leave early enough found themselves trapped—without means to make a living, blocked from accessing bank accounts or engaging in fair commercial transactions, and hemmed in by an exorbitant Flight Tax that prevented flight.⁷⁵ This record is being developed—and distorted—in litigation.

Sometimes the judiciary provides a glimmer of hope, as did Judge Korman in his concurrence in *Bakalar v. Vavra*, a dispute over a drawing from the collection of Fritz Grunbaum.⁷⁶ Grunbaum was a famous Viennese cabaret performer who had a fine collection of Egon Schiele drawings when the Nazis occupied Vienna.⁷⁷ His heirs asserted a claim when a collector tried to auction one of the drawings in New York.⁷⁸ Ultimately, the lower court ruled against the plaintiff, applying Swiss law, but the Second Circuit vacated and remanded in September 2010.⁷⁹ Judge Korman wrote an informative separate concurrence explaining his view of the factual evidence, including the following summary:

Grunbaum was arrested while attempting to flee from the Nazis. After his arrest, he never again had physical possession of any of his artwork, including the Drawing. The power of attorney [to his wife, Elisabeth],

⁷⁴ See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 682-83 (2004) (describing allegations regarding the Austrian postwar practice of extorting donations of some property in exchange for export permits of other property).

⁷⁵ See DEAN, *supra* note 20, at 43-44.

⁷⁶ See 619 F.3d 136, 148 (2d Cir. 2010) (Korman, J., concurring) (writing separately to argue that Grunbaum could have proven his art was stolen by a preponderance of the evidence).

⁷⁷ *Id.* at 137.

⁷⁸ *Id.* at 139.

⁷⁹ See *id.* at 146-48 (vacating the district court's decision in *Bakalar v. Vavra*, No. 05-3037, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008)).

which he was forced to execute while in the Dachau concentration camp, divested him of his legal control over the Drawing. Such an involuntary divestiture of possession and legal control rendered any subsequent transfer void.⁸⁰

Right after Elisabeth completed the forced inventories to streamline Nazi expropriation, she died in the Minsk extermination camp.⁸¹

The panel's opinion also instructed the lower court on remand to address laches, a doctrine that operates to bar stale claims if the opposing party would suffer prejudice in litigation.⁸² Again, where existing evidence so strongly points to theft, why should the present-day possessor get the benefit of the doubt as to what additional evidence might have been unearthed earlier? Under common law principles, the true owner always prevails over other possessors. Nonetheless, despite horrific persecution, theft, and murder, Grunbaum's heirs are likely to lose because they will be declared at fault for waiting too long. The court would thereby reinforce theft and postwar trafficking. The drawing will be sold and one of two things will happen: either its background will be ignored or forgotten because the heirs lost in court or the mystique will actually drive the price upward.

Another example is *Grosz v. Museum of Modern Art*, in which the Second Circuit affirmed a dismissal of a similar claim as time-barred.⁸³ The decision rests on the interpretation of letters exchanged between MoMA and the Grosz heirs' art historian.⁸⁴ MoMA convinced the court to dismiss the claim on the grounds that one of MoMA Chairman Glenn Lowry's letters should be construed to have refused the claim, despite his repeated statements that only a majority of the board of directors—and not he alone—had the authority to speak for MoMA.⁸⁵ Moreover, MoMA refused to even disclose its own provenance records in the case, despite the fact that its own website proclaims that its files are open to all serious researchers.⁸⁶ Goliath again

⁸⁰ *Id.* at 148 (Korman, J. concurring); *see also id.* at 137-39 (majority opinion).

⁸¹ *Id.* at 139.

⁸² *Id.* at 147.

⁸³ *Grosz v. Museum of Modern Art*, No. 10-0257, 2010 WL 5113311, at *1 (2d Cir. Dec. 16, 2010).

⁸⁴ *Grosz v. Museum of Modern Art*, No. 09-civ-3706, 2010 WL 88003, at *7-14 (S.D.N.Y. Jan. 6, 2010).

⁸⁵ Brief for Am. Jewish Cong. et al. as Amici Curiae Supporting Plaintiffs-Appellants at 12-15, *Grosz v. Museum of Modern Art*, 2010 WL 5113311 (2d Cir. June 22, 2010) (No. 10-0257).

⁸⁶ *See The Provenance Research Project*, MUSEUM OF MODERN ART, <http://www.moma.org/collection/provenance/> (last visited Feb. 28, 2011) ("Please note that the Museum's archival records for all collection works are open, as they always have been, to serious researchers.").

beats David on a technicality, trampling on executive policy and history.

I will provide one final example of a prestigious U.S. museum's shutting down objective inquiry into the history of a painting. Last year, the Museum of Fine Arts in Boston won a declaratory judgment action seeking to put to rest an inquiry (perhaps a demand) from Dr. Claudia Seger-Thomschitz to *Two Nudes (Lovers)* (1913) by Oskar Kokoschka, which had previously belonged to her father, Dr. Oskar Reichel.⁸⁷ Dr. Reichel was a Jewish doctor who owned an art gallery and a significant collection that was transferred after the Third Reich annexed Austria in the *Anschluss* on March 12, 1938.⁸⁸ The museum alleged that Dr. Reichel voluntarily sold the painting and three others by Kokoschka to Otto Kallir,⁸⁹ a Viennese art dealer who had moved to Paris by the time of the sale in February 1939 and is said to have had been the most powerful influence on modern art collectors in the United States.⁹⁰ The museum alleged that Dr. Reichel and Mr. Kallir had known each other for many years and often had done business together—the implication being that the sale naturally was fair and unrelated to the liquidation of Dr. Reichel's gallery and paintings in November 1938 and the liquidation of the family's apartment house in 1941.⁹¹ In 1943, Reichel died in Vienna.⁹² Two of his sons fled in 1938 and 1939, one of his sons was murdered in 1940 or 1941, and his wife was deported to Theresienstadt.⁹³

Dr. Seger-Thomschitz only knew to investigate additional claims after receiving a letter on November 10, 2003, from the Vienna Community Council for Culture and Science notifying her that she was the rightful heir to Romako paintings that passed through Otto Kallir: "It is certain that these paintings involved art objects from the property of Dr. Oskar Reichel and which, in connection with the power seizure by National Socialism, he had to sell due to his persecution as a Jew to

⁸⁷ See *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097, 2009 WL 6506658, at *1 (D. Mass. June 12, 2009).

⁸⁸ *Id.*

⁸⁹ Complaint at ¶ 1, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 WL 6506658 (D. Mass. Jan. 22, 2009) (No. 08-10097) [hereinafter *Seger-Thomschitz* Complaint].

⁹⁰ See Laurie A. Stein, *The Path of Art from Switzerland To America from the Late 1930's to the Early 1950's: A Report of Research Results* (undated but commissioned for 2002 report) (on file with author).

⁹¹ *Seger-Thomschitz* Complaint, *supra* note 89, at ¶ ¶ 1, 19.

⁹² *Id.* at ¶ 3.

⁹³ *Id.* at ¶ 19.

the galleries mentioned”⁹⁴ The court ruled that the date of the letter’s receipt was the latest date that the limitations clock could have started to tick, which meant the victims had no chance to recover given the date when the action was finally filed in court.⁹⁵

Dr. Seger-Thomschitz argued unsuccessfully that the court should set aside the limitations period on equitable grounds because to hold otherwise would amount to “aiding, abetting, encouraging and facilitating the illegal and criminal intentional trafficking in stolen art,” particularly because the Austrian records containing Dr. Reichel’s Property Declaration were first made public in 1993 after the family had stopped searching for assets.⁹⁶ The Property Declaration listed Romako and Kokoschka paintings and included evidence that “payment” for the Romako painting in the Vienna Community Council’s possession had been made into a blocked account.⁹⁷ She maintained that the stranglehold of the Property Declaration upon the paintings and evidence of payment into a blocked account for the Romakos indicated that the same thing likely happened in connection with the Kokoschkas, which Kallir had sold to another dealer by 1945.⁹⁸

Sarah Blodgett bought *Two Nudes* in 1947 or 1948 and donated it to the museum in 1972, where it has remained on public display.⁹⁹ Thus, whereas the Viennese government returned paintings because “[i]t is certain” their path from Dr. Reichel though Mr. Kallir occurred “due to . . . persecution,”¹⁰⁰ a U.S. federal court in Boston effectively elevated the public’s enjoyment of the paintings over the need to unwind transactions that financed genocide.

CONCLUSION

This Essay is an academic’s attempt to shed light on a dark moment—the duping of our courts by some prominent U.S. museums to accept revisionist history, contravene executive policies dating to 1943, and unwittingly endorse a pillar of the Nazis’ persecution and genocide of Jews. Application of limitations periods, the discovery rule,

⁹⁴ First Amended Answer and Counterclaim, Exhibit 1, at 2, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 WL 6506658 (D. Mass. July 24, 2008) (No. 08-10097) [hereinafter *Austrian Council Letter*].

⁹⁵ *Seger-Thomschitz*, 2009 WL 6506658, at *9.

⁹⁶ *Seger-Thomschitz*, 2009 WL 6506658, at *6.

⁹⁷ First Amended Answer and Counterclaim, Answer at ¶ 51, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 WL 6506658 (D. Mass. July 24, 2008) (No. 08-10097).

⁹⁸ *Id.*

⁹⁹ *Seger-Thomschitz*, 2009 WL 6506658, at *2.

¹⁰⁰ *Austrian Council Letter*, *supra* note 94, at 2.

and related procedural bars under these circumstances is misguided both as a matter of law and as a matter of ethics. As survivors and soldiers die, as archives are opened to historians, and as information trickles out, survivors' heirs are learning that their families owned some of the most beautiful treasures mankind knows, which were stolen or forcibly sold and are now housed in our most esteemed museums. Those who benefited may have the exclusive keys to those snippets—and often still do. Thus, the reason for delay often lies on their shoulders. Ancient maxims of common law dictate that the stolen property should be returned, even sixty or seventy years later.

Courts should pay careful attention to history before reaching judgment on which claims are plausible. As recognized by some museums that have restituted Holocaust-era art without forcing heirs into court,¹⁰¹ most of the claimants' "stories," like those discussed in the cases above, are in fact plausible. With precedents such as those discussed in this Essay, the judiciary is undermining the executive's ability to continue to lead the world movement toward securing a modicum of justice for Holocaust survivors affected by the "unfinished business" of World War II.¹⁰² Our judges should remember the words of Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom at Nuremberg, who warned:

Human memory is very short. Apologists for defeated nations are sometimes able to play upon the sympathy and magnanimity of their victors, so that the true facts, never authoritatively recorded, become obscured and forgotten.¹⁰³

¹⁰¹ See Carol Vogel, *Inside Art*, N.Y. TIMES, Jan. 14, 2011, at C25 (detailing the efforts of the Zimmerli Art Museum at Rutgers University to restore artwork to the grandson of a Holocaust survivor); see also 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, 438 n.121 (2003) (listing twelve museums that have resolved claims of this nature through settlement).

¹⁰² See generally EIZENSTAT, *supra* note 42. See also Washington Conference Principles, *supra* note 42.

¹⁰³ 3 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 91 (1947).

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