

MoMA and Nazi-Era Art Restitution: Contexts and Thoughts for the Future

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ABSTRACT

MoMA and Nazi-Era Art Restitution: Contexts and Thoughts for the Future

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Holocaust-era restitution remains one of many issues troubling the museum world in recent years. These types of cases expose the persistent concern over ownership of the material culture held within museums that, in part, make up the philosophies and cultural traditions underlying them. In the wake of the 1998 Washington Conference on Holocaust-Era Assets, the American museum community asserted they could properly regulate restitution claims without need for an independent commission, as was being established in many European countries at the time. This thesis reflects upon developments following 1998 and assesses the current value systems of American museums and their commitment to the international issue of restitution by examining the actions and policies of the Museum of Modern Art (MoMA) in New York City. Since the establishment of the Washington Conference Principles, museums holding Nazi-era misappropriated works have continually tried to mischaracterize applicable policy. MoMA has not only experienced difficulties resulting from its early acquisitions, but in recent years, it has been very visible in a series of recent restitution claims and debates.

This thesis argues that MoMA could set a different example, through its statements and actions, for Holocaust-era restitution by acknowledging its historical complicity and urging other institutions and the public to go beyond notions of possession. MoMA is an institution that has undoubtedly become more complex and internationally implicated in the past few years. However, the issue of restitution and its inadequate treatment in the United States has brought into scrutiny museums like MoMA, impacting upon the public's willingness to place confidence in the museum in its role as trustee of works of art. I contend that, should MoMA wish to maintain its position of influence in the museum system in the United States and abroad, it needs to become more invested in the future and be conscious of how it is transmitting memory and the meaning of the past to an increasingly transnational and diverse public. Although this case study examines the treatment of Nazi-looted art in one American institution, the issues under consideration have transferable moral significance across the larger debate of stolen cultural property.

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Introduction

Discourse surrounding museums in the twenty-first century has generated changing views about their function and offerings. Museums, it has been argued, were unique for their focus on visual and object-based learning, expressing vision through the thoughtful display of artwork and cultural objects.¹ This legacy came from early collections of art, material culture and natural science that were at the forefront in challenging accepted ideas about the world.² Museums were thus seen not only places containing objects, but also places of ideas. In recent years, their authority has been criticized as the result of an exclusionary, elitist process of selection that can work to reinforce canons, a dominant point of view, and particular aesthetic values.³ In a pluralistic society, what and how museums collect and what and how they exhibit have now become matters of increasing controversy. The intellectual authority of the museum has undergone heavily publicized questioning: with every new discovery, creation and interpretation, there are conflicting opinions by groups with very diverse views and interests.⁴ Despite this, they are still institutions held in esteem: it has been suggested that the public may place faith in few traditional institutions these days, but the museum is still one of them.⁵ As Michael Kimmelman of the *New York Times* has written, they are sometimes referred to as today's "secular cathedrals," a description that emphasizes the continued authority of their collections and their continued importance in society.⁶

One of the many questions troubling the museum world in recent years, one posing serious problems for the maintenance of respect for its institutions, revolves around concerns over the status of ownership of material culture held within museums. Have museums acquired, intentionally or accidentally, objects in inappropriate ways? If so, have they worked to either return objects they should not have or negotiate agreements which enable them to retain these objects within their collections? This is an enormously complex and highly contested set of issues and

¹ Sara Tam, "Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust," *Fordham Urban Law Journal* 39, no. 3 (2012): 857.

² Willard Boyd, "Museums as Centers of Controversy," *Daedalus* 128, no. 3 (1999): 186.

³ Tam, "Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust," 857.

⁴ Boyd, "Museums as Centers of Controversy," 187.

⁵ Michael Kimmelman, "Museums in a Quandary: Where Are the Ideals?," *The New York Times* (August 26, 2001). <http://www.nytimes.com/2001/08/26/arts/art-architecture-museums-in-a-quandary-where-are-the-ideals.html?pagewanted=all>. Accessed July 25, 2017.

⁶ James Wood, "The Authority of American Museums," in *Whose Muse? Art Museums and the Public Trust*, ed. James Cuno and Neil MacGregor (Princeton, NJ: Princeton University Press, 2004), 104.

concerns, with challenges being made to a wide array of collecting activities, including those implicated in histories of military conquest and colonial practices. Vigorous debates (about such objects as the so-called Parthenon marbles⁷ and the bronze plaques and masks of Benin surge⁸) have occurred in professional gatherings as well as in the mass media.⁹ Within these heated discussions, however, there certainly exists a stated consensus that museums' possession of cultural production acquired as the direct or indirect result of the Nazi persecution between 1933-1945 of certain populations, primarily but not exclusively those targeted as Jews, is morally untenable.

Based on that purported consensus, museums in many countries have been faced with requests for the restitution of objects in their collections. Such Holocaust-era restitution cases are often difficult to investigate as they are complicated by a variety of factors. To begin with, the scale of art looting that took place by the Nazis during the 12 years of their domination of Europe was massive, and comprised many types of confiscations, both institutional and personal, not all

⁷ Juan Pablo Sanchez, "How the Parthenon Lost Its Marbles," *National Geographic*, April 2017, <http://www.nationalgeographic.com/archaeology-and-history/magazine/2017/03-04/parthenon-sculptures-british-museum-controversy/>. Accessed August 15, 2017. This is but one article that details the plunder of the Parthenon sculptures and their subsequent looting by travelers and collectors in attempts to 'save' them from destruction. The most famous and significant of these were brought to London in 1803 by the former British ambassador to the Ottoman Empire, the nobleman Thomas Bruce—also known as Lord Elgin.

⁸ Salome Kiwara-Wilson, "Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories," *DePaul Journal of Art, Technology & Intellectual Property Law* 23, no. 2 (2013): 376. In the nineteenth century, Britain's colonization and dominance over its colonies was extensive and ruthless. Their dominance over the colonized occurred through erasure of cultural identity and instilling within them a sense of inferiority. It is argued, that because of these similarities the principles that justify the restitution of Nazi-looted art may also be used to justify the return of pillaged cultural property. The Benin bronzes currently held in British and American collections can be traced back to the 1897 punitive expedition which involved the British invasion of Benin and the subsequent massacre.

⁹ For more on museums and colonial looting see: Douglas Howland, Elizabeth Lillehoj, and Maximilian Mayer. *Art and Sovereignty in Global Politics*. New York: Palgrave Macmillan, 2017. This compilation explores the relationship between culture, artworks and the practices of sovereignty. Authors explore different global debates involving the demonstration of power and formation of national identities through property and national patrimony. See: Moira G. Simpson. *Making Representations: Museums in the Post-Colonial Era*. London: Routledge, 2006. This source looks at the enduring influence of the museum's colonial origins and recent shifts in museum studies and management that has changed the way they function and their relationships with the cultures represented within their collections – indigenous, minority cultures and communities, to name a few. It focuses on the culture of change and new forms of museological practices that have been asserted in case studies from Canada, the United States as well as Australia and New Zealand.

of which are recognized even to this day as illegal.¹⁰ Actions which are considered illegal began as early as 1933, with “forced sales” contaminating the art market from that point on, with many opportunities for the movement of art objects being possible and many fates for the individuals persecuted also being possible. In many cases, the loss of personally-held family documentation is a very real problem for researchers, even when owners fled successfully or survived invasions and the death camps. Additionally, and as suggested by the Nuremberg Trials, carefully falsified documents to conceal the forced nature of transactions involving fixed and movable property were created.¹¹ In the post-war period, “neutral” countries, like Switzerland, have been caught employing administrative stalling tactics and legal barriers about their activities during the war, and institutions in a key Axis country like Austria have, until recently, made access to critical documentation extraordinarily difficult.¹² Museums thus face the need to wade through situations in which essential information may be hidden, irretrievably lost or impossible to locate in a timely fashion.

Over the last twenty years, a succession of books, documentaries and fiction films have captured the imagination of many and helped educate the public in the complexities that have embroiled the art world in debates about the ethics of ownership and restitution.¹³ This interest is further sustained by the fact that even decades after the end of World War II, significant numbers of artworks looted from the victims of national socialism continue to be discovered, sometimes under sensational circumstances such as the recent discovery of close to 1300 works of art in a Munich apartment.¹⁴ If the majority of situations are far less dramatic, research exposing the

¹⁰ See discussions of “degenerate art” taken from German museum at various points in this thesis.

¹¹ Jennifer Anglim Kreder, “Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation,” *Kansas Law Review* (December 2011): 88.

¹² Melissa Muller and Monika Tatzkow, *Lost Lives, Lost Art: Jewish Collectors, Nazi Art Theft and the Quest for Justice* (New York: Vendome, 2010), 169. See also: *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

¹³ Hector Feliciano, *The Lost Museum* (New York: Basic Books, 1997). See also: *The Monuments Men* (2014, dir. George Clooney), *Woman in Gold* (2015, dir. Simon Curtis) and *Rape of Europa* (a book written in 1994 by Lynn H. Nicholas and adapted as a documentary in 2006 by Richard Berge, Bonni Cohen and Nicole Newnham).

¹⁴ “Gurlitt Case Overview,” accessed May 26, 2017, <http://www.lootedart.com/R4O4QY486811>. See also: Fact Sheet - Results on Munich Stock of Artworks, *Taskforce Schwabinger Kunstfund*, http://www.taskforce-kunstfund.de/fileadmin/downloads/factsheet_en.pdf, accessed July 19, 2017. Of 1258 total works found, 507 were found not to be looted, 499 remain under suspicion and were posted on the Lost Art online database, 252 require further research before they can be properly categorized. Concerning restitution claims resolved, 62 out of 118 claims were resolved with remaining ones still subject to review or require ongoing research.

presence of potentially tainted objects in museum collections place the concerned institutions in occasionally uncomfortable, and certainly challenging positions.¹⁵ As already mentioned, even after lengthy institutional critiques, the museum's primary contribution to society are said to be vested in its mandate to collect, preserve and interpret objects, with public trust being engendered through the mounting of exhibitions that provide the public thoughtful and thought-provoking access to cultural knowledge.¹⁶ However, its relationship to its collections is two-fold, because the same objects that underwrite its authority as a vehicle for knowledge and understanding also represent the museum's financial assets. The museum thus faces competing responsibilities when it comes to creating policies and practices that guide it toward both achieving its primary mission of meeting its legal and ethical obligations.¹⁷ With regards to Holocaust-era restitution matters, this balancing act is made even more urgent because of the widespread understanding that time is quickly running out to make reparations to the family members of those wronged who either still have direct recollections or second-hand knowledge of those who were directly persecuted.

Regarding Nazi-spoliated art restitution, museums have sometimes acted favorably for claimants but they have also often acted, sometimes aggressively, against the interests of claimants. Within the United States, the framework concerning debates on looted art and antiquities in general frequently focus on legal and judicial perspectives, but moral and ethical expectations have also played very strong roles when it comes to the situation of museums in Holocaust-era restitution claims. This thesis takes the case study of one particularly influential American museum – the Museum of Modern Art in New York City (MoMA) – to examine the complexity of factors confronting today's museums as they negotiate restitution claims under an evolving network of laws, policies and international treaties, as well as expectations from professional associations and the public. The choice of MoMA was a conscious decision. With its decision to create an authoritative collection of modern art coming at a time when the possibility of acquiring tainted art was high, and with a continuing belief in the strength of its foundational mandate as a leader in the field, MoMA's history and its prominence in recent restitution cases make it an especially rich subject for study. Its elite position within the museum world also

¹⁵ Jessica Schubert, "Prisoners of War: Nazi-Era Looted Art and the Need for Reform in the United States," *Touro Law Review* 30, no. 3 (2014): 675.

¹⁶ Tam, "Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust," 854.

¹⁷ *Ibid.*

suggests it may serve as a model, both positive and negative, for other institutions. This thesis argues that there is currently an urgent need for MoMA and, by extension, other American museums to look more deeply into their policies and practices, and to participate more actively in developing and enforcing new policies towards approaching restitution claims in ways that ensure public trust.

In 1933, the National Socialists' seizure of power quickly gave rise to policies of political and racial "cleansing," with Communists and trade unionists being early targets of persecution in the political field, along with artists and intellectuals who were thought to contribute to the degeneration of the "German spirit".¹⁸ Jews comprised the largest population of those considered to have contaminated the "purity" of the German race, although they were joined by groups like the Sinti and Roma, LGBT people, Christians such as Jehovah's Witnesses and other religious groups, and those who were described as mentally or physically handicapped.¹⁹ These persecutions resulted in millions murdered and forced many others to flee Europe, sometimes permanently. Less thoroughly mapped out than the impact of the events of 1933-1945 on the actual lives of individuals have been the ways in which the National Socialists used the confiscation of property, fixed and moveable, to demoralize, degrade and financially benefit from those they had decided were a danger to the expanding goals of the "Germanic people". The *Einsatzstab Reichsleiter Rosenberg* (ERR) was one taskforce created under the aforementioned political and racial policies and its goal was to track down valuable artworks dispersed throughout the world for 'repatriation', whether they were legally or illegally obtained.²⁰ In both Germany and occupied countries general pillaging was also conducted under the justification of prepayment and advance for war reparations or to be used by the Third Reich as barter for more valuable pieces.²¹ The brutal deprivation of rights and the persecution of individuals have slowly but surely been brought into sharper focus by scholars. For instance, within Germany, those persecuted were forced to flee for survival under

¹⁸ Stephanie Barron and Peter Guenther, *"Degenerate Art": The Fate of the Avant-Garde in Nazi Germany* (Los Angeles, California: Los Angeles County Museum of Art, 1991), 11.

¹⁹ *Ibid.*

²⁰ Kreder, "Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation," 88.

²¹ Feliciano, *The Lost Museum*, 33–35.

forfeit of their possessions and violent riots were organized and resulted in the ransacking and destruction of primarily Jewish homes and businesses.²²

After the war, there were numerous initiatives that targeted the reclamation of Nazi-looted cultural property, although it was difficult to encompass any serious accounting of what had taken place before organized, systematic confiscations had taken place. In recent years, the most well-known of those redresses has been the activities of the “Monuments Men”, over 400 individuals who belonged to the Monuments, Fine Arts, and Archive (MFAA) program formed across the Allied countries in 1943. Their stated goal was to save and preserve the culture of Europe during and after the war, and after massive, hidden Nazi repositories of European art and material culture were discovered, to try to get stolen property back to the institutions and individuals affected. Collecting points were established in Germany, including two central points in Munich and Wiesbaden, where MFAA personnel processed large shipments of items arriving from repositories and prepared them for return to their countries of origin, the procedure often included attempts at identification and visual documentation but it was assumed that the countries who received shipments would do further research to facilitate accurate returns.²³

In France, the Commission de Récupération Artistique (CRA) was founded in 1944 to help recuperate and restitute cultural works previously stolen by the Nazis.²⁴ However, these attempts were complicated by the loss of people and information and by the resistance shown by different governments and legal systems to properly address the question of restitution. The post-war vigor for recuperation and restitution gradually morphed into disinterest over time. For example, after the CRA was dissolved in 1949, the works under its care was divided for safekeeping among national museums and the rest were put up to auction. However, in recent years, we have seen

²² Matthias Frehner and Daniel Spanke, *Modern Masters: “Degenerate” Art at the Kunstmuseum Bern* (Munich: Prestel, 2016), 54.

²³ Greg Bradsher, “Monuments Men and Nazi Treasures,” *Prologue* 45, no. 2 (Summer 2013): 16. See also: “The OSS and Project SAFEHAVEN — Central Intelligence Agency,” accessed May 26, 2017, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/summer00/art04.html>. The United States embarked on initiatives like program ‘Safehaven’, aimed at locating German financial and cultural assets, including art distributed in previously occupied and neutral territories. As we now know, the stores of plundered goods were also sometimes ransacked as trophies by the Allied forces tasked with tracking down confiscated property in the attempts to return them to their rightful owners.

²⁴ Greg Bradsher, “Documenting Nazi Plunder of European Art,” *The Record* (November 1997). <https://www.archives.gov/research/Holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html>. Accessed August 15, 2017.

improvement. In 1996, a complete illustrated list of the Musées Nationaux Récupération (MNR)'s depository was compiled and made available on the French Ministry of Culture and Communication website. Moreover, in 2008, an exhibition entitled "Looking for Owners: Custody, Research and Restitution of Art Stolen in France during World War II," was organized by the French government, and a companion exhibition was held in Israel entitled "Orphaned Art: Looted Art from the Holocaust in the Israel Museum." Both sought to help further identify ownerless works as well as educate the public about Nazi spoliation during the war.²⁵ Similar efforts were pursued in Austria. Immediately after the war, it had restitution laws enacted but did not provide a hospitable climate for claimants coming forward. It was only in 1998, two years after what has become known as the scandal of the Mauerbach Auction, that Austria endorsed serious change through the creation of its Federal Restitution Law and the subsequent establishment of a commission for provenance research and a committee that dealt specifically with restitution cases.²⁶

²⁵ "ADDIN ZOTERO_ITEM CSL_CITATION {"citong To?" in France and Israel," *Commission for the Compensation of Victims of Spoliation* (August 24, 2008). Accessed August 15, 2017.

<http://www.civs.gouv.fr/news/exhibition-who-do-these-paintings-belong-to-in-france-and-israel/>.

Requests for restitution as a result of the exhibition were to be addressed to the Archives Department of the French Ministry for Foreign and European Affairs.

²⁶ Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization, (Terezin, Prague, 2009), 8, <http://www.claimscon.org/forms/prague/looted-art.pdf>. See also: Konstantin Akinsha, "The Mauerbach Scandal," *ARTnews*, January 2, 2009, <http://www.artnews.com/2009/02/01/the-mauerbach-scandal/>. And Barry James, "Art Looted by Nazis to be Auctioned in Austria," *The New York Times* (October 15, 1996)

<http://www.nytimes.com/1996/10/15/style/art-looted-by-nazis-to-be-auctioned-in-austria.html>. Accessed August 15, 2017. The 1996 Mauerbach Benefit Sale, at its time, was considered a triumphant conclusion to the story of thousands of artworks and art objects confiscated from Austrian Jews by Nazis that were previously kept in custody of the Austrian government post-war. The Austrian government had made no efforts to find the rightful owners of objects until 1969, when Nazi hunter Simon Wiesenthal published a list of seized objects in possession of the Austrian government. 543 claims were filed after the list was published with a mere 33 paintings returned, the rest were stored in a monastery in Mauerbach. The deadline for claims was set for December 31, 1972. In 1986, the Jewish Restitution Successor Organization negotiated a new claims process and the government agreed to relinquish title to all artworks not restituted at the end of the process. 77 paintings and 236 other objects were returned. In 1996, after Austria transferred the remaining objects to the Federation of Jewish Communities in Austria, Christie's auctioned them at the Mauerbach Benefit Sale. Austrian officials had assured the Jewish community that the objects were ownerless and all possible efforts to establish and locate rightful owners had been made and failed. In a show that opened in Vienna on December 2, 2008, the Wachsmuth-Lillie installation was a slide projection of photos of the backs of paintings auctioned at the sale clearly indicate numbers and labels which have the name of the former owners, revealing that the works could have been returned prior to the sale.

Some of the most important developments for the restitution of cultural objects and other assets confiscated in the Nazi period have only occurred more than half a century after World War II ended. In 1997, the Association of Art Museum Directors (AAMD), an American organization, expressed its concern over the subject of looted art and began to draft guidelines for its members. By 1998, after decades of near neglect, the issue of Nazi looted art had again become an international concern and representatives from 44 national governments and 13 non-governmental organizations gathered in Washington, D.C., for a conference on Holocaust-era assets, an event co-hosted by the United States Department of State and the United States Holocaust Memorial Museum.²⁷ Among other things, they agreed to voluntary principles meant to guide attitudes and actions regarding art that had been confiscated from individuals or targeted cultural institutions, these intended to close off the unfinished business of World War II and the moral wrong of continuing to benefit materially from injustice.²⁸ Central to the consensus reached in these principles was the notion of timely ‘just and fair solutions’ in an international arena in which legal systems took radically different forms.²⁹ Delegates agreed that “consideration should be given to unavoidable gaps or ambiguities in provenance in light of the passage of time and the circumstances of the Holocaust era,” and that it made sense to establish national commissions or other bodies, with balanced memberships, “to assist in addressing ownership issues.”³⁰ Many major European countries like Austria, France, Germany, the Netherlands and the United Kingdom have followed through on their commitment to the spirit of the Washington Conference by establishing national processes and mechanisms for the alternate resolution of disputes, generally in the form of advisory committees or commissions to review claims for the restitution of art made against public institutions.³¹

²⁷ “1998 The Washington Conference on Holocaust Era Assets” (Washington, DC: U.S. Department of State, U.S. Holocaust Memorial Museum, December 3, 1998), <https://fcit.usf.edu/holocaust/resource/assets/index.HTM>. Accessed August 15, 2017.

²⁸ *Ibid.*, 4.

²⁹ “1998 The Washington Conference on Holocaust Era Assets.” See: Washington Conference Principles on Nazi-Confiscated Art.

³⁰ *Ibid.*

³¹ “Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims” (World Jewish Restitution Organization, June 2015). See also: David Rowland, “Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences,” *Kunst und Recht* 3, no. 4 (2013): 83-93. In 1998, Austria introduced into legislation, the “Federal Law regarding the return of artworks from Austrian Federal museums and collections” and established a government commission and advisory committee; France established the “Commission

A review of the progress made by these commissions can be found in the documented proceedings of the 2012 “Symposium on International Collaboration in Claims for Nazi-Looted Art”, which focused on alternatives to litigation in Nazi-art disputes.³² Oddly enough, the United States, although prominent in organizing the 1998 conference in Washington, did not afterwards move to create a commission to deal with looted art. The United States has maintained that it operates under unique circumstances, because most of its museums function as non-profits and, unlike the traditional model where museums are largely supported by the national government, American museums keep their operations going from a variety of funding sources: from government grants, private donations and, increasingly, from earned and investment income.³³ This difference in governmental support has been cited as the reason why claimants and museums should work out claims between themselves and turn to the courts if they cannot achieve resolution.³⁴ Effectively, American museums have received but the most general of guidance as they have addressed growing rather than diminishing numbers of claims, each grounded in specific circumstances.

My thesis considers the current value systems of American museums concerning the issue of restitution by looking closely at the conduct of MoMA in New York City. In a country where no governing bodies yet exist to officially guide (let alone regulate) restitution claims and museums to ensure they are upholding their commitment, the choice to use MoMA as a case study is directly connected to the scope and perceived authority of its collection, as well as the fact that

d’indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l’Occupation (CIVS)” in 1999; the United Kingdom established the Spoliation Advisory Panel (SAP) in 2000; Britain introduced the Holocaust (Return of Cultural Objects) Restitution Act in 2009; Germany established an art advisory commission in 2003 called the Limbach Commission; and the Netherlands established the Restitution Committee in 2001. These efforts have not gone without criticism however, and even the Dutch commission once considered a model has faced scrutiny for passing judgments where the panel’s balance-of-interests test increasingly weighed the significance of the work to public collects over the emotional attachment of the claimant. See: Nina Siegal, “Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis,” *The New York Times* (May 12, 2017). <https://www.nytimes.com/2017/05/12/arts/design/are-the-dutch-lagging-in-efforts-to-return-art-looted-by-the-nazis.html>). Accessed August 15, 2017.

³² Evelien Campfens, “Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments” (The Hague: Eleven International Publishing, 2015), http://www.restitutiecommissie.nl/sites/default/files/Fair_and_Just_Solutions-web-compressed.pdf.

³³ Philip Katz, “Service Despite Stress: Museum Attendance and Funding in a Year of Recession” (American Association of Museums, February 2010), 3–4, <http://www.aam-us.org/docs/research/acme-2010.pdf?sfvrsn=2>. Accessed August 15, 2017.

³⁴ “Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims,” 9.

it has been very visible in a series of recent restitution claims and debates. Because of the timing of so much of its collecting activities, according to MoMA's provenance project website, MoMA "owns approximately 800 paintings created before 1946 and acquired after 1932, that were or could have been in Continental Europe during the Nazi era".³⁵ In undertaking my study of MoMA, as would be the case in any other institutional investigation, it quickly became evident that many of the factors which help define and shape an institutional ecology can be traced through the individuals heading the museum.³⁶ Two individuals will be important to my study of this institution: MoMA's founding director, Alfred H. Barr, Jr. who was fundamental in forming the early museum and helped develop its first focused collecting program, and current director Glenn D. Lowry, who was trained as an art historian by Samson L. Faison, Jr. (one of the so-called Monuments Men) and who has held his position since 1995.³⁷

A close look at the history, policies and practices of one museum is intended to further understanding in relation to other American museums. As this thesis will demonstrate, American museums have taken to fighting claims on very narrow grounds in courts, arguably breaking their own codes of ethics and by extension causing the American government to run the risk of appearing to break its international commitments by using the courts as a forum to resolve Holocaust-era claims based on technical grounds rather than on their merits.³⁸ There is a sense that museums in the United States have been slow to sensitize themselves to the realities of looted cultural property at a time where their cooperation might have been expected and have helped model appropriate behavior. James Cuno, art historian, former museum director, and current president of the J. Paul Getty Trust, is controversial for his ideas about "universal museums," which harken back to enlightenment ideals and European imperialism, and causes concern for

³⁵ "Provenance Research Project," *Museum of Modern Art*, accessed September 14, 2016, <https://www.moma.org/collection/provenance>.

³⁶ Ibid.

³⁷ Douglas Martin, EM CLane Faison Jr., 98, Dies; Art Historian and Professor, *The New York Times*, (November 14, 2006). <http://www.nytimes.com/2006/11/14/obituaries/14faison.html>. Accessed August 15, 2017. "Mr. Faison's achievement was taking young men at what was then an all-male school and diverting them from careers as doctors and bank executives by turning them into art history majors. A typical disciple was Glenn D. Lowry, a pre-med student in the early 1970's whose main interest was skiing but who tagged along on an impromptu tour Mr. Faison happened to give of Williams's highly respected art museum."

³⁸ Jennifer Anglim Kreder, "Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling toward the Supreme Court," *University of Pennsylvania Law Review* 159, no. 253 (2010): 254.

those who wish to see various forms of colonial pillage rectified. But at the core of his belief is the important role that museums play within society, having stated that:

... the modern [museum] should engage, address, and intend to change the values of contemporary society, from a set of defined values, institutional values, which were its founders' values. It should take risks, stand against inherited values and stand for the truculently difficult in modern art.³⁹

I interpret his conviction as supporting the belief that American museums can and should play pivotal roles in confronting the unprecedented assault on intellectual, artistic and professional communities of Europe under the Third Reich.

Critics have challenged museums like MoMA by voicing concerns about how these institutions have chosen to deal with restitution claims. In particular, they have been very quick in recent years to denigrate MoMA as an institution that “has refused steadfastly ever since the end of the Second World War to return anything to anyone” whose founding director had “disingenuous and clever ways of acquiring looted art on the European market.”⁴⁰ Although MoMA has had its fair share of harsh critics, I will demonstrate through my historical research, that the museum has been in an especially difficult position because of the conditions under which much of its “classic” acquisitions took place. I will also argue that MoMA could set a different and very powerful example, through its statements and actions, by acknowledging and acting on this history and by educating its supporters and public, to go beyond notions of possession. While this case study examines the treatment of Nazi-looted art in one American institution, the issues under consideration have transferable moral significance across the larger debate of stolen cultural property, so often entrenched within histories of violence and subjugation. Thus, MoMA could help model even larger patterns of thought in the museum world.

My approach to this project is interdisciplinary and draws from heritage ethics and critical museum studies.⁴¹ I take as a point of departure the writings of Katarzyna Murawska-Muthesius

³⁹ James Cuno, “Art Directors in Conversation,” in *Imagining the Future of the Museum of Modern Art* (New York: Museum of Modern Art, 1998), 66.

⁴⁰ “O Canada! Where Did You Go Wrong?,” *Plundered Art: A Perspective from the Holocaust Art Restitution Project*, September 13, 2012, <http://plundered-art.blogspot.ca/search?q=glenn+lowry>. Accessed August 15, 2017.

⁴¹ Some of these sources include: John Henry Merryman, and John O. Haley. *Imperialism, Art and Restitution*. Cambridge: Cambridge University Press, 2009 and Bettina Messias Carbonell. *Museum Studies: An Anthology of Contexts*. Malden, MA: Wiley-Blackwell, 2012.

and Piotr Bienkowski on the “critical museum” as well as inspiration from Andrea Fraser’s article “From the Critique of Institutions to an Institution of Critique”, written in 2005. These scholars advocate for a theoretical concept of museums as institutions that have a social mission to be self-reflexive and critical. These theories also position the museum as an institution operating within the network of material culture and analyze the space between museum theory and practice by looking at their operations, from the drafting of management plans or the framing of visitor experiences, surveys and exhibition briefs.⁴² Each of these scholars believes that museums, especially art museums, could benefit from absorbing social critique by turning themselves into sites of resistance.⁴³ They also believe that museums have active roles to play in encouraging the public to understand the complexity of the present world through acknowledging the significance of memory and the past in the development of an increasingly transnational and diverse public.⁴⁴ The study of the ethics of cultural heritage was also important to my research because of its treatment of different ways museums could use their collections and positions of cultural authority to “give voice to the underprivileged and to take a stance in the controversies about the issues most fundamental to the contemporary world”.⁴⁵ It became integral to my research to explore the conceptual, political and ethical issues museums and those who work within it as a means to begin think about ethical responsibilities not as pertaining to the past, but essential to a domain invested in the future and the consequences of their social actions.⁴⁶

My research also includes an in-depth study of archival documents from MoMA, the Archive of American Art and Columbia University. These documents include acquisition lists, exhibition leaflets, speeches, and minutes of meetings, all of which all helped me understand the institution’s history through a comparative analysis of its official narrative and the one revealed through archival investigation, sometimes revealing the more challenging periods in its history. This approach was especially helpful in writing about MoMA’s creation and early years under founding director Alfred H. Barr, Jr. To further reinforce my study and aid in developing certain

⁴² Susan Pearce, *Objects, and Collections: A Cultural Study* (Washington, DC: Smithsonian Institution Press, 1993), 9.

⁴³ Katarzyna Murawska-Muthesius and Piotr Piotrowski, “Introduction,” in *From Museum Critique to the Critical Museum* (London: Routledge, 2016), 1.

⁴⁴ *Ibid.*, 2.

⁴⁵ *Ibid.*, 1.

⁴⁶ Tracy Ireland and John Schofield, *The Ethics of Cultural Heritage, Ethical Archaeologies: The Politics of Social Justice*, 4 (New York: Springer, 2015), 2.

key ideas, I had contacted the museum and restitution lawyers for interviews, as well as putting in a request to the museum for access to any unpublished material they might be willing to share. To this day, these efforts have been met with silence. In the meantime, I have consulted a variety of written and published statements from newspaper articles and essays to support my research, especially as they relate to what might be termed “museum policies” regarding acquisitions. Obviously, additional sources consulted include journal articles and case law surrounding restitution claims brought against MoMA as well as books that examine museum mandates and policies.

My thesis is divided into three sections. Part one outlines the historical background of how artworks confiscated from Germany’s museums, Jewish households, private collections and dealers found (or may have found) their way into the Museum of Modern Art. Part two focuses on the climate at MOMA with respect to restitution after 1998, particularly as it pertains to the protocols and procedures created by the professional organizations like the American Alliance of Museums (AAM) and the American Association of Museum Directors (AAMD) in order to fulfill the promise of Washington. Part three will assess the record of MoMA to date, and will then go on to argue that museums like it may still be best placed to address the issue of looted art within the American context, due to their function as sites for cultural production and their duty to the public. The conclusion speaks to whether or not cultural institutions and museum professionals have worked hard enough to correct historical injustices of Nazi-era art looting and reviews the very recent Holocaust Expropriated Art Recovery (HEAR) Act that was signed into law by the Obama administration on December 16, 2016 as a way of broaching ideas for the future.

Section 1: Building “The Modern”: MoMA’s Foundations and Wartime Collecting Practices

When the Museum of Modern Art opened on November 7, 1929, ‘modern’ art was still understood as meaning new or contemporary production. The meaning of ‘modern’ over time has been the subject of a series of lively debates but today is largely understood to comprise the artistic production of avant-garde artists operating from the mid-19th century until the mid-20th century, with its watershed moment being in the early twentieth century.⁴⁷ A large part of what modern art signifies today was defined by MoMA’s early acquisitions and programming under its first director Alfred H. Barr, Jr. and the museum’s institutionalization of modernism as the “official mode of representation of the twentieth century.”⁴⁸ The museum’s infancy was in the years between the Great Depression and World War II, a period that proved formative in MoMA establishing itself as what many still consider to be the foremost worldwide institution for modern art. However, this seminal period was not one in which only aesthetic concerns were central: it was also marked by the awareness of the profoundly unsettling political events transpiring in Europe.

Although the Nazi occupation of Paris in 1940 and the subsequent creation of the collaborationist Vichy regime represented to many the destruction of a certain idea of democracy, individualism and cosmopolitanism, and therefore the demise of a symbol of Western civilization,⁴⁹ it was well understood prior to that event that Nazi ideology, championing the superiority of a “pure” German nation,⁵⁰ had already sought in very strong ways to control cultural programs. It did so by enacting policies that affected the cultural arena at large from literature, film, music, radio and press, to dismissing academics and intellectuals from teaching posts, condemning artists who worked in modern styles as ‘degenerate’ no matter what their political

⁴⁷ Richard Brettell, *Modern Art: 1851-1929. Capitalism and Representation* (Oxford: Oxford University Press, 2006), 3. Some sources mark the Great Exhibition of 1851 as the starting point, when photo-mechanical reproduction became influential for the production of art and include artists whose works challenged traditional art practices by acknowledging the implication of new visual media, marked by innovation and experimentation with form. The years following World War II for many marks the transition into contemporary or postmodern art signalled by a radical shift in artistic production in the post-war years.

⁴⁸ *Ibid.*, 7.

⁴⁹ Katy Siegel, *Since '45: America and the Making of Contemporary Art* (London: Reaktion Books, 2011), 49.

⁵⁰ Barron and Guenther, “*Degenerate Art*”: *The Fate of the Avant-Garde in Nazi Germany*, 11.

attitudes.⁵¹ As early as 1933, employees of cultural and educational institutions who were Jewish or were thought to engage in “Judeo-Bolshevist” patterns of “non-conformist” thinking were removed from their positions and, in the case of living visual artists, prevented from exhibiting, sometimes even practicing.⁵² As the Nazi era unfolded, Jewish participation in cultural life in almost any form, including ownership of works of art and the operating of art galleries and auction houses, was considered unacceptable and was effectively eradicated. For an institution like MoMA and its supporters, attention would likely have been most acutely drawn to the fact that works of modern art during this time, some privately held and others held by state institutions, were denounced as ‘degenerate.’ Such works were confiscated, paraded in exhibitions such as the series labelled *Entartete Kunst* that began in Munich in 1937,⁵³ and were subsequently banned from public view, destroyed or sold in order to generate income for the Third Reich.⁵⁴ Intellectuals in literature, film, and the visual arts were effectively charged with degeneracy, leading to the confiscation of 16,000 avant-garde works from national museums, including objects created by artists who today are recognized as canonically modern, such as Max Beckmann, Marc Chagall, Otto Dix, George Grosz, Wassily Kandinsky, Ernst Ludwig Kirchner, and Emil Nolde.⁵⁵ This purging of the cultural sphere represented “a state-sponsored iconoclasm with far reaching consequences,” leading to a lasting distortion of museum history and records continuing to this day.⁵⁶

With the political and cultural crisis sweeping across Europe, it became conceivable that the traditional role that Europe had held as centre of the cultural world would pass to the United States.⁵⁷ As military conflict extended throughout Europe, it became increasingly clear that the economic strength of the United States would be decisive in the battle at hand.⁵⁸ The United States

⁵¹ Ibid., 9.

⁵² Frehner and Spanke, *Modern Masters: “Degenerate” Art at the Kunstmuseum Bern*, 9.

⁵³ Ibid., 20. See also: Barron, “Degenerate Art”, 20. *Entartete Kunst* was supposed to last until the end of September, but the astonishing attendance by public prompted them to extend the viewing until end of November as well as circulating it to other German cities like Berlin. It toured to 13 German and Austrian cities through April 1941.

⁵⁴ Ibid, 18

⁵⁵ Marie-Paule Jungblut, *Looted!: Current Questions Regarding the Cultural Looting by the National Socialists in Europe* (Luxembourg: Musée d’histoire de la Ville de Luxembourg, 2008), 17.

⁵⁶ Frehner and Spanke, *Modern Masters: “Degenerate” Art at the Kunstmuseum Bern*, 18.

⁵⁷ Serge Guilbaut, *How New York Stole the Idea of Modern Art: Abstract Expressionism, Freedom and the Cold War* (Chicago: University of Chicago Press, 1983), 55.

⁵⁸ Ibid.

had long felt itself stand in distinct contrast to old Europe and with the unfolding of World War II, the possibility of a shift away from the historical past and towards establishing a modern cultural hub in America became achievable.⁵⁹ This new dynamic cannot have helped but to lend extra resonance to MoMA's activities during these years.

The American public had already been introduced to modernism in the controversial 1913 International Exhibition of Modern Art (also known as the Armory Show). Today, it is considered to have been a key moment for American modernism and an event that introduced modern art to the United States, shocking the public with its radical aesthetic (including Marcel Duchamp's famous ready-made).⁶⁰ Nevertheless, when MoMA opened its doors in 1929, modernism was still an affront to the sensibilities of much of the American public. They were not used to artwork depicting the chaos of the world around them, as the visual arts were more commonly viewed as sources of public edification, or as an escape from people's tumultuous lives.⁶¹ The early museum emerged in the wake of these provocative debates and from the beginning endeavored to shake the public out of its lethargy towards the arts of its own day, introducing it to tenets of the avant-garde.⁶²

Alfred H. Barr, Jr. was proposed by Paul J. Sachs⁶³ to become MoMA's first director.⁶⁴ Barr was perceived as a surprising and unlikely choice, viewed as outspoken, inexperienced and young.⁶⁵ Sachs, however, respected Barr's skilled grasp of the Harvard method of connoisseurship and its formalist point of view supplemented by his Princeton training in historical and iconographic research, and trusted his judgment and taste.⁶⁶ Barr's fondness for modern art became

⁵⁹ Ibid.-

⁶⁰ Gail Stavitsky, "Americans and the Armory Show: An Introduction," *Confrontation* 113 (2013): 135.

⁶¹ Lynes Russell, *Good Old Modern; An Intimate Portrait of the Museum of Modern Art* (New York: Atheneum, 1973), 141.

⁶² Ibid., 126.

⁶³ "Paul J. Sachs Correspondence Archive," *The Museum of Modern Art Archives*, 1998, <https://www.moma.org/learn/resources/archives/EAD/Sachs/>. Accessed August 15, 2017. Paul Joseph Sachs comes from the influential Sachs banking family. Appointed Assistant Director of the Fogg Art Museum at Harvard in 1915, and its associate Director in 1923, he taught classes at Wellesley College and Harvard University, and was credited with training a generation of art museum professionals, among them Alfred H. Barr. Sachs was one of the founding members of The Museum of Modern Art, and served as a Trustee from October 3, 1929 through November 10, 1938.

⁶⁴ Alice Goldfarb Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern* (Chicago: Contemporary Books, 1989), 64.

⁶⁵ Ibid.

⁶⁶ Ibid., 38.

instrumental in promoting the art of established European modernists in America and in introducing the movement to the American public and market. The preview of the new museum's first show, held between 8 November and 7 December 1929, on the 12th floor of the Heckscher building, impressed the public with its carefully chosen artists and artworks.⁶⁷ Barr had selected works by the four post-impressionist masters (Cézanne, Seurat, van Gogh and Gauguin) who were well respected by French critics and not as radical as other more current, but controversial "isms" (such as Fauvism, Futurism, Cubism, Constructivism, Dadaism, and Surrealism).⁶⁸ The exhibition's success earned Barr respect from critics and connoisseurs alike, converting many who were known for either their apathy or their antipathy towards modern painting.⁶⁹ Critics hailed the opening of the new museum as marking the "final apotheosis of modernism and its acceptance in respectable society".⁷⁰ By 1936, the Museum's influence was clear: only a few short years after its inception, modern art had become widespread in the United States and the value of modern art on the international market had increased exponentially.⁷¹ Barr would also be prominent in deepening the public's understanding of twentieth century art with important exhibits like *Cubism and Abstract Art* (1936) accompanied by Barr's iconic exhibition catalogue cover with its genealogical flow chart (Figure 1). However, both Barr and modernism would not be without their critics, for the association of modern art with politics would put it in a place where it could be to be blamed as communist and in the post-war years, when European artists were accused of overtaking American art production.⁷²

⁶⁷ Ibid., 67–71.

⁶⁸ Ibid., 69.

⁶⁹ Ibid., 71. Royal Cortissoz of the *Herald-Tribune*, known for his usual denunciation of Modernism remarked that the show had "some notable landscapes" with "two or three exceptional examples of still life", writing with uncharacteristic kindness that the museum's assemblage of works for the show was impressive.

⁷⁰ Ibid., 70. Under Barr's directorship, MoMA expanded beyond its initial one-room exhibition gallery in the Heckscher building into a world-famous institution on 11 West and 53rd Street in Midtown Manhattan that would influence the public through its issued judgments and tastes, see p.127.

⁷¹ Ibid., 175. Seurat's *La Grande Jatte*, sold for \$200 in 1891, was bought by the Chicago Art Institute for \$25,000 in 1925, and \$400,000 was offered by a bidder 1930 for the work. Its bid value had increased 200,000% percent over 40 years.

⁷² Marie Elisabeth Ohlinger, "A Balancing Act: Max Beckmann and Post-War American Cultural Politics," MA thesis, Concordia University, 2016, 14. Barr's support of modern art, his interest in political refugees and his travels to Eastern Europe and particularly, Russia, would also put him under suspicion as an individual and require him to be investigated before he was cleared to work for the government on the Advisory Commission to the Council of National Defense in 1940.

During the war, the avant-garde notions of individualism and freedom embodied in modern art became valuable symbols in the fight against fascism. Modern art indeed became associated with progress and freedom in the face of fascist propaganda manipulation.⁷³ MoMA was more involved in modernism than any other American institution when it was founded and deeply attuned to the European scene, given that most considered American modernism had not yet had emerged with great strength. It lent its support to the plight of European artists and intellectuals who had begun to be persecuted in Europe from 1933 onwards.⁷⁴ In a 1939 report on MoMA's activities, Barr wrote: "the catastrophe in Western Europe suddenly created an emergency toward which the museum, profoundly concerned with the preservation of cultural freedom, could not remain indifferent."⁷⁵ When the United States government's *Immigration Act* of 1924 threatened to restrict refugees from coming into the United States during the war, activists and individuals concerned about refugees displaced by the war banded together in 1940 to establish the Emergency Rescue Committee (ERC), which was based out of New York City.⁷⁶ MoMA had no official connection with the ERC. However, given that for many modern artists and intellectuals in Europe MoMA was a main point of contact in America, Barr was thus informally involved with the ERC's activities. Both he and his wife, Margaret Scolari, worked with Varian Fry, one of the ERC's founding members. Margaret aided by navigating government bureaucracy and drafting letters.⁷⁸ The Barrs, along with other individuals, also provided support in other means, such as by funding or by making appeals to the State Department for passport renewal on Fry's behalf, providing him with affidavits and obtaining guarantees of support to help secure visas for artists.⁷⁹ Fry travelled to France to help refugees obtain visas or to secure them passage to the United States and the Barrs

⁷³ Cecile Whiting, *Antifascism in American Art* (New Haven: Yale University Press, 1989), 74.

⁷⁴ Stephanie Barron, Sabine Eckmann, and Matthew Affron, *Exiles + Emigrés: The Flight of European Artists from Hitler* (Los Angeles, California: Los Angeles County Museum of Art, 1997), 100.

⁷⁵ Chamberlain Papers (1939-1945), Folder 14, 235. The Museum of Modern Art, New York City.

⁷⁶ Varian Fry, *Surrender on Demand* (New York: Random House, c1945).

⁷⁸ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 186.

⁷⁹ Harold L. Oram to Varian Fry, January 22, 1941, Varian Fry Papers, [ca. 1940]-1967: Series II: Arranged Correspondence, University Archives, Rare Book & Manuscript Library, Columbia University in the City of New York. Oram writes to Fry on behalf of the museum. See also: Alfred H. Barr to Archibald Macleish, May 9, 1941, Varian Fry Papers, [ca. 1940]-1967: Series IV: Subject Files, University Archives, Rare Book & Manuscript Library, Columbia University in the City of New York. "Our Museum has no official connection with the Committee but the Trustees have given money which has been used by the Committee for the rescue of half dozen of the most distinguished modern artists living in France".

would send lists of particular artists' names for Fry to track down such as Marc Chagall, Max Ernst, Pablo Picasso, Wassily Kandinsky, Jacques Lipchitz and Henri Matisse.⁸⁰ During this time, MoMA organized wartime public programs like government-sponsored exhibitions to project America's image as a society strongly invested in defending freedom and democracy, and also became strongly associated with the legacy of the Bauhaus. It sponsored retrospectives of the artists, architects and designers fleeing Germany and through them, promoting to the American public, the novel approaches to art pedagogy and experimentation that were the hallmark of the Bauhaus.⁸¹

The early museum was still busy forming its core collection of modern artworks when war broke out in Europe in 1939. Acquisitions for MoMA during this period were, some might argue, fortuitously timed as the condemnation of modern art by the Nazi regime led to the destruction of thousands of works but also led to the displacement of many others that were sold off on the international markets of France and Switzerland to foreign buyers to help raise funds for the Third Reich. These sales took the form of auctions or transactions through sanctioned dealers who helped the dispersal of artworks into public and private collections worldwide. Thus, it is important not to forget that the opportunity to build the collection of the newly formed MoMA also coincided with the Nazi purge of modern art, and during this time, Barr was faced with an unprecedented

⁸⁰ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 186. Fry would end up helping over 2000 other individuals whose names were not originally on the lists and whose lives were in danger.

⁸¹ "MoMA.org | Interactives | Exhibitions | 2008 | The Museum and the War Effort: Artistic Freedom and Reporting for 'The Cause,'" accessed May 28, 2017, <https://www.moma.org/interactives/exhibitions/2008/wareffort/>. MoMA created the Armed Services Program in 1942, mandated to facilitate exhibition of war focused art and film as well as throwing parties for service men and women at the museum. They organized a National Defense Poster Competition urging artists to create posters that would encourage citizens to support the war. Winning designs were displayed in the museum and recruiting stations as well as billboards through the country. *Images of Freedom* was also an exhibition organized before the United States entered the war in 1941, and included submissions by photographers portraying different facets of American life. See also: Magret Kentgens-Craig, and Lynette Widder. *The Bauhaus and America: First Contacts, 1919-1936*. Cambridge: MIT Press, 2001. MoMA's first exhibition on the German avant-garde movement took place from 7 December, 1938 to 30 January 1939 and was entitled *The Bauhaus 1919-1928*, curated by Walter Gropius and Herbert Bayer. It then travelled to reach a broader U.S. audience and not just the museum's audience. The exhibition was influential because it emphasized the pedagogical foundations of the Bauhaus and promoted the school as an art educational model to American audiences. The school's fusion of fine and applied arts was also influential on Barr who would establish six different curatorial departments at MoMA among them, film, photography and architecture and design. For more on this first exhibit see: Adrijana Sajic, "The Bauhaus 1919-1928 at the Museum of Modern Art, N.Y., 1938; the Bauhaus as an Educational Model in the United States" (2013). *CUNY Academic Works*. http://academicworks.cuny.edu/cc_etds_theses/183. Accessed August 20, 2017.

opportunity for acquisitions for MoMA's fledgling collection.⁸²

Initially, MoMA's founders had entertained the idea of a fluid collection from which older works would be deaccessioned to make room for newer contemporary works.⁸³ The bequeathing of Lizzie P. Bliss' sizeable collection to MoMA in 1931 discouraged the original idea of a changing collection: it was hard to ignore the enduring value of works by the likes of Paul Cézanne, Georges Seurat, Paul Gauguin, Henri Matisse and Pablo Picasso.⁸⁴ This idea underwent even swifter renovation as displaced European works became available.⁸⁵ By 1953, MoMA had entirely renounced the idea of deaccessioning in favor of creating a masterworks collection through which the museum committed itself to the responsibility of gathering and exhibiting the richest possible collection of what it defined as modern art.⁸⁶

Émigré art dealers were instrumental in changing the American museum landscape by helping museums acquire many valuable modern works during and for a time after the war.⁸⁷ Curt Valentin was one such individual who specializing in twentieth century German and Austrian modernist art. Prior to coming to America, Valentin apprenticed in Hamburg under Karl Buchholz, a Berlin dealer, and one of the four sanctioned by Hitler to liquidate modern art from Germany. Buchholz employed Curt Valentin between 1934 and 1937 in Germany and helped him start his practice in the United States in 1937.⁸⁸ Barr frequently dealt with Curt Valentin for his purchases of modern artworks, and the two nurtured a close friendship that would last until Valentin's death in 1954. Today, on MoMA's archive page, Valentin is described as one of the most "widely respected ... astute dealers in modern art,"⁸⁹ but the relationship of this individual to Barr and to MoMA warrants a much closer look than these laudatory comments suggest.

⁸² Jeanne Willette, "Breaking the Begats: An Anti-Teleological Approach to Alfred Barr" (Art and Teleology Panel - Southeastern College Art Conference, Pittsburgh, Pennsylvania, 2015), 12.

⁸³ Kirk Varnadoe, "The Evolving Torpedo: Changing Ideas of the Collection of Painting and Sculpture of the Museum of Modern Art," in *The Museum of Modern Art at Mid-Century: Continuity and Change*, ed. Barbara Ross (New York: Museum of Modern Art, 1995), 35.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, 25.

⁸⁶ *Ibid.*, 44.

⁸⁷ Jonathan Petropoulos, "Bridges from the Reich: The Importance of Émigré Art Dealers as Reflected in the Case Studies of Curt Valentin and Otto Kallir-Nirenstein," *Kunstgeschichte Open Peer Reviewed Journal* (2011): 3.

⁸⁸ *Ibid.*

⁸⁹ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 64.

When Valentin emigrated to the United States, he opened the New York branch of the Buchholz Gallery and carried with him ‘degenerate’ art to sell.⁹⁰ He also had in his possession a letter from the Reich Chamber of Fine Arts authorizing him to sell ‘degenerate’ art and enabling him to travel back and forth to Germany to obtain stock from Buchholz, a travel right he did make use of before American entry into the war.⁹¹ Valentin’s partnership with Buchholz would continue until the end of the war, allowing him to traffic works from Germany throughout the conflict. MoMA’s version of Valentin’s arrival to the United States provides a conflicting account. According to MoMA’s biographical note on its archives site: “Valentin was able to emigrate thanks to financial backing from MoMA trustee Edward Warburg and the support of Barr.”⁹² Earlier, on June 30, 1942, Barr had written: “Mr. Valentin is a refugee from the Nazis both because of Jewish extraction and because of his affiliation with free art movements banned by Hitler. He came to this country in 1937, robbed by the Nazis of virtually all possessions and funds”.⁹³ Whatever the case, Barr later vouched for Valentin’s good character in his application to become an American citizen and with MoMA’s support, Valentin quickly established himself as the leading dealer in German Expressionist art in America. In addition to opening a branch of Buchholz in New York, he became one of the most important bidders, representing MOMA and other important clients, at the historically important Fischer sale in Lucerne, Switzerland held on 30 June, 1939, featuring at auction around seven hundred works stripped by the National Socialists from various German museums.⁹⁴

⁹⁰ Petropoulos, “Bridges from the Reich: The Importance of Émigré Art Dealers as Reflected in the Case Studies of Curt Valentin and Otto Kallir-Nirenstein,” 13. See also: Godula Buchholz and Karl Buchholz. *Buch- und Kunsthändler im 20. Jahrhundert* (Cologne: DuMont, 2005), 64-69. Godula Buchholz writes that when Valentin arrived in the United States in January 1937 to set up this branch of the Buchholz empire (there would be galleries in Bucharest in 1940, Lisbon in 1943, Madrid in 1945, and Bogota in 1951), he carried “baggage containing sculptures, paintings, and drawings from the Galerie Buchholz in Berlin.” She goes on to say that the works in his luggage were by artists who had been declared “degenerate” back in Germany; MoMA’s archive website on Curt Valentin similarly states: “In 1937 Valentin immigrated to the United States with a sufficient number of modern German paintings to open a gallery under the Buchholz name in New York City”.

⁹¹ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

⁹² Petropoulos, “Bridges from the Reich: The Importance of Émigré Art Dealers as Reflected in the Case Studies of Curt Valentin and Otto Kallir-Nirenstein,” 13.

⁹³ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 178. See: Alfred Barr to Mathias Correa (30 June 1942)

⁹⁴ Feliciano, *The Lost Museum*, 156.

Barr was undoubtedly highly aware of the events transpiring overseas and the plight of artists by Nazi officials throughout the 1930s and early 1940s.⁹⁵ In 1932, he travelled to Stuttgart to find treatment for insomnia, a condition that had been plaguing him since the museum's opening.⁹⁶ During his visit, he wrote an article entitled "Art Under the Third Reich" that detailed early observations of the National Socialists' closing and control of art and galleries during his stay.⁹⁷ The article was only published in the United States in 1945, after the end of the war. Had his observations been published at the time they were written, they would have been one of the early alerts to the American public as to what was happening to intellectuals, artists, and art under the Nazi regime.⁹⁸ Knowing of Barr's experience, his having seen what was happening in Europe well before war even broke out on September 3, 1939, raises suspicions about whether Barr was consciously taking advantage of the war and unusual opportunities provided by unethical art dealers and auctions of degenerate art in building up the museum's collection.

Although several paintings and sculptures that had been sold at the Fischer ended up in MoMA's collection, Barr did not directly bid on any work there, instead providing Valentin with money to bid on MoMA's behalf for the auction.⁹⁹ Many dealers and museums boycotted the

⁹⁵ Barron, Eckmann, and Affron, *Exiles + Emigrés: The Flight of European Artists from Hitler*, 102.

⁹⁶ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 104–105.

⁹⁷ Alfred H. Barr, Jr. Papers [IV.B.82; Mf 3262:235]. The Museum of Modern Art Archives, New York. "Art in the Third Reich", details his observations in Stuttgart in 1933. He describes a meeting on April 9 in Stuttgart in the city's civic theatres where individuals gathered to hear what was expected of them under the new government. Excerpts were read aloud from "*Kulturorigramm im neuen Reich*": among them "it is an important cultural duty of the regime of the new National Resurgence to set free from any foreign, external influence our native creative personalities and by so doing to give them the possibility of increasing their vitality... the widely held contemporary belief that art is international is absolutely misleading" and "it is a mistake to think that the national revolution is only political and economic. It is above all cultural. We stand in the first stormy phase of revolution.... Revolution will penetrate just as thoroughly the territories of art, culture and science as it has economic and political activities. If anyone should ask: what is left of freedom? He will be answered: there is no freedom for those who would weaken and destroy German art. Freedom is only for those who carry in themselves the German artistic spirit and a fanatical will to reform."

⁹⁸ Alfred H. Barr, Jr. Papers [I.A.8; mf 2164:1264]. The Museum of Modern Art Archives, New York. Barr writing to John Hay Whitney enclosing his Stuttgart for review, claiming there were few articles that focused on generalities rather than "particular concrete instances of what went on in specific places".

⁹⁹ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 178. While many dealers boycotted the auction, others banded together to keep the prices low by allowing only one among them to bid. Two months after the sale, MoMA announced it had bought five important works from the Bucholz Gallery featured in the "Art in Our Time" exhibition, works that came from the Swiss sale.

auction in Lucerne, unwilling to encourage or support the Nazi war machine.¹⁰⁰ MoMA's position on this auction has been, to put it mildly, contradictory. In 1942, Barr wrote to MoMA manager Thomas Mabry: "I am just as glad not to have the museum's name or my own associated with the auction."¹⁰¹ To an Associated Press reporter a decade later, Barr implied that MoMA had boycotted the auction and thereby lost the best Munch ever on the market.¹⁰²

The works bought for Barr by Valentin at the Fischer Auction (namely André Derain, *Valley of the Lot at Vers*, 1912, taken at Cologne Museum; E.L. Kirchner, *Street Scene*, 1913, taken from the National Gallery of Berlin; Wilhelm Lehmbruck, *Kneeling Woman*, 1911, taken from the Berlin Gallery; Paul Klee, *Around the Fish*, 1926, taken from the Dresden Gallery; Henri Matisse, *Blue Window*, 1913, confiscated from the Folkwang Museum) were exhibited in "Art in Our Time", a MoMA exhibition in the summer of 1939, with credits indicating they had been lent "anonymously" (Figure 2).¹⁰³ Although some of Barr's actions can be read as concern for the plight of artists and intellectuals abroad, archival findings suggest that Barr also had eyes on establishing Modernism in the United States through the emigration of influential intellectuals as well as by building up a strong collection of modern masterworks.¹⁰⁴ MoMA's acquisitions from this particular auction not only raises troubling questions about whether Barr's desire to save artworks was for their preservation or to take advantage of the auction, but also insist that the honesty of his collecting ethos requires further examination.

¹⁰⁰ Sophie Cachon, "Que S'est-Il Vraiment Passé Au 21 Rue La Boétie, Dans La Mythique Galerie Rosenberg?," *Sortir Paris*, April 27, 2017, <http://www.telerama.fr/sortir/que-s-est-il-vraiment-passe-au-21-rue-la-boetie-dans-la-mythique-galerie-rosenberg,155071.php>. Accessed August 15, 2017. Rosenberg, like some other dealers, was adamantly against the 1939 auction in Lucerne, warning potential buyers that currency harvest from the sale would "fall back on our heads in the form of bombs". This also highlights Rosenberg's objections to supporting in any way the 1939 auction. Paul Rosenberg was a Jewish art dealer who survived the war in exile in New York, having lost more than 400 paintings to Nazi-confiscation. In this exhibition: *21 Rue la Boetie*, 63 works exhibited that had passed through Rosenberg's galleries are shown courtesy of private loans and explores the debate about restitution and transparency that still plagues many of their wartime provenances.

¹⁰¹ Marquis, *Alfred H. Barr, Jr.: Missionary for the Modern*, 178.

¹⁰² Ibid.

¹⁰³ Harriet Schoenholz Bee and Michelle Elligott, *Art in Our Time: A Chronicle of the Museum of Modern Art* (New York: Museum of Modern Art, 2004).

¹⁰⁴ Alfred Hamilton Barr Papers [mf 1933:1208-1209]. Archives of American Art, Smithsonian Institution. Edward Warburg to Barr, suggesting that they try to entice Joseph Albers into the United States because it would be a "great feather in the cap of the Museum of Modern Art [...] with Albers over here we have the nucleus for an American Bauhaus!"

Given American museums' demand for cultural objects during the war, research by museums into new acquisitions often focused on authenticity rather than ownership and investigation. Barr himself stressed the importance of buying modern works as they became available during the war: a vigorous purchasing campaign was insisted upon, and a discretionary fund was established that would allow immediate purchases to be enacted by the departmental committee headed by Barr.¹⁰⁵ In the 1941 minutes for a meeting of the board of museum trustees,¹⁰⁶ the board agreed that the museum should not “bargain with artists nor try to beat down dealers below a reasonable profit. But should we not continue to take advantage of unusual opportunities for purchase....,” pointing out that well-timed purchases would stretch the purchasing fund and help amass a collection “that is worth more, so far as its purchased items are concerned, a great deal more than was paid for it.”¹⁰⁷ Barr was an instrumental figure for MoMA's early acquisitions, and both his specific views on and passion for modern art fuelled the museum's acquisition policies during and after the war. Although Barr was eventually dismissed from his position in 1944 as museum director, he was still very much present in an advisory capacity until he was later named Director of the Collections in 1947.¹⁰⁸

The magnitude of the destruction and purge of artworks by the National Socialists has had far-reaching and lasting consequences on art history and for museums up to the present day. Our perception of modernism as outlined by the selective collection at MoMA, for example, has been taken as an authoritative account, even though it only pays homage to select ‘masters’, a group that sometimes ignores those whose careers were disrupted, and never recovered, or those who were murdered in death camps.¹⁰⁹ On a more “every day” basis, the art world became physically contaminated, not only by the presence of works of art purged for their “degeneracy” by the Nazis, but also by art that was looted, by direct seizure or through circumstances of duress

¹⁰⁵ Chamberlain Papers (1939-1945), Folder 14, 199. The Museum of Modern Art Archives, New York.

¹⁰⁶ Chamberlain Papers (1939-1945), Folder 13, 176. The Museum of Modern Art Archives, New York. Details from Section III: The War. May 1939 to October 1945, explains museum trustee appointments. Page 176 looks at new election of trustees Henry R. Luce, Mrs. David Levy, Mrs. Simon Guggenheim, Archibald MacLeish and Dr. Carleton Sprague Smith, including Alfred Barr and Dick Abbott for a total of 25 trustees.

¹⁰⁷ Chamberlain Papers (1939-1945), Folder 14, 199. Quote by James T. Sobey who served primarily as a Trustee on the board at MoMA and advisor to its Committee on the Museum Collections between 1940-67.

¹⁰⁸ Russell, *Good Old Modern; An Intimate Portrait of the Museum of Modern Art*, 285.

¹⁰⁹ Frehner and Spanke, *Modern Masters: “Degenerate” Art at the Kunstmuseum Bern*, 18.

by those whose ethnicity had first led to persecution and then to mass murder. As Jonathan Petropoulos has stated in his case study of modernist art dealers Curt Valentin and Otto Kallir-Nirenstein¹¹⁰ – a text worth drawing upon here at some length – émigré art dealers are thought to have conveyed to American collectors and museums objects that were caught up in these latter sets of dynamics:

There is an Oskar Kokoschka self-portrait in MoMA's collection now that was once owned by a Jewish couple, Alfred and Rosy Fischer, who sold it to the Halle Museum in 1924. Halle paid some of the purchase price, but not for all of it and stopped payments in the Nazi era because the family was Jewish (this was not uncommon). After the payments were stopped, the Nazis confiscated it, put it in the Degenerate Art exhibition and then sold it through Buchholz and Valentin to MoMA. This case has been studied by Andreas Hüneke and published in a book about the Fischer collection done by the Jewish Museum in Frankfurt. But because the Fischers were not paid in full by the Halle Museum, the Jewish couple retained certain rights to the picture....

An even more questionable artwork in The MoMA's collection throwing doubt on Curt Valentin's reputation is Paul Klee's painting, *Introducing the Miracle* (1916). Valentin acquired the painting from left-wing German-Jewish cultural critic Walter Benjamin, who had bought it from Berlin dealer J.B. Neumann (1887-1961) prior to the Nazi seizure of power. Because of Nazi racial persecution, Benjamin emigrated to France. In 1940, after the German invasion and conquest of France, Benjamin was imprisoned in an internment camp in the South of France; as is well known, he managed to gain his liberation and attempted to flee over the Pyrenees Mountains to Spain. When he was detained by Spanish authorities, he committed suicide. It is unclear when or how Valentin acquired this painting by Paul Klee, but it would appear that it occurred after 1938 and 1940: at a time when Benjamin was suffering economic persecution by the Nazis, including the loss of a significant part of his highly valued library...¹¹¹

With what we may now safely identify as MoMA's evident desire to enrich its collection while engaging in what some at the time saw as less than seemly behavior, it is not surprising that the kind of onerous provenance research which might have halted the acquisition of such works as the Kokoschka and Klee paintings was not a top priority for the museum to demand of the dealer or to undertake itself... It is hardly surprising then, that restitution of looted art from the persecuted has become a problem that MoMA has had to confront in more recent times. Even a glance, however, at current, very public MOMA postings on the two-mentioned paintings

¹¹⁰ Petropoulos, "Bridges from the Reich: The Importance of Émigré Art Dealers as Reflected in the Case Studies of Curt Valentin and Otto Kallir-Nirenstein."

¹¹¹ Ibid., 29–32.

suggests this area needs to be probed thoroughly. Petropoulos' assertions concerning the possible status of these objects made eight years ago are not even mentioned, let alone refuted.¹¹²

Section 2: MoMA and Post-1998 Nazi-Era Art Restitution Claims

In the years following the 1998 Washington Conference on Nazi-confiscated art and the enthusiasm generated by the gathering, restitution claims and cases have become increasingly prominent within the art world. Understanding restitution as a process beyond museums simply returning objects is central to this investigation. In their mission to protect and display cultural heritage, museums, it has been argued, must also preserve the historical record by denying shelter for misappropriated entities such as looted artefacts, objects and artworks. In the present, American museums have often taken to fighting claims in courts on technical grounds, despite acknowledging the pressing issue of Nazi-era art restitution, and having promised to identify and return works stolen during WWII and encourage cooperation nationally and internationally.¹¹³ In such cases, they appear not only to have breached their self-determined code of ethics but also have positioned their government to be seen as having broken international commitments of principle. This section of my thesis will examine the specifics of some of these apparent conflicts.

For decades following the war, the search for Nazi-confiscated art was pursued by American-based Holocaust survivors and their families, often in isolated, unsupported situations. However, the declassification of wartime documents in the late 1990s helped by making previously unavailable records and documents accessible to the public. For example, the Clinton administration's executive order 12958 of April 1995 expanded and accelerated the declassification of all such government records.¹¹⁴ These efforts, in addition to publication of

¹¹² "Paul Klee. Introducing the Miracle. 1916," *The Museum of Modern Art*, accessed July 22, 2017, <https://www.moma.org/collection/works/79614?locale=en>. See also: "Oskar Kokoschka. Self-Portrait. 1913", *The Museum of Modern Art*, accessed July 22, 2017, <https://www.moma.org/collection/works/78508>. Petropoulos' article "Bridges from the Reich" is from a working paper given at a conference entitled: '[Hitler's Europe: New Perspectives on Occupation](#)', in Vienna on 10 November 2009.

¹¹³ The Association of Art Museum Directors, "Resolutions of Claims for Nazi-Era Cultural Assets," accessed June 2, 2017, <https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info>.

¹¹⁴ "Executive Order 12958" (Federal Register vol.60, no.76, April 17, 1995), <https://www.gpo.gov/fdsys/pkg/FR-1995-04-20/pdf/95-9941.pdf>. Accessed August 15, 2017.

popular literature on looted artworks, brought the unresolved issue of Nazi-looted art back into the public purview.¹¹⁵ In May 1997, the ‘Eizenstat Report’ was produced by an alliance of United States government historians, researchers, policy makers and diplomats, calling for even greater public access to all Holocaust-era records. Launched in June 1998, another report was produced, titled “United States and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden and Turkey on Looted Gold and German External Assets and United States Concerns about the Fate of the Wartime Ustasha Treasury”.¹¹⁶ Both reports relied on federal historical records and accelerated examinations from international governments of their own past actions regarding Holocaust assets. Stuart Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, was instrumental in producing these reports, which otherwise would have been delayed and deflected for the assignment of resources and declassification of documents. By 1998, the issue of Nazi looted art had become an international concern, leading to the holding of a special section of the Washington Conference on Holocaust Era Assets in November 1998.¹¹⁷ Eizenstat, also in charge of organizing the conference, opened the proceedings by underscoring the international meeting as an opportunity to commit to the necessary conventions needed bring to a close the unfinished business and tragedies of World War II.¹¹⁸ The conference addressed, among other issues, the persistent moral wrong of countries that tried to gain materially from the injustice of the war and encouraged the international identification and restitution of Nazi-era looted works taken from persecuted individuals, to surviving rightful owners and the families of those whose works were confiscated. The conference recognized for the first time in an international forum, the unprecedented scale of losses that occurred during

¹¹⁵ Michael Bazylar, *Holocaust Restitution : Perspectives on the Litigation and Its Legacy* (New York: New York University Press, 2006), 34. The Eizenstat Report was an interagency historical review launched in May 1997, formally called the “U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II”.

¹¹⁶ William Z. Slany and Stuart Eizenstat, “U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury: Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II” (Washington, DC: Supt. of Docs, U.S. Gov. Printing Office, 1998).

¹¹⁷ “Art Museums and the Identity and Restitution of Works Stolen by the Nazis” (Association of Art Museum Directors, May 2017), 2, https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf.

¹¹⁸ “The Washington Conference on Holocaust-Era Assets,” accessed June 2, 2017, <https://fcit.usf.edu/Holocaust/resource/assets/index.HTM>.

World War II that had yet to be remedied. Understanding that survivors could never be properly compensated for their decimated families and lives destroyed, it was imperative that a full accounting be made of assets that were confiscated from them or their families.¹¹⁹

The conference proceedings concluded with the Washington Principles (hereafter the “Principles”), a set of eleven guidelines developed in consensus to help handle Nazi-appropriated art restitution claims from victims of Nazi-confiscation and their heirs (Appendix A). As we have already noted, the non-binding principles called for: the identification of Nazi confiscated art; tasked museums with designating resources to review artworks in their collections for a Nazi-era provenance; encouraged pre-war owners and heirs to come forward with claims; determined that the process of dealing with claims should be just and fair; encouraged nations to develop national processes to implement the principles as well as making repositories and necessary documentation accessible to the public.¹²⁰

Major museums such as the National Gallery of Art, the Metropolitan Museum of Art, the Smithsonian Institution, as well as the Association of American Art Museum Directors sent representatives to the Washington Conference.¹²¹ Although MoMA did not send a representative, director Glenn Lowry had provided testimony in February of the same year before a congressional committee about the issues involved in the restitution of art looted by the Nazis: “Let me begin then with an unequivocal statement: The Museum of Modern Art does not and will not knowingly exhibit stolen works of art. Like our sister institutions, we maintain our collections with scrupulous regard for our professional and ethical obligations.”¹²² He further assured members of Congress of the commitment on the part of American museums, stating: “We will not countenance the acquisition or display of stolen art, and we are committed to doing everything possible to ensure that our collections are untainted by the stigma of the Nazi past”.¹²³ Tying MoMA to the impulses behind the imminent Washington gathering, Lowry was adamant in his stated allegiance to what could be described as “clean provenances”. Nevertheless, it bears noting – even before MoMA’s

¹¹⁹ Ibid.

¹²⁰ Ibid. See: “Appendix G: Washington Conference Principles on Nazi-Confiscated Art”.

¹²¹ Ibid., 949–970. See: “Appendix F: Participants”, *Washington Conference on Holocaust Era Assets*, 1998”.

¹²² Glenn Lowry, “Archives | Financial Services Committee | U.S. House of Representatives,” (February 12, 1998). Accessed August 15, 2017.

<http://archives.financialservices.house.gov/banking/21298low.shtml>.

¹²³ Ibid.

record begins to be looked at in detail – that Lowry’s ringing affirmation of a need to guard against the tainted Nazi past was being made at about the same time that his employer was refusing to act decisively in favour of gaining a hearing for the claimants of an Egon Schiele portrait that had been on loan at MoMA from an Austrian museum. On the surface, at least, public endorsements of the part of this powerful museum in 1998 on behalf on the cause of Nazi-looted art restitution seemed to fall somewhat short of its actual practices.

MoMA along with many American museums, is a member of both the Association of Art Museum Directors (AAMD) and the American Alliance of Museums (AAM). The AAMD is a professional organization in the United States that has a code of ethical conduct and standards of professional practice for its membership that is comprised of some of the most influential American museum directors. As previously mentioned, it had expressed concern over the subject of looted art by drafting guidelines for its members, guidelines which in fact formed the basis for the Washington Principles. Indeed, the AAMD and the AAM (American Alliance of Museums, formerly the American Association of Museums) were already intensely active just prior to the Washington Conference,¹²⁴ both issuing codes that dealt with the concern of Nazi-looted art in domestic collections and institutions.¹²⁵ The AAM advised: “if a museum determines that an object in its collection was unlawfully appropriated during the Nazi-era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner.”¹²⁶ Similarly, the AAMD guidelines argued that “if a member

¹²⁴ “Nazi-Era Stolen Art and U.S. Museums: A Survey” (Claims Conference and the World Jewish Restitution Organization, July 25, 2006), 6, <http://art.claimscon.org/wp-content/uploads/2014/04/U.S.-Museum-Survey-report-07-25-06.pdf>. In June 1998, the AAMD released their “Task Force on the Spoliation of Art during the Nazi/World War II Era” and adopted guidelines on how to deal with Nazi-era looted art. In November 1998, the AAM published “Common Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era,” subsequently amended in April 2001.

¹²⁵ Nancy Yeide, Amy Walsh, and Konstantin Akinsha, *The AAM Guide to Provenance Research* (Washington, DC: American Association of Museums, 2001). The AAM intended this guide as a “comprehensive and authoritative resource for tracing the ownership history of works of art. Focused on cultural property looted by the Nazis and others during WWII, it is divided into three parts: Basic Provenance Research and Principles, Holocaust-Era Provenance Research, and Appendixes, which include bibliographies of collections, dealer archives, and “red flag names” compiled by the Office of Strategic Services.” (from: American Alliance of Museum website, “Nazi-Era Provenance, <http://www.aam-us.org/resources/nazi-era-provenance>)

¹²⁶ “Unlawful Appropriation of Objects During the Nazi Era,” accessed June 2, 2017, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era>. Under “Claims of Ownership”.

museum receives a claim against a work of art in its collection related to an illegal confiscation during the Nazi/ World War II-era, it should seek to review such a claim promptly and thoroughly [and] the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.”¹²⁷ Both sets of ground rules addressed the use of civil litigation and application of civil law defenses similar to those issued in the later released Washington Principles:

When appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi-era without subsequent restitution... [I]n order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.¹²⁸

Ultimately, the Washington Principles, the AAMD and AAM each strongly advocated for museums not to taint their collections with art stolen from persecuted individuals during the Holocaust, strongly urging them to facilitate return and to work as amicably as possible with claimants towards a fair solution. Progress followed: both professional organizations collaborated in 2003 on the Nazi-Era Provenance Internet Portal (NEPIP), a search tool covering objects in United States museum collections that had changed hands in Continental Europe during the Nazi era.¹²⁹ In a 2006 survey conducted by the Claims Conference¹³⁰ and the World Jewish Restitution Organization (WRJO),¹³¹ some 140,000 objects was identified among participating museums for

¹²⁷ “Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II-Era (1933 – 1945)” (American Association of Museum Directors, June 4, 1998), <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf>.

¹²⁸ “Unlawful Appropriation of Objects During the Nazi Era.” Under “Claims of Ownership”.

¹²⁹ “Nazi-Era Stolen Art and U.S. Museums: A Survey,” 6. Individuals using the portal can look up objects by artist’s name, nationality of artist, title of object, originating place of object or using descriptive keywords. In the basic search, there are 3 fields: (1) artist name or (2) nationality, (3) place or culture of object. Should the user not possess any of the information required for the basic search, advance search based on keywords is next to impossible because the 3 first fields are still required. Ability to access the database in its entirety is also not an option.

¹³⁰ “History - Claims Conference,” accessed June 3, 2017, <http://www.claimscon.org/about/history/>. The Claims Conference is short for the Conference on Jewish Material Claims Against Germany. Founded in 1951, it is an organization of major Jewish national and international organizations that have taken up the task of negotiating with the German government, a program of indemnification for the material damages to Jewish individuals and to the Jewish people caused by Germany throughout the Holocaust.

¹³¹ “About Us / Our Mission,” *World Jewish Restitution Organization*, accessed July 22, 2017, <http://wjro.org.il/about-wjro/about-us-our-mission/>. The WRJO consists of leading world Jewish organizations. It was registered as a non-profit and has been operational since 1993. Its mandate is to address the restitution of Jewish property and educate the public about the material wrongs that occurred during the Holocaust. The body consults and negotiates with national and local governments for the recovery of Jewish properties in Europe (except for Germany and Austria).

which study was required into Nazi-era ownership history.¹³² Currently, NEPIP lists approximately 29,792 objects submitted from 179 museums, just above 20 percent of the total number of the projected scope of study needed.¹³³

Provenance research – meaning the systematic review of museum collections for artworks whose object histories suggested they may have been looted or misappropriated during the war – as well as making those ownership histories publicly available, represents one of the important ways museums promised to begin to address the complex issue of stolen works during World War II. According to the AAM Code of Ethics, initially adopted in 1991 and last modified in 2000, “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 (deaccessioning).”¹³⁴ Therefore, facing the possibility that an object “in a museum’s custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum’s responsibility to practice ethical stewardship is paramount,” the AAM encourages member museums to take urgent action in developing and implementing policies and practices, such as provenance research, to help in the identification and restitution of these objects.¹³⁵ According to the same 2006 survey by the Claims Conference and WRJO, out of 114 institutions, only 12 museums responded by stating they employed a fulltime researcher and only one third had established a budget for this type of research.¹³⁶ In most museums, the registrar, curator or other employees conduct provenance research in addition to their regular duties.¹³⁷ Turning to our specific ‘case study’, records show that MoMA’s provenance project initially employed a head researcher from 2001 to 2005, with a full-time replacement then not coming back on until 2011. It also did not specify whether it allocated a separate budget for provenance research.¹³⁸ Almost two decades following the Washington Conference when MoMA along with other museums promised

¹³² “Nazi-Era Stolen Art and U.S. Museums: A Survey,” 11. The total number (140, 000) is likely significantly higher, as there are a number of museums that did not provide this information regarding their collections, or did not respond at all.

¹³³ “Nazi-Era Provenance Internet Portal,” accessed July 22, 2017, <http://www.nepip.org/>.

¹³⁴ “Code of Ethics for Museums,” *American Alliance of Museums*, accessed June 2, 2017, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics>.

¹³⁵ “Unlawful Appropriation of Objects During the Nazi Era.” Under “General Principles”.

¹³⁶ “Nazi-Era Stolen Art and U.S. Museums: A Survey,” 10.

¹³⁷ Ibid.

¹³⁸ Isabel Vincent, “New York Museums Have Not Returned Nazi-Seized Art,” *The New York Post*, October 7, 2012, <http://nypost.com/2012/10/07/new-york-museums-have-not-returned-nazi-seized-art/>. MoMA’s provenance research project was spearheaded by Christel Hollevoet-Force from 2001-2005.

to investigate their collections, MoMA's provenance page has revealed around eight hundred works that met the target definition of works with provenance before "1946 and acquired after 1932 that were or could have been in Continental Europe during the Nazi era",¹³⁹ but their research has ultimately concluded – one could argue with anything but conclusive demonstration – that the "majority of provenance records are sufficiently complete to eliminate the likelihood of Nazi misappropriation."¹⁴⁰ Their provenance project also poses difficulties for users as it lacks an actual search function. Users are required to sift through the lists of works on the website or through the spreadsheet document in order to attempt to locate works of interest. While MoMA maintains that they currently have no works with questionable provenance, many of the works listed in the portal show questionable acquisitions from notorious galleries like Bucholz, or galleries that had been effectively looted like Galerie Flechtheim in Düsseldorf, and the Galerie Thannhauser in Munich, Berlin and Lucerne, or are missing provenance details altogether. Yet to respond to Petropoulos' allegations about two important paintings, MoMA has also recently returned another painting.

In 2015, MoMA decided that Ernst Ludwig's Kirchner *Sand Hills at Engadine* had a tainted provenance. This work had been left behind by Max Fischer, Frankfurt-based owner of an important art collection, when he fled Germany for the United States in 1935, after which it was acquired by German collector Kurt Feldhäuser in 1938 and then sold to MoMA in 1949 under the title *Dunes at Fehmarn* (Figure 3).¹⁴¹ The museum was initially contacted in 2004 by David Rowland, attorney for the Fischer heirs, after they had taken stock of the list of the works of the family collection. Based on research and eleven years of lengthy investigation, it was determined that the work belonged to the 'abandoned' Fischer collection, which meant that any transaction involving the work took place without his knowledge or benefit.¹⁴² The return of the work by the museum was publicized to present MoMA as professional and cooperative, exemplifying best

¹³⁹ "Provenance Research Project."

¹⁴⁰ Vincent, "New York Museums Have Not Returned Nazi-Seized Art."

¹⁴¹ "The Museum of Modern Art Restitutes Ernst Ludwig Kirchner's Sand Hills in Engadine to the Heirs of Max Fischer" (The Museum of Modern Art, New York, November 16, 2015), http://press.moma.org/wp-content/files_mf/moma_kirchner_pressrelease.pdf.

¹⁴² Charlotte Burns, "MoMA Returns Expressionist Landscape after Decade-Long Detective Case," *The Art Newspaper* (November 16, 2015). <http://theartnewspaper.com/news/museums/moma-returns-expressionist-landscape-after-decade-long-detective-case/>. Accessed 15, 2017.

practices in the handling of Nazi-era art claims.¹⁴³ The museum's director Glenn Lowry called it a "successful example of how all parties working together brought us to the right point" and that understanding that a work of art in the collection actually belonged to the heirs of Max Fischer, "there's no sense of loss...it feels like we're doing the right thing".¹⁴⁴ Contrastingly, in many other instances, MoMA has fended off claims by taking up the trend amongst private collectors of using lawsuits to "quiet" and complicate title claims, thus using the ill-equipped courts to mediate issues involving restitution despite the cooperative spirit advocated by the AAM/AAMD guidelines and the Washington Conference.¹⁴⁵ Reports following up on the progress of restitution-conscious initiatives reveal that museums, among them MoMA, appear to continually breach the principles agreed upon by the international community by improperly defending against claims, and have been slow to implement an effective mechanism to deal with claims.¹⁴⁶ Technically, if the museum feels a claim is truly contentious, there is no legal or ethical bar to them initiating litigation or using the courts to quiet title to works, or for them to take all reasonable steps to litigate at minimal expense to avoid depleting 'trust assets' unnecessarily.¹⁴⁷ However, Gideon Taylor, chair of operations at the World Jewish Restitution Organization has criticized litigation tactics used by museums as overly aggressive, reminding us that "museums are central to a civilized society...[and] the American museum community, while understandably an advocate for artwork to remain in public hands, must follow through on its prior commitments not to taint collections with art stolen during the Holocaust". They should, he argues, follow through on agreed guidelines

¹⁴³ "New York Museum Returns Painting Stolen by Nazis after Decade-Long Battle," *The Telegraph*, (November 17, 2015). <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/12001388/New-York-museum-returns-painting-stolen-by-Nazis-after-decade-long-battle.html>. Accessed 15, 2017.

¹⁴⁴ Ibid.

¹⁴⁵ *Grosz v. Museum of Modern Art*, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010); *Malevich v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005); *Museum of Modern Art and Solomon R. Guggenheim Foundation v. Schoeps* 549 F. Supp. 2d 543 (2008); *U.S. v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); *Restitution of Ernst Ludwig Kirchner's Sand Hills in Engadine* (2015).

¹⁴⁶ Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization, "Holocaust-Era Looted Art: A World-Wide Preliminary Overview." See also: World Jewish Restitution Organization's Report Concerning Approaches of the United States Museums to Holocaust-Era Art Claims, <http://art-69bd.kxcdn.com/wp-content/uploads/2015/06/WJRO-Report-Concerning-Approaches-of-United-States-Museums-to-Holocaust-Era-Art-Claims.pdf>.

¹⁴⁷ Simon Frankel and Ethan Forrest, "Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense," *Journal Of Art, Technology & Intellectual Property Law* 23, no. 2 (2013): 280.

as confirmed by AAM leadership in congressional testimony for how AAM and AAMD member-institutions should handle Nazi-era claims.¹⁴⁸

One of the most well-known restitution cases involving MoMA concerned Egon Schiele's *Portrait of Wally* ("Wally") loaned to MoMA in 1997 by the Leopold Museum in Vienna (Figure 4). The painting originally belonged to Lea Bondi, an Austrian Jew and owner of an art gallery in Vienna. The portrait personally belonged to Mrs. Bondi and was included in the objects confiscated from her gallery during the annexation of Austria to Germany (*Anschluss*) in 1938. After the war, the "Wally" was mistakenly returned to the wrong family and Mrs. Bondi enlisted the help of Dr. Leopold, a noted collector, in tracking down her painting. The heirs' claim alleges that, using subterfuge, Leopold acquired "Wally" for himself and sold his collection including the portrait, to the newly established Leopold Museum (effectively himself) in 1994, doctoring its provenance.¹⁴⁹ MoMA exhibited 'Wally' from October 8, 1997 to January 4, 1998. Three days after the end of the New York exhibition, the New York District Attorney's office issued a subpoena to effectively quarantine the painting that was subsequently quashed on September 21, 1999 by the New York Court of Appeals.¹⁵⁰ The very next day, the painting was seized by the government of the United States under orders from New York County District Attorney Robert M. Morgenthau, alleging that the Leopold Museum imported and intended to export "Wally" knowing it was stolen.¹⁵¹ These actions appeared congruent with the American government's stance towards correcting the injustices perpetrated by Nazi Germany; at the time, the United States led the way in urging other governments to help identify and return art looted by Nazis and return them to their rightful owners.

¹⁴⁸ "U.S. Museums Fail to Address Nazi-Era Stolen Art Claims," *Claims Conference/WRJO - Looted Art and Cultural Property Initiative*, accessed June 2, 2017, <http://art.claimscon.org/our-work/advocacy/u-s-museums-fail-to-address-nazi-era-stolen-art-claims/>.

¹⁴⁹ *U.S. v. Portrait of Wally*, a painting by Egon Schiele, Defendant in Rem, Opinion and Order, 663 F.2d 232 (S.D.N.Y. 2009).

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, 663:27–28. Section 12.03 of New York's Arts and Cultural Affairs Law. Anti-seizure statutes are legal instruments that facilitate the lending of artworks for temporary exhibition by guaranteeing that they cannot be seized by the courts of the borrowing State. The purpose of such statutes is to overcome the reluctance of museums and similar institutions to loan their artworks to foreign jurisdiction where they might be subject to some form of judicial seizure.

When the *Portrait of Wally* was seized by the United States government on September 22, 1998, it launched a criminal investigation that lasted thirteen years.¹⁵² Despite allegations that the painting was stolen, MoMA's director Glenn Lowry defended the partnership with the Leopold Museum on the premise that "Schiele is an extremely important artist, and Leopold has the finest group of Schieles anywhere...".¹⁵³ He also tried to downplay the controversy by comparing the Wally case to any other case that might come under public scrutiny, claiming that investigations always reveal a great deal of information necessarily including "some problematic, some not".¹⁵⁴ As surprising as this somewhat casual attitude was the silence and therefore implicit support from Ronald Lauder, chairman at MoMA but more notably founder of the Commission for Art Recovery.¹⁵⁵ MoMA was against holding the painting in New York primarily out of fear that collectors would stop lending out their works because art might become subject to detention.¹⁵⁶

The museum's stated motivation for contesting the case was the repercussions it would enact internationally. In New York State, there is currently immunity for works on loan from abroad, although, it does not protect them from federal seizures.¹⁵⁷ When the museum originally won its motion to quash the subpoena that halted the shipment from being returned to Austria, Lowry described it as a victory because "there was a serious potential that works of art would cease to come to New York... but this ruling sends a very strong signal to our friends around the

¹⁵² *Ibid.*, 663:38–39. It was seized under the National Stolen Property Act that consists of 3 elements: (1) the transportation interstate or foreign commerce of property, (2) valued at \$5,000 or more, (3) with knowledge that the property was stolen, converted or taken by fraud.

¹⁵³ Judith Dobrzynski, "The Zealous Collector - A Special Report: A Singular Passion For Amassing Art, One Way or Another," *The New York Times*, December 24, 1997, <http://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html>. Accessed August 1, 2017.

¹⁵⁴ *Ibid.*

¹⁵⁵ "About - Commission for Art Recovery," accessed June 3, 2017, <http://www.commartrecovery.org/about>. It was established in 1997 to continue the efforts of restituting art that was seized, confiscated or wrongfully taken by the Third Reich. The Commission deals with governments, museums and other institutions internationally. They encourage museums and governments to research, identify and publicize works in their possession that may have been stolen during the years of the Third Reich. They are not a claims organization but use moral suasion to help orchestrate claims.

¹⁵⁶ Paul Hirschhorn, "Museum Wins Dispute over Art Allegedly Stolen by Nazis," *CNN*, September 21, 1999, <http://www.cnn.com/US/9909/21/looted.art/>. Accessed August 15, 2017.

¹⁵⁷ Howard Spiegler, "Portrait of Wally: The U.S. Government's Role in Recovering Holocaust Looted Art," in *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, ed. Michael Bazylar and Roger Alford (New York: New York University Press, 2006), 285.

world that their anxieties about lending to museums in New York State can now be diminished.”¹⁵⁸ The museum further maintained the victory extended to all of the people and museums of New York state, as it meant that New York would “continue to be the cultural center of the world.”¹⁵⁹ Clearly, these concerns, grounded in inflated rhetoric, were seen as more pressing than confronting the issue of legitimate ownership.

Howard Spiegler, co-chair of New York’s Herrick, Feinstein’s Art Law Group, who litigated the Wally case for the Bondi heirs, alleges that MoMA could (and should) have applied to the United States State Department for full immunity prior to having “Wally” shipped over if they truly believed that the painting was untainted. This process involves the applicant certifying that it has “undertaken professional inquiry, including independent, multi-source research into the provenance of the objects being loaned” as well as “certifying that it does not know, or have reason to know, of any circumstances with respect to any of the objects that would indicate the potential for competing claims of ownership.”¹⁶⁰ If the State Department determines that a loan is “culturally significant and... in the national interest”, it grants the work automatic immunity from seizure at both the state and federal level.¹⁶¹ This federal procedure is a process that balances the interest of cultural exchange while also supporting the mission to ensure that Nazi-looted property is properly identified so that it might be returned.¹⁶² Spiegler’s article on the Schiele case argues that given the availability of this option, failure to apply for immunity is either a result of ignorance of the procedure, or indicates that a serious question about the provenance had arisen already, making lenders/borrowers unwilling to submit it to scrutiny.¹⁶³ No such application, obviously, was made to the State Department by MoMA for the Leopold loans.¹⁶⁴ In a memorandum to the court, MoMA claimed that “it did not apply for federal protection because it believed state law offered broader protection”.¹⁶⁵ However, by choosing to bypass government vetting that would have ensured the

¹⁵⁸ Judith Dobrzynski, “Judge Rejects Seizure of 2 Schieles,” *The New York Times*, May 14, 1998, <http://www.nytimes.com/1998/05/14/arts/judge-rejects-seizure-of-2-schieles.html>. Accessed August 15, 2017.

¹⁵⁹ Hirschhorn, “Museum Wins Dispute over Art Allegedly Stolen by Nazis.”

¹⁶⁰ Spiegler, “Portrait of Wally: The U.S. Government’s Role in Recovering Holocaust Looted Art,” 285–286.

¹⁶¹ *Ibid.*, 285.

¹⁶² *Ibid.*, 296.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ Dobrzynski, “Judge Rejects Seizure of 2 Schieles.”

loan's immunity from seizure, one might very well conclude that the museum knew to begin with that the loan was problematic.¹⁶⁶

The Schiele case demonstrated how important lending and borrowing works from abroad was considered to be by American museums, and how insistently they were willing to guard the tradition even in the face of the tragedies of the Holocaust. It has not been surprising then, that museums faced with approaches about their own holdings by potential heirs will most often utilize affirmative legal defenses to block ownership claims. The successful employment of these defenses, while illustrating museal ardor about ownership, also demonstrates how the passage of time increasingly works against claimants seeking restitution. In restitution cases, two of the most commonly used defenses are statutes of limitations and laches. Statute of limitations set a maximum time after an event for invoking certain kinds of legal action. New York State law stipulates three years and this limit varies for other states with some, though by no means all jurisdictions also allowing for the suspension of limitations under certain circumstances.¹⁶⁷ The laches defense is one of undue delay and prejudice, with two requirements: that the plaintiff

¹⁶⁶ Ulrike Knöfel and Marion Kraske, "Stealing Beauty: Dispute Rages Over Austria's Looted Art," *Spiegel Online*, April 4, 2008, <http://www.spiegel.de/international/europe/stealing-beauty-dispute-rages-over-austria-s-looted-art-a-545392.html>. Accessed August 15, 2017. Collector Rudolf Leopold is no stranger to controversy: described as a zealous collector who has often overlooked problematic acquisitions. Since the founding of the Leopold Museum in 1994 and the Schiele controversy, paintings in the museum's collection with dark histories and problematic provenances have been subject to increased scrutiny, including: Albin Egger-Lienz's *Forest Scene* and *Mountain Mowers*; Egon Schiele's *Portrait of Wally*, *Houses by the Seaside*, *Woman in Underwear*; Anton Romako's *Nike and Wreath*, *The Spring*, *Nude of a Young Girl*. Although the Leopold Museum is partially publicly funded, it is considered a private institution, a status that has shielded it against claims for restitution until recently. See also: Judith Dobrzynski, "THE ZEALOUS COLLECTOR -- A special report.; A Singular Passion For Amassing Art, One Way or Another," *The New York Times* (December 24, 1997). <http://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html> (accessed August 15, 2017). Sources revealed to Dobrzynski prior to her article that Dr. Leopold is known to be a "too passionate" collector, "someone who badgered and manipulated owners until they sold him their treasures, often at a very low price". See: "Rudolf Leopold Obituary," *The Telegraph* (June 30, 2010). <http://www.telegraph.co.uk/news/obituaries/culture-obituaries/art-obituaries/7864320/Rudolf-Leopold.html> (accessed August 15, 2017). According to this article, Leopold was also previously sued by Schiele's sister, Melanie Schuster, was allegedly one of several people who "felt they had been somehow tricked by Leopold. She claimed that he had persuaded her to swap watercolours for less valuable oils and conned her into signing a receipt by presenting it as a loan document. She sued, successfully, and Leopold was forced to return 60 works."

¹⁶⁷ Katharine Skinner, "Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums," *Vanderbilt Journal of Entertainment & Technology Law* 15, no. 3 (2013): 686. See: *Von Saher v. Norton Simon Museum of Art* 592 F.3d 954, 958 (9th Cir. 2010).

unreasonably delayed in filing suit and that the defendant suffered harm as a result of that delay.¹⁶⁸ These are some of the most common defenses in American restitution cases involving individual collectors, who were never “touched”, unless through personal ethical choice, by the Washington Principles. As we will see in their application to specific situations concerning MoMA’s collection, allowing the employment of these defenses ensures that each case is stacked against claimants from the start as most statute of limitations will have already run from the date of original theft.¹⁶⁹ When the restitution case depends on museums to determine what means will be used to adjudicate a fair solution, these legal devices can be, and very often are powerful inducements for overlooking the spirit of 1998.

In the case known as *MoMA & Guggenheim v. Schoeps* (2008), the museums involved issued confident public statements that they held rightful title to the art in question, denying the claim made by the heir of Paul von Mendelssohn-Bartholdy that the works were looted and proper title had therefore never been transferred. Indeed in 2007, MoMA teamed up with the Solomon R. Guggenheim Foundation to bring a suit against Julius H. Schoeps, heir of Paul von Mendelssohn-Bartholdy to settle title to two Pablo Picasso paintings, *Le meneur de cheval nu* (1905-1906) (Figure 5) held by MoMA and *Le Moulin de la Galette* (1900) (Figure 6) held by the Guggenheim Foundation.¹⁷⁰ The two sides disagreed about whether the sales of the paintings were made under duress.¹⁷¹ In a public statement, the museums promoted their efforts in cooperation while rebuking the claim altogether: “Mr. Schoeps’ lawyers were duly given access to the provenance files. Despite the museums’ requests for provenance information, Mr. Schoeps provided only repetitive general statements without a basis in fact.”¹⁷² According to both museums, the original owner Mendelssohn-Bartholdy, gifted the paintings to his second wife Elsa – who was not Jewish – in 1927. After 1935, the paintings were relinquished to Jewish art dealer Justin K. Thannhauser and subsequently, *Boy Leading a Horse* was sold to William S. Paley, former President and Chairman

¹⁶⁸ Alexandra Minovich, “The Successful Use of Laches in World War II-Era Art Theft Disputes: It’s Only a Matter of Time,” *Columbia Journal of Law & Arts* 349, no. 27 (2004): 349.

¹⁶⁹ “Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims.”

¹⁷⁰ *Museum of Modern Art and Solomon R. Guggenheim Foundation v. Schoeps*, 549 F.2d 543 (S.D.N.Y. 2008).

¹⁷¹ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) at 4.

¹⁷² “Statement from the Museum of Modern Art and the Solomon R. Guggenheim Foundation Regarding Claims on Two Picasso Paintings in Their Collections” (The Museum of Modern Art & The Guggenheim Foundation, December 7, 2007), http://press.moma.org/wp-content/press-archives/news/Schoeps_FinalLetter.pdf.

of The Museum of Modern Art in 1936 and officially donated to MoMA in 1964.¹⁷³ Lowry, on behalf of both museums confirmed that their extensive research made clear the museums' ownership of the works and that Schoeps had no basis for his claim, publicly declaring: "the provenance chain is complete... we have done an enormous amount of research which confirmed what we already knew. There is absolutely no evidence that these paintings were sold under duress."¹⁷⁴ Both museums subsequently moved to bar the claim with the doctrine of laches. The documentary evidence attached to Schoeps' counterclaim meanwhile alleged that the original owner had never actually made a gift of the Picassos in 1927 and that the provenance of the Picassos was highly suspect.¹⁷⁵ The plaintiffs additionally claimed the museums should not be permitted to raise a proper laches defense because the heirs had not previously been aware that the paintings were lost as a result of Nazi persecution until they began to conduct an investigation, after which they diligently asserted their claim.¹⁷⁶

Although both museums filed suit against the heir over rightful ownership, the case settled out of court the morning of the trial, and resulted in the museums keeping the artworks while the claimant received compensation.¹⁷⁷ In a memorandum order issued after settlement, the presiding judge found the confidentiality provision in the settlement agreement to be "against the public interest and a troubling reversal of the parties' previously stated positions on this issue. From the outset, the parties on both sides portrayed the lawsuit as of considerable public interest because of

¹⁷³ Ibid.

¹⁷⁴ Carol Vogel, "Two Museums Go to Court Over the Right to Picassos," *The New York Times*, December 8, 2007, <http://www.nytimes.com/2007/12/08/arts/design/08muse.html>. Accessed August 15, 2017.

¹⁷⁵ *Museum of Modern Art and Solomon R. Guggenheim Foundation v. Schoeps*, 549 F.2d. The provenance record indicates that from Paul von Mendelssohn-Bartholdy's possession, the painting of *Boy Leading a Horse* somehow ended up with Justin Thannhauser but no gift had been made. The Art Loss Registry (ALR) also said that the Thannhauser name does not "mean good things" and although the specific painting was not registered as stolen or missing with the ALR does not mean it is not, ALR lists are not exhaustive and not all thefts are necessarily reported to the ALR. ALR is the "world's largest private database of lost and stolen art, antiques and collectables. Its range of services includes item registration, search and recovery services to collectors, the art trade, insurers and worldwide law enforcement agencies". It was originally called the International Foundation for Art Research (IFAR) based in New York and established in 1976. ALR was established in London in 1990 by major private business from the insurance industry and the art market. For more on ALR:

<http://www.artloss.com/about-us>

¹⁷⁶ Ibid., 549:28.

¹⁷⁷ Emily Graefe, "The Conflicting Obligations of Museums Possessing Nazi-Looted Art," *Boston College Law Review* 51, no. 2 (March 2010): 349.

the importance of establishing the truth concerning the sensitive issues involved...”¹⁷⁸ If the museums were diligent in their research and confident in their right to each work, and since they repeatedly asserted that “the plaintiffs’ claims were without merit, that their ownership of these paintings was good and solid, and that they were in effect being extorted...”¹⁷⁹ the court found it troubling that the museums reversed their position to pay a financial sum to a party that they had adamantly insisted had no claim at all.

In *Grosz v. Museum of Modern Art* (2010), three works by George Grosz - *The Poet Hermann-Neisse with Cognac* (1927) (Figure 7), *Self-Portrait with Model* (1928) (Figure 8), and *Republican Automaton* (1920) (Figure 9), were claimed as stolen or looted. The plaintiffs sought clear title to the works and their return. Although Grosz was a German artist, his works were anti-totalitarian, exemplifying the type of ‘degenerate’ art that Hitler hated, and he had to flee Nazi Germany. The paintings had been left in the possession of Jewish art dealer, Alfred Flechtheim, who was even more reviled than the artist and whose gallery was liquidated by the Nazis after Grosz left in 1933. Everything left behind by Grosz was confiscated by formal decree.¹⁸⁰ Although the case sought a declaration of title based on the fact that the paintings were illegally sold as a result of Nazi persecution, MoMA’s defense diverted focus to when the statutes of limitations began to run.¹⁸¹ While some lawyers argue that laws regarding time limits account for the difficulty of reconstructing an accurate historical record after so long, others believe that “the statute of limitations was never intended to cover something like wartime mass pillaging of property”,¹⁸² and that given the American commitment to restitution, both the courts and museums should accept that reality. This case represents another demonstration that museums recognize the strength of technical defenses and over time, as witnesses and documents disappear, it will become increasingly easier to prove that plaintiffs delayed in bringing suit despite the merit of their claims.

¹⁷⁸ *Schoeps v. The Museum of Modern Art and the Solomon R. Guggenheim Foundation, Memorandum Order*, accessed July 25, 2017.

¹⁷⁹ *Schoeps v. Museum of Modern Art et al* (S.D.N.Y. February 2, 2009).

¹⁸⁰ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) at 1.

¹⁸¹ *Ibid.*, 13.

¹⁸² Patricia Cohen, “Suit Against MoMA Highlights Time-Limit Rule in Nazi Looting Claims,” *The New York Times*, August 23, 2011, <http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html>. Accessed August 15, 2017.

In *Grosz v. MoMA*, the court ultimately ruled that the plaintiff's claims to all three paintings were time barred under a "demand and refusal" rule.¹⁸³ The statute of limitations normally begins against a bad faith purchaser on the date of theft or bad faith acquisition – even if the true owner is unaware.¹⁸⁴ However the "demand and refusal" rule has been followed in New York since 1966,¹⁸⁵ ruling that "an innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return".¹⁸⁶ The contention was whether MoMA refused to return the paintings to the claimants in satisfaction of the "demand and refusal" rule. Both sides agreed that MoMA refused to return the works, but disagreed regarding the time of the first refusal. The ruling rested on the interpretation of letters exchanged between both sides: the claimants said that MoMA did not refuse until April 12, 2006.¹⁸⁷ In Lowry's first letter to them on July 20, 2005, which MoMA decided constituted their initial refusal, he stated that he alone did not have the authority to speak for MoMA without a decision from a majority of the board of trustees and would need to consult with the board before providing the heirs with a proper answer.¹⁸⁸ The heirs, following this, believed that they had to wait for a final decision and thus, official refusal from MoMA.¹⁸⁹ The court ultimately found that constructive refusal took place in 2005 and therefore the suit which was filed April 9, 2009, missed the three-year deadline by eight months. In a public statement, the museum said that it had "worked closely with the [Grosz] estate for nearly 6 years on the provenance of works..." and that "... it is confident that its efforts in responding to each such claim far surpass even the highest ethical and legal obligations demanded by such extraordinary circumstances"¹⁹⁰ because they had determined there was no "... definitive conclusion that challenges the Museum's ownership of the picture" and that all evidence pointed to MoMA's clear title.¹⁹¹ The Grosz heirs have said they have given up their fight, claiming they "have no desire to reopen it... MoMA has very deep pockets and is a very powerful institution".¹⁹² Further discouraging them, was the fact that MoMA had hired former United States Attorney

¹⁸³ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) at 25.

¹⁸⁴ *Ibid.*, 13.

¹⁸⁵ *Menzel v. List*, 49 Nisc.2d (N.Y.Sup.Ct. 1966).

¹⁸⁶ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) at 13.

¹⁸⁷ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

¹⁸⁸ *Ibid.*, 13.

¹⁸⁹ *Schoeps v. Museum of Modern Art et al*, 07 Civ. 11074 (JSR). See: Appendix C.

¹⁹⁰ William Cohan, "MoMA's Problematic Provenances," *ARTnews*, December 2011, 77.

¹⁹¹ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

¹⁹² Vincent, "New York Museums Have Not Returned Nazi-Seized Art."

General Nicholas Katzenbach, a powerful figure in the legal community, to conduct the review of claims by the Grosz heirs.¹⁹³ All of these details illustrate how difficult it has become for claimants to come forward, let alone sustain lengthy proceedings. Claims are often barred by technical defenses and the nature of a claim that demands convincing details of theft from the very beginning may involve details out of their reach.¹⁹⁴ As so many of these cases can be dismissed as time-barred, claimants are robbed of the ability to obtain further evidence, such as primary documents, that could be concealed by the defense through pre-trial discovery, a process that sometimes represents the only opportunity to gather the kind of evidence required.

MoMA is but one museum stubbornly protecting its assets from ownership claims using defenses like statute of limitations and laches, even though their professional codes of conducts encourage them to work with heirs over claims to find mutually agreeable solutions. This trend is apparent in, for example, cases involving the Detroit Institute of Arts and the Museum of Fine Arts in Boston, although these tend to get somewhat less attention in the general press than MoMA's cases.

In *Detroit Institute of Arts v. Ullin* (2007), the museum asserted that Michigan's three-year statute of limitations prevented the court from deciding the merits of the case.¹⁹⁵ According to the museum, the claim was time-barred because according to Michigan law, it began accruing in 1938,¹⁹⁶ when Martha Nathan originally sold Van Gogh's *Les Bêcheurs* (1889) (Figure 10) to a group of prominent dealers – Justin Thannhauser, Alexander Ball, George Wildenstein – to afford leaving Germany. The court agreed with the museum that the claim had been filed too late, meaning that Ms. Nathan would have had to bring a claim against the museum no later than 1941, when World War II was still devastating Europe and when Ms. Nathan could not have tracked her

¹⁹³ “MoMA Hires Katzenbach to Assess Restitution Claim,” *ARTnews*, January 31, 2006, <http://www.artnews.com/2006/01/31/moma-hires-katzenbach-to-assess-restitution-claim/>. Accessed August 15, 2017. Nicholas Katzenbach served as attorney general and undersecretary of state under President Lyndon B. Johnson and was hired to review the available documentation and to undertake any additional research he deemed appropriate, including meeting with Jentsch and the Grosz heirs. He is known as an extremely influential lawyer – according to the *New York Times*: He helped shape the political history of the 1960s, facing down segregationists, riding herd on historic civil rights legislation and helping to map Vietnam War strategy as a central player in both the Kennedy and Johnson administrations, (see: <http://www.nytimes.com/2012/05/10/us/nicholas-katzenbach-1960s-political-shaper-dies-at-90.html>)

¹⁹⁴ Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 478.

¹⁹⁵ *Detroit Institute of Arts v. Ullin*, No. 06-10333, 2007 (E.D. Mich. March 31, 2007).

¹⁹⁶ *Ibid.*, 6.

painting to the Detroit Institute.¹⁹⁷ The Nathan heirs also made a claim to the Toledo Museum of Art in 2006 concerning Gauguin's *Street Scene in Tahiti* (1891) (Figure 11), which has been sold to the same dealers, and although the two cases were decided by different judges in different states under the differing laws of those states, the Detroit Institute decision employed largely the same reasoning as the Toledo Museum decision to reach the same result. In both cases, the court ruled that simply by adopting the 1999 AAM "Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era" ("Guidelines") – did not mean that the museums waived their right to assert a statute of limitations defense.¹⁹⁸ The court noted that the "Guidelines" on their face do not require museums to waive any defenses they have, only that they may elect to waive certain available defenses.¹⁹⁹ It should be noted that Graham W.J. Beal, Director of the Detroit Institute of Arts, has stated:

I personally regret that our defense included statute of limitations but, given the DIA's relationship to the city of Detroit—at that time the legal owners of the art collection—the museum could not leave itself open to a charge of neglect in defending city property. We may agree to disagree on aspects of this case, but no action taken by the DIA in relation to Holocaust-related claims can fairly be called hostile or aggressive.²⁰⁰

In *Museum of Fine Arts, Boston v. Seger-Thomschitz* (2010), the Boston Museum of Fine Arts likewise avoided an adjudication of a restitution claim on facts and merits by asserting a statute of limitations defense over the ownership of the painting *Two Nudes (Lovers)* by Austrian painter Oskar Kokoschka, originally owned by Oskar Reichel (Figure 12).²⁰¹ Claudia Seger-Thomschitz, Reichel's only heir, argued unsuccessfully that the court should set aside the limitations period on equitable grounds. To hold otherwise, she stated, would amount to "aiding, abetting, encouraging and facilitating the illegal and criminal intentional trafficking in stolen art," particularly since the Austrian records containing Dr. Reichel's Property Declaration were only first made public in 1993, after the family had stopped searching for assets.²⁰² In this case, whereas

¹⁹⁷ Ibid., 6–7.

¹⁹⁸ Ibid., 7. See: Appendix E.

¹⁹⁹ Ibid.

²⁰⁰ Alanna Martinez, "Museums Respond to Biting Report on Nazi-Looted Art," *The Observer*, February 7, 2015, <http://observer.com/2015/07/museums-respond-to-biting-report-on-nazi-looted-art/>. Accessed August 15, 2017.

²⁰¹ *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d (D. Mass. 2010).

²⁰² Kreder, "Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation," 296.

the Austrian government had determined that the path of sale occurred due to persecution, the American federal court in Boston effectively allowed the use of technical defenses and elevated the public's benefit of the paintings over the need to correct the record on transactions that financed genocide.²⁰³

In the cases mentioned above and those involving MoMA in more depth, it can be said that although it might be ethical for museums to pursue litigation when an heir brings a self-evident bogus claim of ownership,²⁰⁴ it can also be argued that is unethical to use the same actions when the ownership claim may be valid or if further research is needed to establish the facts of the historical situation.²⁰⁵ As museums hold a position of discretion, it is reasonable to expect that they use and follow their professional ethical guidelines to resolve issues of Nazi-looted artwork equitably with claimants. Ethical responsibilities cannot be divorced from fiduciary responsibilities and American museums have already promised to set themselves against illicit trade but also against perpetuating the trauma of World War II through denying rightful heirs the ability to reclaim their possessions. Justifying the failure to do so on the grounds that ethical conduct will deprive the American public of access to valuable art and objects may only generate more mistrust of their conduct. Recent developments in international law have called for a more active role on the part of acquirers of cultural items – whether fine art or archaeological artefact – to ensure untainted provenance. As we have seen, these policies have been reflected in the professional codes of United States museum associations, to which institutions and their professionals are supposedly accountable.²⁰⁶ The public thus should expect to see more museums set the example for governments, private collectors and dealers, by expressing leadership through consistent ethical behaviour and over-compliance to these standards, rather than through some would argue are but very occasional acts of good will.

Section 3: Duty and Responsibility – Museums as Stewards of Culture and the Public Trust

As some have poignantly remarked, “as the generation of Holocaust survivors slips away, it is urgent that the task of provenance research of items of artwork in American museums rapidly

²⁰³ Ibid.

²⁰⁴ Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 513.

²⁰⁵ Ibid., 347.

²⁰⁶ Boyd, “Museums as Centers of Controversy,” 192–193.

be complete.”²⁰⁷ Although museums are expected to seek “fair and just solutions” to Nazi-era claims, they are not bound, as has been previously established, by the conventions outlined at the Washington Conference. Their accountability hinges deeply on independent moral codes that may vary from one case to another, and from one museum to another. Bernd Neumann, Germany’s long-term Federal Commissioner for Culture has been empathetic to the plight of museums facing restitution claims, declaring:

it is understandable that [museum directors] would like to keep their collections as complete as possible. They’ve restored their pieces and cared for them over decades. They want to have something to offer the public, but their behavior stands in contradiction to the moral responsibility we have, which is without doubt more important.²⁰⁸

Making culture accessible for research, study and public enjoyment, promoting the ideal of discovering and understanding the whole of human knowledge has always been important to the museal legacy. However, presumably behind Neumann’s empathy is the notion that underlying these core ideals exists the expectation that museums build their collections responsibly and that their directors consider the moral responsibility and values at stake in cases where ownership is disputed.

In the present, since museums are increasingly expected to embody, not merely reflect, societal values and concerns, it thus becomes crucial to discuss whether museums are behaving in ways consistent with the responsibility and trust invested in them by society, particularly, although certainly not exclusively, as it concerns their behavior and the acquisition of works for their collections. At the heart of cultural exchange between museums in the United States and abroad is the lending and borrowing of artworks and cultural relics, a practice is so universally valued in the United States, that in New York State there is even a law called the New York Arts and Cultural Affairs Law (ACAL) in existence since 1968 that shields lent artworks from being seized by anyone with a claim to legal ownership while the art is on display in American museums.²⁰⁹ In

²⁰⁷ “Nazi-Era Stolen Art and U.S. Museums: A Survey.”

²⁰⁸ Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 475. Taken from an interview Spiegel conducted with Bernd Neumann on December 3, 2008. See: “There’s No Point in Trying to Duck,” *Spiegel Online*, December 3, 2008, <http://www.spiegel.de/international/germany/searching-for-nazi-looted-art-there-s-no-point-in-trying-to-duck-a-594232.html>

²⁰⁹ Doreen Carvajal, “Dispute Over Bill to Protect Art Lent to Museums,” *The New York Times*, May 21, 2012, <http://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to->

recent years, the American museum community has come to fear that this safeguard has eroded, that foreign museums, dreading entanglement in costly ownership battles, are more hesitant to make loans. This has served to heighten anxieties about ownership in general, and together this has sometimes led to a denial on the part of the museum, of the human stories and suffering behind the objects, creating for some a sense of continued violation. In the case of MoMA, we have seen that objects acquired through the marketplace have direct repercussions on a museum's obligations especially in the case of Nazi-era looted artworks. It has been suggested that for museums to be considered acting in benefit of the public, the institutions and their directors need to look beyond the mere application of legal defenses and consider the moral responsibility and values at stake in these cases. This section, with reference both to MoMA and other American institutions, will explore the argument that placing the need to keep a museum's collections intact above all other considerations is not a defense of integrity but its betrayal and argues that a behavior that justifying itself using retentionist beliefs represents a type of unethical leadership.

In 2002, the “Declaration of the Importance and Value of Universal Museums” (hereafter the “Declaration”) was signed by leading museum directors of vastly different museum collections in Europe and North America, among which were: the State Museums of Berlin, the Louvre, Art Institute of Chicago, J. Paul Getty Museum, Solomon R. Guggenheim Museum, the Metropolitan Museum of Art, Prado Museum, the British Museum and the Museum of Modern Art.²¹⁰ The “Declaration” argued that “over time, objects so acquired – whether by purchase, gift or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them” and that “we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source.”²¹¹ When the “Declaration” was issued, the most high profile repatriation issue facing the museum art world was the Greek government's request to the British Museum to return the

museums.html. Referring to New York Consolidated Laws, Arts and Cultural Affairs Law - ACA § 12.03. Exemption from seizure - See more at: <http://codes.findlaw.com/ny/arts-and-cultural-affairs-law/aca-sect-12-03.html#sthash.Ea2kQ9FL.dpuf>. The ACAL does not grant possession of a work of art to either current possessors or claimants and does not prevent claimants from coming forth, it simply prevents seizure while works are temporarily loaned to a New York museum.

²¹⁰ “The Declaration on the Importance and Value of the Universal Museum. (DIVUM)” (British Museum, London, 2002). See Appendix B.

²¹¹ Ibid.

Parthenon marbles.²¹² In a statement supporting the “Declaration”, Nail MacGregor, director of the British Museum, emphasized the important context offered by the museum and warned against diminishing the collections of the world’s leading museums and galleries because it would represent “a great loss to the world’s cultural heritage.”²¹³ The document defended the vital roles museums play, describing them as:

agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.²¹⁴

It also emphasized the potential loss for the public resulting from removing objects from collections and underscored the need to address restitution claims on a case by case basis.²¹⁵ The “Declaration” addressed different categories of restitution: historical art works purchased legally; war booty seized on behalf of the state as reparations, cultural possessions acquired as a consequence of persecution (like Nazi-loot); and stolen goods from illegal excavations and plundering.²¹⁶ In many ways, the document, although specifically referencing Greek sculpture, was perceived as a fearful reaction by many directors that restitution and repatriation would diminish the scope of collections and leave them with empty museums.

The “Declaration” captured the persistent retentionist quality of some contemporary museological thinking. Its defense against restitution was also seen by many as an attempt to distance museums from past injustices and their moral obligations by claiming their importance as Universal Museums, of value for all of humanity.²¹⁷ This has become another frequent approach by museums to discussions about repatriation and restitution, the defense of universalism being employed as a means to rationalize keeping museum’s collections intact. As soon as the Declaration was issued, George Abungu, heritage consultant and former Chairman of the International Council of Museums (ICOM) remarked:

²¹² Neil Curtis, “Universal Museums, Museum Objects and Repatriation: The Tangled Stories of Things,” *Museum Management and Curatorship* 21, no. 2 (2006): 119.

²¹³ Ibid.

²¹⁴ Peter-Klaus Schuster, “The Treasures of World Culture in the Public Museum,” *ICOM News* 57, no. 1 (2004): 4.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Curtis, “Universal Museums, Museum Objects and Repatriation: The Tangled Stories of Things,” 119.

It is a way of refusing to engage in dialogue around the issue of repatriation. If the signatories of the Declaration are trying to create the idea that their collections are held in trust for all of humanity, then why do they still call themselves by their original names? Why not “Universal Museum in Britain” rather than “British Museum”? I personally do not believe in mass repatriation, except for human remains and materials of great emotional and spiritual value to a group. I do believe, however, that there should always be dialogue between museums, and between museums and communities affected by issues of repatriation, in order to reach amicable solutions. Solutions may even include acceptance by the community concerned of the present ownership situation, and the museum may be provided with a permanent loan. However, to declare that museums are universal, solely in order to avoid such discussions, is the wrong way to go about such issues. This is why I do not support the Declaration nor the notion of Universal Museum.²¹⁸

A conspicuous feature of the “Declaration” was its claim that museums with diverse collections containing objects from around the world, could be ‘universal’ and offer a more insightful perspective on objects than would be possible if objects were only displayed with material from a museum’s specific locality. The somewhat “exclusive club” of influential museum directors, were criticized as being driven largely by the fear that materials held in their collections would continue to face claims for repatriation and using the Declaration as little more than a way to avoid addressing the issue of repatriation and restitution.²¹⁹ The idea of heritage in the document is emphasized as material objecthood, which understands works, artifacts, sculptures or art objects as “valuable objects that have been inherited from past generations.”²²⁰ Although many museums “resist considering their collections as commodities that can be bought and sold”, they also rely on property law rights when resisting claims to remove items from their collections particularly as we have seen in cases of acquisitions complicated by looting or theft.²²¹ Questionable acquisitions are avoided in the Declaration by simply mentioning the neutrality a museum provides when displacing objects from their original source.²²² Unfortunately, this approach of promoting a seemingly objective and neutral viewpoint is common to many museum practices, not just that of the Declaration’s signatories. It reflects the persistence of retentionist values employed in the philosophies and language used by modern museums inherited from 18th and 19th century

²¹⁸ George Abungu, “The Declaration: A Contested Issue,” *ICOM News* 57, no. 1 (2004): 5.

²¹⁹ *Ibid.*

²²⁰ Curtis, “Universal Museums, Museum Objects and Repatriation: The Tangled Stories of Things,” 120.

²²¹ *Ibid.*

²²² *Ibid.*

enlightenment origins, and as influenced by the notions of state (or corporate/“non-profit”) ownership and by the ideology of competitive individualism. Claiming that encyclopedic museums fulfill the ambitions of enlightenment foundations by encouraging people confront or discover the world’s diverse and interrelated cultures,²²³ or that museums should acquire antiquities even if they are unprovenanced in order to preserve culture and contribute to the important study of a common history is also to disregard the Western museal legacy of exploitative colonialism.²²⁴ The promulgation of a search for universal knowledge transcending national and cultural borders dismisses the circumstances under which objects were acquired as irrelevant and presumes a monopoly on knowledge and authority that is not open to trans-cultural accountability.²²⁵ By promoting the idea of a universal culture, museums show a continued reluctance, if not refusal, to engage actively in a dialogue about the issue of restitution and repatriation, let alone even more complex issues arising from the human histories in which objects are incubated.

Harold Skramstad, president of Detroit’s Henry Ford Museum and an active member of the AAM has addressed the shift in societal values that has led to what Neil Harris has termed the ‘de-privileging’ of institutions like the museum. In today’s society, what and how museums collect or exhibit undergo increasing scrutiny, Skramstad has remarked on the museum’s universalist claims of value and authority:

...which gave us such a strong, almost religious sense of calling, and which have done so much to improve the quality and professionalization of everything we do – now seems to be a barrier to preparing us to address legitimate expectations of a more pluralistic society. In retrospect, it appears clear that we have based much of our appeal upon our belief that the appropriating, holding and exhibiting of the material record of the human and natural world is an intrinsic social good, which is understood and valued by all, and not solely the particular groups that have both

²²³ James Cuno, *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton, NJ: Princeton University Press, 2012), 38.

²²⁴ Ibid. André Malraux’s concept of le musée imaginaire – a philosophical view of art and art history as arising out of dialogue between works of art. The dialogue happens only if works can be compared whether within a museum space or in the minds of individuals. Malraux’s imaginary museum may similarly be implicated in the history of exploitative colonialism despite its idealized and seemingly neutral presentation. Malraux was known for having been a French resistance hero and novelist, who also served as Minister of Cultural Affairs under Charles de Gaulle. In 1923, Malraux led a looting expedition under the guise of an archaeological expedition to Cambodia’s remote Banteay Srei temple in the Angkor area and seized a number of statue heads and bas-reliefs from the temple to be sold to the highest American bidder. See: Harris, Geoffrey T. *André Malraux: a reassessment*. Basingstoke, Hampshire: Macmillan, 1996.

²²⁵ Louise Tythacott and Kostas Aryanitis, *Museums and Restitution: New Practices, New Approaches* (Farnham, Surrey: Ashgate, 2014), 10.

governed and staffed our museums.... It is in our claim to the expectation of authority where much of the present controversy over the role of museums has been centered... properly managing and continuously renegotiating our authority will be a major and time-consuming responsibility of the future.²²⁶

Skramstad is not alone in his belief that museums are no longer perceived as infallible and thus can no longer presume the privilege of issuing pronouncements of expertise that automatically trump public concerns. In this era of public challenge, coming to consensus is difficult among both museum practitioners and the greater public, and museums should and can serve as a forum for these differing perspectives.²²⁷ When it comes to the controversial issues involving restitution, a strong case can be made that museums can no longer afford to divorce the ethics of acquisitions that happened in earlier centuries from the claims of dispossessed individuals today. Nor can they remain authoritative institutions predicated upon expertise and rights of ownership. If they intend to remain relevant, they must become socially and politically accountable. Public opinion is coming to regard a museum as bound to an ethical duty to investigate the history of an object prior to its acquisition, regardless if it was a good faith purchase or gift and museums are no longer able to persuasively argue that it is better to acquire an object with questionable provenance than to allow it to fall into a private collection.

Although many critics accuse American museums of being too adversarial when initiating litigation to defend stolen Nazi-era artworks,²²⁸ there are others who argue that those allegations discount – in light of their institutional obligations to protect their assets – the truly difficult choices museums must make when dealing with Nazi-era art claims.²²⁹ To return to the primary focus of this thesis – the comportment of MoMA – under New York State law, the Museum of Modern Art is a “private, non-profit institution” chartered by the State of New York Department of Education, “to foster public awareness of modern and contemporary art.”²³⁰ Under section §3.27 of the “Chartering and registration of museums” legislation, the museum is required to “organize its

²²⁶ “Museums for the New Millennium: A Symposium for the Museum Community,” Report of a Symposium Held 5-7 September 1996, Center for Museum Studies, Smithsonian Institution, in Association with the American Association of Museums” (Washington, DC: Center for Museum Studies, Smithsonian Institution): 38.

²²⁷ Boyd, “Museums as Centers of Controversy,” 187.

²²⁸ Murawska-Muthesius and Piotrowski, “Introduction,” 37.

²²⁹ Frankel and Forrest, “Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense,” 283.

²³⁰ “Chartering and Registration of Museums and Historical Societies with Collections,” New York State Education Law § 3.27.

governing authority, staff, financial resources, collections, public programs and other activities to effectively achieve its mission statement and fulfill its public trust obligations.”²³¹ The same law defines public trust as the “responsibility to carry out activities and hold assets in trust for the public benefit,” the most obvious example of assets being a museum’s collections of cultural objects.²³² Within this understanding, the public comprises the museum’s primary constituent and beneficiary. Unlike a private trust which responds to its duty to a particular person or family, “the trustees of an art museum, those entrusted to care for and maintain a particular community’s patrimony, do not owe a fiduciary duty to a particular person but to the public as a whole.”²³³ The same public thus accords them special elements of public support and benefit as non-profit corporations.²³⁴

A museum’s status as a non-profit corporation burdens it with the fiduciary obligations of both duty of loyalty and care to their trustees, or the public, obligations which obviously come into play when museums need to make decisions about acquisitions and deaccession of works.²³⁵ Duty of loyalty means that the museum owes loyalty to its beneficiary, in this case the public. The deaccessioning works of art is generally a good example of how museums can be put in a position to breach the duty of loyalty. By removing works from the museum’s collection and thus out of the public domain, deaccessioning may conflict with the museum’s duty of loyalty to the public especially if the public opposes it or are displeased with the deaccessioning in such a way that future bequests could be obstructed and bad press obtained.²³⁶ Duty of care means exercising care

²³¹ Ibid. Section 2, Governance, I.

²³² Ibid. Definitions, 18.

²³³ Allison Tait, “Publicity Rules for Public Trusts,” *Cardozo Arts and Entertainment Law Journal* 33, no. 2 (2015): 435.

²³⁴ Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 493.

²³⁵ Ibid.

²³⁶ Ibid., 497. For an early example of a controversial deaccession by the Metropolitan Museum in New York see: Josh Niland, “How the Met’s Sale of a Max Beckmann Painting Changed US Museums” *Hyperallergic*, <https://hyperallergic.com/359201/how-the-mets-sale-of-a-max-beckmann-painting-changed-us-museums/>. Accessed August 15, 2017. In 1971, Max Beckmann’s “Self-Portrait with Cigarette” (1947) was by the museum’s then head of the Department of 20th-Century Art, 36-year-old Belgian émigré Henry Geldzahler. At the time, deaccessioning was basically unregulated. Geldzahler’s scheme was to sell off large portions of a gift the museum had received from the shipping heiress Adelaide Milton de Groot to finance other purchases. The Max Beckmann paintings within the lot were sold at a conservative \$25,000 each, roughly half of what they were actually worth at the time. The de Groot sell-off received contentious press. Afterwards, in June 1973, the museum published for the first time a formal set of policies on deaccessions, with uniform criteria on which works could be deaccessioned and how.

that “ordinarily prudent persons would use in handling their own property.”²³⁷ In 1984, the Supreme Court of Hawaii in *In re Estate of Dwight* found that a trustee violated his duty of care when he purchased land without first properly inspecting its structural and health conditions – for its leaking roof, damaged support beams, bad electrical wiring among other defects – demonstrating lack of care and diligence.²³⁸ This situation is analogous for a museum acquiring trust property, since for the museum the notion of “duty of care” becomes an important element in restitution cases: obtaining a work without conducting the due diligence of researching provenance or by disregarding undocumented or gap-filled provenance can subject the museum to a potential restitution in the future.²³⁹ Because museums are organized as charitable trusts within the United States and hold their assets for the public at large despite being sometimes privately owned or financed, they need to engage in activities that benefit the public interest in return for the special privileges they are granted, such as tax exemptions.²⁴⁰ These all come into consideration when museums need to assess whether it is beneficial to pursue litigation for claims over ownership. Simply put, in order for a museum to retain the benefits they enjoy, they also have to ensure that they act in a manner that ensures the public retains faith or confidence in their activities.²⁴¹

These duties are just some of the responsibilities that museums must grapple with conducting restitution cases.²⁴² Other pressures can lead to museums being placed in situations where the potential goodwill from restitution cannot outweigh the financial burden of deaccessioning and where museums may argue that they can best maintain trust through denying the claim.²⁴³

²³⁷ Frankel and Forrest, “Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense,” 283.

²³⁸ Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 495.

²³⁹ *Ibid.*, 494. See also: *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999) in which the Rosenberg family sued the museum over a Henri Matisse painting that the museum received as bequest but without adequate investigation. The museum’s own research revealed the painting was stolen during the case and the paintings were returned to the heirs. In *Republic of Turkey v. The Metropolitan Museum of Art*, 762 F. Supp. 44, 1990 U.S. Dist. LEXIS 18771 (S.D.N.Y. 1990), in which Metropolitan Museum of Art purchased the “Lydian Hoard” knowing that the objects were looted by treasure hunters and put some pieces on permanent display with misrepresented provenance and later returned the objects to the Republic of Turkey once Turkey brought a suit in federal district court.

²⁴⁰ Glenn Lowry, “A Deontological Approach to Art Museums and the Public Trust,” in *Whose Muse? Art Museums and the Public Trust* (Princeton, New Jersey: Princeton University Press, 2004), 134.

²⁴¹ *Ibid.*, 135.

²⁴² Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 494.

²⁴³ *Ibid.*, 498.

An example of such potential burdens and confusions arose not too long ago in New York State. In 2009, emergency rules on deaccessioning were promulgated by the New York Board of Regents, which oversees museums formed in the state after 1889 and whose rules are considered even more stringent than those of the AAMD. Indeed, if a museum violates any of these rules they risk losing their charter. The emergency rules allowed deaccession under only four circumstances:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/ or
- (4) the institution is unable to conserve the item or material in a responsible manner.²⁴⁴

When the final revisions were passed in 2011, among other additions, a clause had been added indicating deaccession could be made, “if the institution is repatriating the item or returning the item to its rightful owner.”²⁴⁵ Provisions permitting deaccession for the “refinement of collections or the return of objects to their rightful owners” was criticized by some of New York’s most prominent museums and Glenn Lowry wrote to Dr. Merryl H. Tisch, the chancellor of the Board of Regents, complaining that the rule’s inclusion “would remove from Regents-governed institutions the curatorial discretion that has made them among the most respected in the world.”²⁴⁶ Those who were waiting for increased government regulation of museum deaccessioning practices supported the new rules as they have the advantage of the force of law behind them, and must be followed if the relevant museums are to remain open under Board of Regents’ mandate.²⁴⁷ The AAM and AAMD were moderate in their enthusiasm, and while endorsing the new rules they preferred that “deaccessioning standards be left to museum professionals rather than government regulators.”²⁴⁸

The museum has historically functioned as both public and educational institution, charged with the mission to steward both works of art and the public's trust. Since ‘public trust’ is listed under the obligations allowing MoMA to be officially chartered, it is clearly a core aspect of the

²⁴⁴ Patterson Belknap Webb & Tyler LLP, “New York Board of Regents Adopts New Deaccessioning Rules,” *Lexology*, August 28, 2012, <http://www.lexology.com/library/detail.aspx?g=569f91f1-5f52-4f6e-9025-539f1809f2d8>. Accessed August 15, 2017.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

institution itself.²⁴⁹ Although differing in specific details, generally museum professionals and scholars have defined that the phrase ‘public trust’ as encompassing a museum’s duty to responsibly collect, preserve and display the world’s art. The AAM in their ethical standards regarding ‘public trust and accountability’ indicates that the museum is a “steward of its resources held in the public trust” and that it must “identif[y] the communities it serves and mak[e] appropriate decisions in how it serves them.”²⁵⁰ Important as the concept is, it has remained relatively broad in definition and relies primarily on individual interpretation for its applications.

In a 2004 essay by MoMA’s Glenn Lowry discussing a deontological approach to art museums and the public trust, he looks at the shifts in museum practice that have occurred due to changes in the way they market themselves, fundraise and become more ambitious.²⁵¹ A deontological approach judges the morality of actions based on adherence to rules (in this case, museum policies or professional ethical codes) rather than the outcome or consequences resulting from the actions.²⁵² In his understanding, Lowry claims there is “very little that defines what constitutes acting within the public trust... in many ways it is up to individual ...museums to establish a relationship with the public and then to act in a way that is consistent with their understanding of the museum.”²⁵⁴ As public institutions, Lowry states, museums are expected to act and behave in ways that are “keeping with the values they embody.”²⁵⁵ However, he also observes that large metropolitan institutions have become complicated and competitive institutions with “extensive collections, staffs and publics that include annual visitors, members, individual and corporate supporters, artists, tourists, scholars, as well as those who may actually visit a museum but who believe in their mission.”²⁵⁶ When it comes to acting to inspire trust, Lowry believes that “public trust is first and foremost an issue of responsibility, which the *Oxford English Dictionary* defines as being morally accountable for one’s actions” but must also be seen as “negotiable, and responsive to evolving expectations and conditions” where the “onus is on the

²⁴⁹ Tait, “Publicity Rules for Public Trusts,” 341.

²⁵⁰ “Museum Standards and Best Practices - Public Trust and Accountability,” *The American Alliance of Museums*, accessed June 11, 2017, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/public-trust>.

²⁵¹ “A Deontological Approach to Art Museums and the Public Trust,” 130.

²⁵² Gary Edson, *Museum Ethics: Theory and Practice* (Hoboken: Taylor & Francis Group, 1997), 270–271.

²⁵⁴ “A Deontological Approach to Art Museums and the Public Trust,” 135.

²⁵⁵ *Ibid.*, 134.

²⁵⁶ *Ibid.*

institution to carry out its mission with skill and intelligence and with an understanding of the parameters of what it can and cannot do.”²⁵⁷ As we have seen, museums are constantly negotiating these conditions, especially when it comes to restitution cases. Prior to the settlement in *Schoeps v. MoMA and Guggenheim Foundation* (2009), both Glenn Lowry of MoMA and Guggenheim director Richard Armstrong had claimed that their “provenance research made clear from the beginning that the museums are the proper owners of these works, and that the claims had no merit [but] we settled simply to avoid the costs of prolonged litigation, and to ensure the public continues to have access to these important paintings.”²⁵⁸ The settlement is, on the surface confounding because if the museums were indeed certain about their ownership over the paintings, why would they opt to settle the morning before a trial that would have clarified, once and for all, their title to the works? This financial settlement, openly critiqued by the judge, is a powerful example of negotiations made possible because of the absence of rules, negotiations that can shelter retentionist fears within a framework which might seem to be more about fiscal maturity through avoidance of heavy, long-running litigation costs. Perhaps this kind of dynamic is what Lowry refers to when he says that public trust has emerged as a central question for art museums because while they appear to be “pushing the boundaries of acceptable practice in terms of their marketing, fundraising, programming and ambition, there are as yet no clear rules as to what is appropriate behavior.”²⁵⁹ As he sees it, as museums continue to broaden their audience and show that they can generate substantial economic returns through adopting marketing strategies from the business world,²⁶⁰ it is unavoidable that the public and media will begin to take a closer look at their operations. As Lowry puts it:

Given the success and popularity of art museums there is a certain irony that their credibility is now being questioned. But it is precisely the institution's popularity that has, in many ways, brought it under closer scrutiny [...] With this attention came the awareness that art museums, like other institutions, are not perfect, that they occasionally engage in questionable practices.²⁶¹

²⁵⁷ Ibid., 129.

²⁵⁸ Philip Boroff and Lindsay Pollock, “Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement,” *Bloomberg News*, June 18, 2009, <http://www.commartrecovery.org/docs/Judge%20Slams%20MoMA,%20Guggenheim%20on%20Secret%20Holocaust%20Art%20Agreement%20-%20Bloomberg.pdf>.

²⁵⁹ “A Deontological Approach to Art Museums and the Public Trust,” 130.

²⁶⁰ Ibid., 132.

²⁶¹ Ibid., 130.

These considerations become important in discussing the particular position of museums: they are not ideologically neutral and the way they are still being managed and described by individuals at their heads is indicative of the major obstacles in play for restitution claims. It might be argued that the inception and character of museums like MoMA cannot be dissociated from the American ideologies of philanthropy and competitive individualism that characterized the country in the late nineteenth and twentieth century.²⁶² Early museum builders perhaps preferred to see themselves as benevolent philanthropists advancing the common good. The resulting vacillation between individual and collective action built into the venture itself has become a defining characteristic of the modern museum project, in which exists a counterbalance of individual assertiveness with collective action.²⁶³ Even within Lowry's description of the museum's roles and responsibilities exists this tension between individual and collective benefit. His explanation of the museum's positioning should be critically examined through the lens of a corporatized entity, which has fought for its survival in a climate where art museums compete against each other, perhaps resembling more corporations driven by commercial interests rather than not-for-profit institutions driven by educational mandates.²⁶⁴

²⁶² Wood, "The Authority of American Museums," 107.

²⁶³ Murawska-Muthesius and Piotrowski, "Introduction," 16.

²⁶⁴ "Art Museums by the Numbers 2016" (American Association of Museum Directors, January 9, 2017), <https://aamd.org/our-members/from-the-field/art-museums-by-the-numbers-2016>. Accessed August 17, 2017. In recent decades, increased 'corporatization' has been evidenced in museums' Within the past decade, museums have experienced unprecedented growth as cultural and educational centers – serving more than sixty million people annually according to this report by the AAMD. American businesses acknowledge the advantage of sponsoring art museums to both service public interest as well as advance corporate relations and marketing goals. According to the AAMD, corporations annually provide more than one billion USD to art museums representing "more than five times the combined annual budgets of the National Endowment for the Arts and the National Endowment for the Humanities." Corporate support allows many museums to enhance their public programming and contribute towards "general operating costs, capital improvements and expansions, educational and outreach activities, membership programs, fundraising benefits and special events, art acquisitions, conservation initiatives and publications, as well as temporary exhibitions and other major public programs." In obvious ways, corporate financial support benefits art museums but also represents conflicting challenges stemming from the need to satisfy external commercial interests. Some are relatively innocent, for instance, MoMA's UNIQLO Fridays partnership allows visitors to visit exhibitions free of charge. Others are more controversial and have showcased the ethical dilemmas presented by the intersection of commercial interests within the museum. The New York Metropolitan Museum's "Alexander McQueen: Savage Beauty" (4 May – 7 August, 2011) was an immensely popular show but shouldered critical outrage over the McQueen fashion house as the exhibition's main sponsor. Critics saw the sponsorship as another in

Museums today have evolved into powerful and influential institutions with a range of professional responsibilities. It can be argued that they have a duty to take reasonable steps to protect their assets held in trust but, just as strongly, it can be asserted that they are also ethically obliged to claimants who, in the name of history, assert ownership of works held by the museum.²⁶⁵ The modern museum is therefore a site where the personal, public and political aspects of culture are in constant opposition and where the past and present often collide.²⁶⁶ Gone are the days when one can grant adequacy to simple statements like the ones made by MoMA's founding director, Alfred H. Barr. In his words:

...the museum collections as exhibited should be for the public the authoritative indication of what the museum stands for in each of its departments. They should constitute a permanent visible demonstration of the museum's essential program, its scope, its canons of judgment, taste and value, its statements of principle, its declarations of faith.²⁶⁷

The unique experience provided by the museum is embedded within its position as a steward of cultural heritage and its educational mandate. For the American art museum to thrive and retain public trust, it must be and must be perceived as being consistent with and supportive of the democratic society that continued to enabled it.²⁶⁸

MoMA's most recently approved collections management policy, from 2010, states it must take all Nazi-era art restitution claims seriously:

...the Museum will not purchase or accept as a gift, bequest or loan any work of art it knows or has good reason to believe is of questionable provenance or was stolen or sold under duress. In acquiring works of art for its collection and in borrowing

the long line of controversial sponsorships that had people asking who was really running their museums? Like the Guggenheim's company-funded BMW and Armani shows (1998 and 2000-01, respectively), for the Armani show, the museum had received a 15\$ million gift and was charged with commercialism and conflict of interest. In each case the museums were decried for selling out curatorial integrity by allowing commerce to seep into art and affect the programming of nonprofit institutions. For more see: *Ethics and Visual Arts*. Edited by Elaine King and Gail Levin. New York: Roundhouse, 2007.

²⁶⁵ Frankel and Forrest, "Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense," 284.

²⁶⁶ Tristram Besterman, "Crossing the Line: Restitution and Cultural Equity," in *Museums and Restitution: New Practices, New Approaches* (Farham: Routledge, 2014), 20.

²⁶⁷ R+P, Series 2, Folder 9. The Museum of Modern Art Archives, New York.

²⁶⁸ Wood, "The Authority of American Museums," 107.

works for exhibitions, the Museum shall consider and, whenever possible, follow the guidelines promulgated from time to time by the AAM and AAMD.²⁶⁹

This policy, it should be noted, still does not reference the Washington Principles, and has not prevented the museum from dismissing claims and from frequently asserting legally that it holds good title to the work. MoMA has joined, if not led, some of the most venerated institutions in the United States in persuading federal judges to dismiss complex Holocaust-era art restitution cases without addressing their merits, thereby preventing fact-finding and remembrance.²⁷⁰

When museums are perceived as being insensitive to the impact of their behavior on people whose personal or community narratives are vested in the objects within the museum's care, it represents, I argue, a breach of professional obligations by breaking with their loyalty and duty to the public. Currently, issues of race, history and heritage are being heatedly debated around the world and as much as some museums would prefer to dismiss the circumstances under which objects were acquired as irrelevant, original and present contexts raise important questions about the function of contemporary museums in democratic society. In a survey conducted by the American Association of Museums in 2001, museums were considered a more "reliable source of historical information than books, teachers or even personal accounts by relatives."²⁷¹ Do we betray that trust by continuing a pattern which allows learners to believe there is only one true account of the past, the one that is held by the museum? As previously mentioned, Michael Kimmelman, in a provoking article in the *New York Times*, emphasizes that the public may place faith in few traditional institutions these days, but the museum is still one of them.²⁷² Kimmelman claims that museums today suffer from an identity crisis, because they are beginning to resemble corporations or sites of spectacle akin to *Disneyland*. Increasingly, he says, museums are finding themselves at a crossroads and need to decide where they want to go and what they want to be without compromising their educational mandates or adversely affecting the unique experience they provide for the public.²⁷³

²⁶⁹ "Collections Management Policy," *Museum of Modern Art*, October 5, 2010, https://www.moma.org/momaorg/shared/pdfs/docs/explore/CollectionsMgmtPolicyMoMA_Oct10.pdf. Accessed August 15, 2017.

²⁷⁰ Kreder, "Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation," 76.

²⁷¹ Kimmelman, "Museums in a Quandary: Where Are the Ideals?"

²⁷² Ibid.

²⁷³ Ibid.

There is a genuine fear that major museum collections would be threatened by demands for restitution with any changes to laws and practices ‘opening the floodgates’ and running the risk of ‘everything would disappear’.²⁷⁴ However, listening to and acknowledging different identities and recognizing claims by dispossessed and Indigenous groups is to acknowledge a divide that has always existed, and represents an integral part of history. Within the debate regarding restitution and contested artworks, different scholars and recent writings have looked at how the past has played a powerful role in the motivations, attitudes and actions of both museums and claimants, revealing wounds that have yet to heal and facts that must be considered. Some strongly advocate that museums need to begin to collectively move towards addressing their limitations and treat the objects within their collections ethically in order to begin to move towards a better future.²⁷⁵ Jeannette Greenfield, known for seminal work on the historical, legal and political issues surrounding the return of cultural treasure, has remarked that “cultural property is most important to the people who created it or for whom it was created or whose particular identity is bound up with it. This cannot be compared with the scholastic or even inspirational influence on those who merely acquire such objects or materials.”²⁷⁶ Although restitution has generally been treated as a process that entails giving back objects, there are proponents who believe it does not need to be a notion that speaks only of loss. They believe it can also be a process that conceptualizes and enacts restitution in a way which presents museums with important gains in terms of cultural relationships and knowledge, as well as holding significance for other types of postcolonial and present-day repatriation efforts. The tenets and claims of universalism should, it has been strongly suggested, be analyzed, understood and challenged if the international integrity of the Western museum is to be maintained or regained.²⁷⁷ If restitution and repatriation is understood as increasing knowledge and understanding, rather than trying to destroy these things, it would meet the declared aim of the “Declaration on the Importance and Value of the Universal Museum” to “foster knowledge by a continuous process of reinterpretation.”²⁷⁸ Effectively, it would better serve the museum community by opening up opportunities for interactions with their beneficiaries that would benefit

²⁷⁴ Tythacott and Arvanitis, *Museums and Restitution: New Practices, New Approaches*, 9.

²⁷⁵ Ibid.

²⁷⁶ Piotr Bienkowski, “Authority and the Power of Place: Exploring the Legitimacy of Authorized and Alternative Voices in the Restitution Discourse,” in *Museums and Restitution: New Practices, New Approaches*, ed. Louise Tythacott and Kostas Arvanitis (Farham: Routledge, 2014), 37.

²⁷⁷ Besterman, “Crossing the Line: Restitution and Cultural Equity,” 26.

²⁷⁸ Curtis, “Universal Museums, Museum Objects and Repatriation: The Tangled Stories of Things,” 117.

all and ensure a sustainable model of the contemporary museum in a century of increasingly globalized cultural interactivity and accountability.²⁷⁹

David J. Rowland who specializes in art recovery and was the attorney for the Grosz heirs in *Grosz v. MoMA*, explains that the events that transpired under the Third Reich are “not comparable to what we would consider as normal economic, legal and political society.”²⁸⁰ It must follow, he insists, that “to deal with the specific issues and losses related to Nazi-era looted art works and the oppressive system that allowed them to occur, the rules we use to redress wrongs cannot be the same that we would employ in a normal society.”²⁸¹ In essence, this statement, issued in 2013, restates what so many purportedly agreed to in 1998. Rowland has found American museums’ “blindness to contemporary human sensitivity ... both disturbing and indefensible,” as they turn to the presently ill-equipped courts to mediate issues involving restitution. To repeat, in *Toledo Museum of Art v. Ullin* (2006),²⁸² when the court judge ruled that the statute of limitations had run by 1943, historically speaking this meant that it began before Allied forces had landed on the beaches of Normandy, let alone defeated the unified forces of Nazi Germany.²⁸³ The ruling stood and the court considered the owner’s failure to pursue her claim to be evidence that she did not believe the sale of that painting was wrongful.²⁸⁴ Similarly, in *Grosz v. MoMA* (2010),²⁸⁵ we saw that the case was dismissed because the Plaintiffs missed the statute of limitations by just eight months and the court dismissed the dispute as a “legal, not a historical, question.”²⁸⁶ The false dichotomy thus exposed is that even though the judicial system relies on social events to create and interpret the law, in these cases, the same system ignores widely accepted historical facts when deliberating on the plausibility of ‘voluntary’ transactions that were in fact, made under duress. Although legal courts are a natural choice in dealing with legal disputes and the administration of justice, what becomes central in the suits about title and ownership is the employment of technical

²⁷⁹ Besterman, “Crossing the Line: Restitution and Cultural Equity,” 26.

²⁸⁰ David Rowland, “Have U.S. Museums Lived up to the Promise of the Washington Conference? The Case for the Mandatory Referral of Nazi-Era Art Claims to a Neutral Art Commission?,” *Rowland & Petroff: Attorneys at Law* (2013): 153.

²⁸¹ *Ibid.*

²⁸² *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (2006).

²⁸³ *Ibid.*, 477:85.

²⁸⁴ *Ibid.*

²⁸⁵ *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010).

²⁸⁶ Kreder, “Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation,” 86.

defenses, which are asserted to prevent the merits of the claims from being properly considered.²⁸⁷ Further the AAM explicitly declares that the maintenance of legal standards should be the minimum, and that “museums and those responsible for them must do more than avoid legal liability, they must take affirmative steps to maintain their integrity so as to warrant public confidence”.²⁸⁸

MoMA has been prominent in a troubling story, although it has not been alone. The question must be asked, as it will be in the final section of this text, if there are alternative attitudes and positions to be developed for the future. The trend of using uncompromising tactics, despite the cooperative spirit advocated by the AAM/AAMD guidelines and their call for alternate mediation, as well as – of course – the more widely known Washington Principles, is counter to what increasing numbers of people have come to see as the complex moral position of museums, and the exciting encounters which those can generate.

Concluding Remarks: Looking to the Future, New Developments in United States Law

To imply today that there is almost no looted art in North American museums is simply not tenable. In looking at the history of MoMA and its actions under Alfred Barr, we have already seen that at least some American museum directors and collectors who purchased art during the 1930s and 1940s were doing more than rescuing artworks from the National Socialists: they were taking advantage of frightful situations of which they were very much aware. During and after the war, the United States was still “conducting business as usual, even in the cultural arena – defining new museum collecting policies, mounting exhibitions, and building private collections from the best possible art available on the market.”²⁸⁹ This ethos has slowly undergone change. The National Gallery in Washington, for example, has independently pursued projects such as publishing a thirty-volume detailed catalogue of its entire collection that began before the Washington Conference and is still a work in progress. Any updates on the provenance of their works are added

²⁸⁷ Rowland, “Have U.S. Museums Lived up to the Promise of the Washington Conference? The Case for the Mandatory Referral of Nazi-Era Art Claims to a Neutral Art Commission?,” 151.

²⁸⁸ “Code of Ethics for Museums.” Also see: Piotr Bienkowski, “Authority and the Power of Place: Exploring the Legitimacy of Authorized and Alternative Voices in the Restitution Discourse,” in *Museums and Restitution: New Practices, New Approaches*, ed. Louise Tythacott and Kostas Arvanitis (Farham: Routledge, 2014), 37.

²⁸⁹ Kreder, “Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation,” 101.

to curatorial records and made available to researchers.²⁹⁰ The National Gallery continues to update its website with a list of annual acquisitions, along with detailed provenance information²⁹¹ Thus, although acknowledging that it is a “time consuming, expensive kind of research,”²⁹² overall the National Gallery has put forth a good faith effort to conduct and publicize provenance research needed to identify art displaced during the Holocaust.²⁹³ Scattered though these special commitments to provenance research may be, they do continue. This year, for example, a new initiative was launched: the German/American Provenance Research Exchange Program (PREP), a partnership co-organized by the Smithsonian Provenance Research Initiative (SPRI), Smithsonian Institution, Washington, D.C., and the *Zentralarchiv der Staatlichen Museen zu Berlin, Stiftung Preußischer Kulturbesitz* (Central Archives of the National Museums in Berlin, Prussian Cultural Heritage Foundation, SPK) gathers museum professionals who specialize in World War II-era provenance projects for a three-year exchange. PREP intends to provide a forum for professionals within the field to network and share their research as well as introduce participants to available resources and local experts at institutions in both countries.²⁹⁴ Among its goals is the mentoring of the next generation of museum professionals. Despite these aspiring

²⁹⁰ “Mr. Earl A. Powell, III: Director, National Gallery of Art, United States,” in “*Chapter 4: Nazi-Confiscated Art Issues*” of the *Washington Conference on Holocaust-Era Assets*, 1998, 470, <http://fcit.usf.edu/Holocaust/resource/assets/heac4.pdf>.

²⁹¹ “Recent Acquisitions,” *The National Gallery of Art*, accessed July 27, 2017, https://www.nga.gov/content/ngaweb/Collection/recent_acquisitions.html.html.

²⁹² “Mr. Earl A. Powell, III: Director, National Gallery of Art, United States,” 470.

²⁹³ *Ibid.* The National Gallery has also been cooperatively engaged in a complicated 1998 claim to clarify ownership in a case regarding more than 20 Dürer drawings from the Lubomirski Collection. At the end of the war, these drawings were dispersed to many public and private collections in the United States and abroad. Mr. Powell: “... more than 20 drawings by Durer from the Lubomirski Collection which were returned in the 1940s to a lineal descendant of the family which originally owned them. This gentleman subsequently sold the drawings to several purchasers in good faith. These works are now held in many public and private collections in this country and abroad. The complexity of the case, which involves rightful ownership, dates back to 1823 and involves conflicting claims from more than one institution, and shifting national boundaries”. See also: Brady Vause, “Disputed Dürers: The Lubomirski Drawings and the Complexities of Restitution,” paper written at George Washington University, Washington, D.C., December 2002.

²⁹⁴ “Provenance in the World War II Era, 1933 - 1945,” *Smithsonian*, accessed August 20, 2017, <http://provenance.si.edu/jsp/prep.aspx>. The German/American Provenance Research Exchange Program (PREP)’s first series of exchanges are to take place between 2017-2019. In their respective cities, these partners will host a total of six Exchanges: New York – Berlin in 2017; Los Angeles – Munich in 2018; and Washington, D.C. – Dresden in 2019. Program participants include museum curators and provenance researchers, archivists, lawyers, and specialists in information technology and digital humanities as well as graduate students engaged in WWII-era provenance research.

examples, however, many American museums still hide behind the excuse of the cost of provenance research and take the strongest of adversarial positions when their collections become subject to challenges.²⁹⁵

Legalistic defenses are not necessarily equivalent to moral ones.²⁹⁶ Litigation, as it has been so often handled, tends to place blame on claimants, faulting them for not demanding their property back from some of America's most influential national institutions in a "timely" fashion.²⁹⁷ Historians have already shown that seemingly voluntary transactions were in fact the consequences of forced sales, findings that arguably should factor into determining plausibility of claims for Holocaust-era art and in establishing a climate conducive to soliciting claims.²⁹⁸ In cases like *Detroit Institute of Arts v. Ullin*, among others, we have seen that turning to courts instead of an alternative resolution method means that the law and the use of technical defenses – which can be waived, but rarely are – often trump the historical and moral basis of a claim. Because American courts must treat Nazi-era claims like any other civil law claims, they are unable to properly decide cases based on their merits.²⁹⁹ Furthermore, even in the exceptional cases where a state attempts to

²⁹⁵ Conference on Jewish Material Claims Against Germany and World Jewish Restitution Organization, "Holocaust-Era Looted Art: A World-Wide Preliminary Overview," 30.

²⁹⁶ Tom Campbell, "Democratic Aspects of Ethical Positivism," in *Judicial Power, Democracy, and Legal Positivism*, ed. Jeffrey Goldsworthy and Tom Campbell (New York: Routledge, 2017). For more information, read about legal positivism - a philosophy of law that argues the existence of law depends on social or positive norms. Today, the tradition of legal positivism is widely held as intellectually, empirically and morally untenable. The problems associated with legal positivists' strict subscription to rules as a means of controlling conduct has resulted in what many see as failures in identifying the important boundaries between law, morality and politics in legal systems. This results in the failure of legal systems to adapt to changing circumstances (slavery, national socialists during WWII, South African Apartheid, etc) and acknowledge the personal and social realities of individuals who pass through the courts.

²⁹⁷ The Association of Art Museum Directors, "Resolutions of Claims for Nazi-Era Cultural Assets." However, fewer than forty paintings have been restituted by American museums since 1998, according to the AAMD Registry of Resolution Claims for Nazi-Era Cultural Assets, with 29792 potentially problematic objects are listed on the Nazi-Era Provenance Internet Portal (count as of July 2017). David Rowland, "Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences," *Kunst Und Recht* 3, no. 4 (2013): 86, doi:<https://doi.org/10.15542/KUR/2013/3-4/2>. According to the Commission for Art Recovery, comparing Nazi Era Art claims between European countries with established commissions and the United States which claims it is unique and does not need a neutral art commission reveals that litigation results in 90% of claims denied

²⁹⁸ *Detroit Institute of Arts v. Ullin*.

²⁹⁹ Catherine Hickley, "After 26 Years, Munich Settles Case Over a Klee Looted by the Nazis," *The New York Times*, July 26, 2017, <https://www.nytimes.com/2017/07/26/arts/design/after-26-years-munich-settles-case-over-a-klee-looted-by-nazis.html>. Accessed August 15, 2017. After 26 years, a family will be

pass a law extending the statute of limitations for claims for Holocaust-era works, such laws are often overruled by the Federal government's exclusive authority over foreign affairs.³⁰⁰ It thus follows that there is a strong moral argument to change the law or establish a neutral art commission to deal with restitution claims. The American people and those dispossessed by the Nazis should be better served by their national cultural institutions – the same ones who claim to act in their name. Otherwise, acts of denial by museums not only dismiss a history of human suffering but also create a sense of continued violation and echo the “brutal, institutionalized and officially sanctioned attitudes of the era in which the looting occurred.”³⁰¹

The importance of the conflict over looted art is that it remains for many a symbol of Nazi destruction. Therefore, beyond the matter of property rights, the restitution of these objects holds significance as a powerful act of justice.³⁰² The Washington Principles, apart from creating guidelines for the development of new practices in the return of Nazi-looted objects, also raised expectations that cultural institutions and museum professionals would work proactively to correct historical injustices of Nazi-era art looting. There is a strong case to be made that cultural institutions, belonging to the subsection of society that deals directly with the stewardship of cultural heritage, are not doing their jobs correctly if they are weighing corporate interests against

reimbursed for the seizure of Paul Klee's “Swamp Legend”, once scorned and confiscated as the work of a degenerate. The city of Munich agreed to settle, allowing them to keep the work in Munich's Lenbachhaus museum and the heirs of the German art historian from whom it was taken would be paid a sum equal to its market value. Matthias Mühling, the director of the Lenbachhaus, presented the settlement as evidence of progress while acknowledging that the justice system has not always been equipped to deal with these types of claims. “Through the story of this painting over the last 26 years,” he said in an interview, “we can trace the change of mentality not just in the museums, but also in the legal approach, the way we think about law and justice. Law and justice are not always the same thing. This settlement is a very important achievement for our museum. This is not just an important painting by Paul Klee, it contains the whole history of the 20th century.”

³⁰⁰ *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Circuit 2009). California state passed a law in 2002 (Cal. Code. Civ. Proc. §354.3) that extended the statute of limitations for those claims seeking recovery of Holocaust-era artwork until December 31, 2010. On May of 2007, Marei von Saher, filed a complaint in the Federal Court for the Central District of California seeking to recover the works in question. She alleged that her claim was timely according to Cal. Code. Civ. Proc. §354.3. The museum subsequently moved to dismiss the complaint, and the court granted the motion on October 18, 2007. The court held that section 354.3 was an “unconstitutional intrusion into the federal foreign affairs power and also found that the regular three-year limitations period under Cal. Code. Civ. Proc. §338 had expired” (from <http://www.commartrecovery.org/cases/marei-von-saher-vs-norton-simon-museum-art-pasadena-et-al>)

³⁰¹ Bienkowski, “Authority and the Power of Place: Exploring the Legitimacy of Authorized and Alternative Voices in the Restitution Discourse,” 21.

³⁰² Graefe, “The Conflicting Obligations of Museums Possessing Nazi-Looted Art,” 474.

the moral duty to their public and to history. While critics have reproached the United States government for not doing more to ratify the Washington Principles, it might be argued that legislative change should be brought about because of leadership taken by our esteemed cultural institutions and not despite or because of their conduct. That being said, legislative change is possibly called for under whatever the circumstances and it has taken place elsewhere. To turn to an example, dramatic change occurred in the United Kingdom after a 2002 claim by the Feldmann heirs to the British Museum for three drawings allegedly stolen by the Gestapo in 1939.³⁰³ The history of the theft was not disputed by the museum, but the drawings' return was obstructed by the *British Museum Act* of 1963 prohibiting deaccessioning except under certain prescribed conditions which did not include restitution.³⁰⁴ This resulted in a lengthy debate of a bill in British parliament to make concessions for the restitution of artworks; in 2009 the *Holocaust (Return of Cultural Objects) Act* entered into force for a period of ten years from the day it was passed. Seventeen named museums were thereby permitted to restitute from their collections objects looted by the Nazis.³⁰⁵ During the debate of the bill in Parliament, Baroness Deech, a British academic and lawyer who sits as a member in the House of Lords of the United Kingdom Parliament, passionately asserted that:

Art is an ethical issue. Displaying looted art, once it is known to be such, is not just an invasion of privacy and a demonstration that wrongdoers may indeed profit from their crimes; it is also putting on show something that the owners never meant to be seen in such circumstances. It has ceased to be an object of beauty and one that the museums can be proud of or use for educational and aesthetic aims. The spectator cannot look at it without seeing the pain and betrayal that led it to be situated there in a national museum. It taints the spectators who knowingly take advantage of the presence of the picture there and it speaks to them of loss and war, not creativity and insight.³⁰⁶

The Baroness poignantly referenced the human value of art. In today's climate regarding restitution claims, the argument she makes rings all the truer as the placement of primary

³⁰³ "Spoliation Case Settled," *The British Museum*, accessed June 23, 2017, http://www.britishmuseum.org/about_us/news_and_press/press_releases/2013/spoliation_case_settled.aspx.

³⁰⁴ Besterman, "Crossing the Line: Restitution and Cultural Equity," 21.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*, 21–22.

importance on keeping a museum's collect intact above all other considerations does not speak to integrity but, as we have seen, can be conceived of as a betrayal.

Very recently, the United States has indeed started to make some changes. On December 16, 2016, the Holocaust Expropriated Art Recovery (HEAR) Act was signed into law by the Obama administration.³⁰⁷ The bipartisan bill was cosponsored by Senate Democrat Chuck Schumer and Republican Senator Ted Cruz and has been positively seen as an effort to further United States policy on Nazi-confiscated art and other property as already set forth in the Washington Conference Principles on Nazi-Confiscated Art, and the Terezin Declaration.³⁰⁸ It seeks to ensure that claims to artwork and other property stolen or misappropriated by the Nazis do not continue to be unfairly barred by statute of limitations and are resolved in a just and fair manner.³⁰⁹ The bill allows civil claims or causes of action for the recovery of artwork and property taken between January 1, 1933 and December 31, 1945, to be commenced within six years after

³⁰⁷ See Appendix F.

³⁰⁸ "Prague Holocaust Era Assets Conference: Terezin Declaration" (Prague, Czech Republic, June 30, 2009). The Government of the Czech Republic, in cooperation with the Documentation Centre of Property Transfers of Cultural Assets of WW II Victims, the Federation of Jewish Communities in the Czech Republic, the Jewish Museum in Prague, the Terezin Memorial, the Institute of Jewish Studies at the Hussite Theological Faculty of the Charles University in Prague and the Forum 2000 Foundation, hosted a "Holocaust Era Assets" conference in Prague on June 26-30 2009, a gathering of 47 countries. The objectives of the conference, among other things, included: assessing the progress made since the 1998 Washington Conference on Holocaust Era Assets in the areas of the recovery of looted art and objects of cultural, historical and religious value (according to the Washington Conference Principles on Nazi-Confiscated Art and the Vilnius Forum Declaration 2000), and in the areas of property restitution and financial compensation schemes; review current practices regarding provenance research and restitution and, where needed, define new effective instruments to improve these efforts.

³⁰⁹ "Holocaust Expropriated Art Recovery Act of 2016," Pub. L. No. 114-308, 1621 USC (2016). The bill has also had support from many others, among them: Ronald Lauder President of the World Jewish Restitution Organization (WRJO) and chairman of the Commission for Art Recovery; actress Dame Helen Mirren; Christie's International Director of Restitution, Monica Dugot; President of the Commission for Art Recovery. As previously mentioned, Ronald Lauder was chairman of MoMA during the 1998 "Wally" case and sided with the Museum against the Jewish family. Ronald S. Lauder, "Testimony for S. 2763, the Holocaust Expropriated Art Recovery Act – Reuniting Victims with Their Lost Heritage," *Senate Committee on the Judiciary Subcommittees on the Constitution and Oversight, Agency Action, Federal Rights and Federal Courts* (2016), https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage. Lauder appears to have learned from past experience, testifying: "...even more despicable is that this art theft, probably the greatest in history, was continued by governments, museums and many knowing collectors in the decades following the war... This was the dirty secret of the post-war art world, and people who should have known better, were part of it [...] There are museums here in the United States that have been waiting out the clock to pass the statute of limitations. This also forces claimants to spend enormous amounts of money on legal fees – another strategy to make them give up [...] This is not justice. Stalling claims is an abuse of the system."

the claimant's 'actual discovery' of: (1) the identity and location of the artwork or other property, and (2) a possessory interest in the artwork or property.³¹⁰ The bill does not apply to claims barred on the day before enactment of the bill if: (1) the claimant had knowledge on or after January 1, 1999, and (2) six years have passed from the date such claimant acquired such knowledge and during which time the claim was not barred by a statute of limitations.³¹¹ Thus, the HEAR Act does not apply retroactively to claims previously barred by Federal or State statute of limitations. The act will cease to have effect on January 1, 2027, although it will continue to apply to any claims still pending on January 1, 2027.³¹²

The HEAR Act was positively received as a major step towards reaffirming United States foreign policy to return looted works of art,³¹³ for the most part because it provides a national standard for statute of limitations, eliminating the need to debate timeliness in different ways in different states when it comes to the use of both laches and statute of limitations. It is expected that the focus in restitution cases can now shift towards consideration of the actual history and facts underpinning a specific situation rather than arguing on the finer procedural points of law.³¹⁴ However, the act's terms and their applications still remain somewhat unclear and may present new obstacles for claimants. For instance, a claimant's 'actual discovery' is defined as having "actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance or amount to actual knowledge thereof."³¹⁵ In her testimony to the US, Dr. Agnes Peresztegi of the Commission for Art Recovery testified in support of the HEAR Act, but cited among her concerns:

... that knowledge cannot be construed as possessed by all family members if not all family members actually have the knowledge. It is not the fault of the descendants of Holocaust survivors not to be close to each other. Families, who, but for the Holocaust, would have lived their lives in close proximity to each other,

³¹⁰ Ibid. Section 5: Statute of Limitations.

³¹¹ Ibid. Section 5: Statute of Limitations, subsection (e).

³¹² Ibid. Section 5: Statute of Limitations.

³¹³ *Schoeps v. Museum of Modern Art et al*, 07 Civ. 11074 (JSR). The mention of foreign policy here, refers to the *lex loci delicti* rule from the conflict of laws, which has sometimes been cited in restitution cases. Conflict of laws is the branch of law regulating all lawsuits involving a "foreign" law element where a difference in result will occur depending on which laws are applied.

³¹⁴ Isaac Kaplan, "New Bill Passed Will Aid the Recovery of Nazi-Looted Art," *Artsy*, December 13, 2016, <https://www.artsy.net/article/artsy-editorial-new-bill-passed-will-aid-the-recovery-of-nazi-looted-art>. Accessed August 15, 2017.

³¹⁵ Holocaust Expropriated Art Recovery Act of 2016. Section 4: Definitions, (4).

were decimated and dispersed around the world. Therefore, it is important that the right to benefit from the HEAR Act is allocated to individual claimants and not to groups of heirs, who may not even know about each other's existence.³¹⁶

How 'actual knowledge' and other terms, are construed will become important in subsequent cases as well as the determination of who can possess this knowledge.³¹⁷ In cases concerning Nazi-era looted art, the burden still lies with the claimant to produce evidence of legitimate ownership. One problem that will continue to persist is the determination of when relatives knew or should have known that they were entitled to something they probably knew little about with many victims deceased and records destroyed.³¹⁸ Since some states, like New York, have statutes of limitation rule that are more favorable to claimants, Dr. Peresztegi also urged the drafters of the HEAR Act to add a provision that would not allow it to extinguish claims that are valid under the laws of these states:³¹⁹ this was not reflected in the final version of the act, which supersedes all relevant state laws including New York's 'demand and refusal' rule.

The HEAR Act's six-year limitis said to have resulted from "decade long discussions on the practical aspects of restitution among museums, art professionals and claimant representatives," under the assumption that "it is long enough to facilitate negotiation and the amicable resolution of restitution claims" while also propelling museums to complete provenance research of their holdings with renewed vigor under the newly prescribed limit.³²⁰ It does not, however, eliminate timeliness as a factor for affirmative defenses and the addition of three years is hardly expected to alter the fate of cases more than six years old and not valid under the act, let alone cases from decades ago. As another point of critique, Dr. Peresztegi also warned the

³¹⁶ Agnes Peresztegi, "S. 2763, the Holocaust Expropriated Art Recovery Act – Reuniting Victims with Their Lost Heritage," § Senate Committee on the Judiciary Subcommittees on the Constitution and Oversight, Agency Action, Federal Rights and Federal Courts (2016), https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage. Accessed August 15, 2017.

³¹⁷ *Schoeps v. Museum of Modern Art et al*, 07 Civ. 11074 (JSR). In this case, the Court agreed with the museums that the issue was governed by German law. Yet the museums argued that the plaintiff needed to be appointed personal representative of the decedent's estate by the New York Surrogate even though under the relevant foreign inheritance law (German) that was employed in this case, there is no estate but property passes immediately by operation of law to the descendant's heirs.

³¹⁸ Jennifer Anglim Kreder, "Analysis of the Holocaust Expropriated Art Recovery Act of 2016," *Chapman Law Review* 20, no. 1 (2017): 23.

³¹⁹ Peresztegi, S. 2763, the Holocaust Expropriated Art Recovery Act – Reuniting Victims with Their Lost Heritage.

³²⁰ *Ibid.*

committee that the HEAR Act “would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another,” and performs other disservices, including: narrowing the definition of looted art.

The HEAR Act is relatively recent and has only resulted in a single application.³²³ Only time will tell if the HEAR Act will alter the fate of present day cases or if new procedural obstacles will arise in application. In comparison, other countries have not only enacted laws to facilitate the restitution of Nazi-era looted works, but have also established independent commissions to either recommend actions or to resolve claims.³²⁴ It appears that an independent commission with a diverse advisory committee dedicated to overseeing and issuing recommendations for Nazi-era restitution claims such as employed in Austria, might be a more effective means to efficiently process claims. In 1998, following various scandals, Austria passed the Art Restitution Law and thereby implemented the Washington Principles, that, among other things, provided a foundation to set up a federally appointed commission to effectuate restitution of Nazi-Looted art.³²⁵ The impact has been substantial, the commission has issued 290 recommendations. In 256 cases, they ordered the return of the artworks and in 34 cases they recommended that the artworks should not

³²³ “US Court Denies Germany’s Motion to Dismiss Lawsuit Brought by Heirs of Jewish Art Dealers Persecuted by Nazis,” *Artforum*, April 4, 2017, <https://www.artforum.com/news/id=67588>. Accessed August 15, 2017. Germany’s motion to dismiss a lawsuit filed to recover the Guelph Treasure (devotional and medieval art objects owned by the House of Guelph) was denied by Colleen Kollar-Kotelly, a federal judge in Washington, DC. This is the first case to be influenced by the HEAR Act with positive results. In this case Germany and the Prussian Cultural Heritage Foundation argued that the statute of limitations had passed for a claim, however, with the HEAR Act, such limitations have been uniformly changed and the defendants in this case profited from retaining the right to raise the issue until the deadline stipulated in the act’s sunset clause in 2027. Judge Kollar-Kotelly turned down the defendants’ argument for dismissing the suit, citing the Foreign Sovereign Immunities Act (FSIA), which halts lawsuits against other countries but makes exceptions where the government breaks international laws. It was ruled that Germany’s appropriation of art from its own citizens before 1939 during the time Nazis breached borders and attacked other nations is a violation of international law and therefore cannot claim immunity. The application of HEAR bolstered with the existing FSIA is significant because it may set a strong precedent for future promising applications of the Act.

³²⁴ Rowland, “Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences.” Germany and Austria are two of the five European countries—the others being Holland, Britain, and France—with state-mandated advisory committees designed to provide a sanctioned, legal way for victims and other potential claimants to seek restitution of what was stolen.

³²⁵ “The Austrian Art Restitution Law” (Commission for Art Recovery), accessed July 27, 2017, <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf>. See previously covered ‘Mauerbach Scandal’ and ‘Portrait of Wally’ case.

be returned.³²⁶ A system like this in the United States might, at the very least, avoid delays in proper provenance research on the part of Museums who are reluctant to part with works, not to mention alleviate the expense of research for both claimants and defendants. An independent commission would also be able to come closer to assuring uniform judgment across all claims rather than leaving it up to varying interpretations of state courts.³²⁷

Since the establishment of the Washington Conference Principles, museums which hold Nazi-era misappropriated works have continually tried to mischaracterize applicable policy and laws even though the official national position has been clear and constant over seventy years.³²⁸ In 1998, it was hoped that museums would willingly give up works of art in the face of valid claims. The limited review within this project of the judicial proceedings for Nazi-era restitution cases has revealed that despite testimony from someone as highly placed as Glenn Lowry that museums “have always been able to address conflicting ownership claims responsibly and ethically...[and]... there is no reason to believe that these long-standing professional practices will change,”³²⁹ they have continued to undermine the diplomatic efforts of the Washington Principles and they have not yet, to date, developed any process as efficient as what is provided by some of the European commissions. The current system, which depends on museums to select the way in which to adjudicate a fair solution for claims, does not provide much incentive for the museum to act objectively: they hold the more advantageous positions and are also interested parties. At the very least, and in lieu to date of any serious discussions of a national commission, if museums

³²⁶ Rowland, “Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences.” Prior to 1998, Austria was criticized for its evasive approach to restitution (ex:1996 Mauerbach Scandal). After the Washington Conference, Austria made major improvements in field of restitution and passed art restitution laws and established a government commission to review and research the art collections of every federal museum as well as an advisory committee to issue recommendations concerning the return of Nazi-era artworks.

³²⁷ Michael Franz, “The Limbach Commission: What Is It and Will Reforms Make a Difference?,” *Apollo Magazine* (September 26, 2016). Accessed 15, 2017. <https://www.apollo-magazine.com/the-limbach-commission-what-is-it-and-will-reforms-make-a-difference/>. Although commissions represent a preferable alternative dispute resolution process, they are not without their controversies as well. The Limbach Commission was set up in 2003 by the German government to mediate Nazi-looted art restitution disputes by making non-binding recommendations in disputes where both parties agree to the commission reviewing their case. It has issued 13 recommendations so far, in this instance it has been contrasted to the Austrian commission which, although not free of controversy, has addressed hundreds of claims in the same period. It has been criticized as incompetent, lacking transparency, requiring standardized procedure, not to mention rebuked for its failure, until recently, to appoint a Jewish member.

³²⁸ Kreder, “Analysis of the Holocaust Expropriated Art Recovery Act of 2016,” 21.

³²⁹ Lowry, “Archives | Financial Services Committee | U.S. House of Representatives.”

seriously committed to completing their provenance research and subsequently updated and revised their standards of due diligence, they would be able to avoid similar difficulties over ownership down the line, most notably when the deadline of the HEAR Act comes into force in 2027.³³⁰

The issue of restitution and its inadequate treatment in the United States has brought into scrutiny museum comportment, while also having an impact upon the public's willingness to place confidence in the museum in its role as trustee of works of art. According to scholar James Wood, if a museum fails to carefully define and conscientiously exercise its authority, it will fail the very public that has granted it authority and whom it serves, and who ultimately has the power to revoke it.³³¹ If the public's trust in a museum's authority ultimately derives from their being perceived as reinforcing the values found in egalitarian and democratic society, then moving forward, public confidence will depend on their the manner not only in which they collect, present and explain the cultural heritage they hold, but how they choose to support the new legal developments in Holocaust-Era restitution and how willing they are to consider the potential for non-adversarial, extra-legal procedures. As we have seen, MoMA is an institution that has become increasingly more complex and internationally involved over time, which means that it is politically implicated to an intense degree.³³² Undoubtedly, it has the capacity to further consolidate its position of influence in the museum system in the United States and abroad. However, since it is dangerous to assume that a place is guaranteed for museums like MoMA in the society of the future, they must take great care in nurturing professional virtues like integrity and accountability. After all, if their purpose is to be of service to society, then it is vital that they be genuinely responsive to their social environment as well as its changing needs and goals.

³³⁰ Bienkowski, "Authority and the Power of Place: Exploring the Legitimacy of Authorized and Alternative Voices in the Restitution Discourse," 21–22.

³³¹ Wood, "The Authority of American Museums," 104.

³³² Christine Sylvester, *Art/Museums: International Relations Where We Least Expect It* (Boulder: Paradigm Publishers, 2009), 3.

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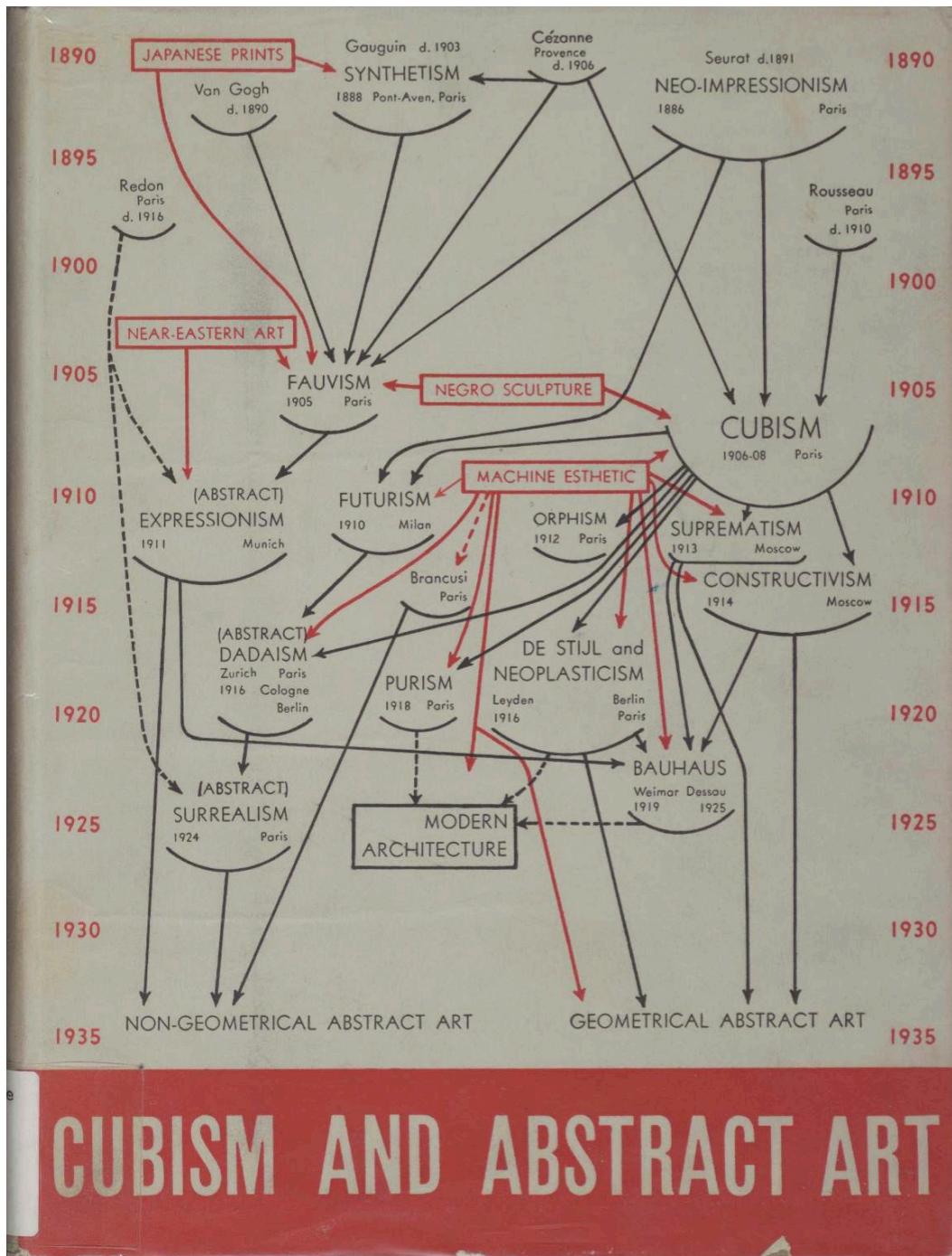


Figure 1: Museum of Modern Art, *Cubism and Abstract Art Chart*, 1936, Print, New York City, The Museum of Modern Art, www.moma.org/calendar/exhibitions/2748.



93 MATISSE: *The Blue Window*. About 1912. 51¼ x 35⅞ inches. Lent anonymously



270 LEHMBRUCK: *Kneeling Woman*. 1911. Cast stone, 69½ inches high. Lent anonymously
Lehbruck's finest work and one of the masterpieces of modern sculpture. Lehbruck's mature work suggests the elongated elegance and spirituality of late Gothic sculpture.



126 KIRCHNER: *The Street*. 1913. 46½ x 35 inches. Lent anonymously
Ernst Ludwig Kirchner. German, born 1880. Died Switzerland, 1933. Leader of *Brücke* group, Dresden, 1905. His art is now officially forbidden in Germany.

Figure 2: From The Museum of Modern Art, *Art in our Time: 10th Anniversary Exhibition: Painting, Sculpture, Prints* (May 10-September 30, 1939). New York City: The Museum of Modern Art, 1939.



Figure 3: Ernst Ludwig Kirchner, *Sand Hills at Engadine*, 1917-18, Oil on canvas. New York City, Museum of Modern Art, https://www.moma.org/s/ge/collection_ge/objbyartist/objbyartist_artid-3115_tech-6_role-1_sov_page-3.html.



Figure 4: Egon Schiele, *Portrait of Wally*, 1912, Oil on canvas. Vienna, Leopold Museum, <http://www.leopoldmuseum.org/en/leopoldcollection/masterpieces/33>.



Figure 5: Pablo Picasso, *Le meneur de cheval nu*, 1905-1906, Oil on canvas, New York City, The Museum of Modern Art, <https://www.moma.org/collection/works/79994>.



Figure 6: Pablo Picasso, *Le Moulin de la Galette*, 1900, Oil on canvas. New York City, Solomon R. Guggenheim Museum, <https://www.guggenheim.org/artwork/3411>.



Figure 7: George Grosz, *The Poet Hermann-Neisse with Cognac*, 1927, Oil on canvas. New York City, Museum of Modern Art, https://www.moma.org/learn/moma_learning/george-grosz-the-poet-max-herrmann-neisse-1927.



Figure 8: George Grosz, *Self-Portrait with Model*, 1928, Oil on canvas. New York City, Museum of Modern Art, <https://www.moma.org/collection/works/79955>.



Figure 9: George Grosz, *Republican Automatons*, 1920, Watercolor and pencil on paper. New York City, Museum of Modern Art, Advisory Committee Fund, <https://www.moma.org/collection/works/34169>.



Figure 10: Vincent Van Gogh, *Les Bêcheurs*, 1889, Oil on paper lined onto canvas. Amsterdam, Stedelijk Museum Amsterdam, <http://www.stedelijk.nl/en/artwork/606-les-becheurs>.



Figure 11: Paul Gauguin, *Street Scene in Tahiti*, 1891, Oil on canvas. Wikimedia Commons.

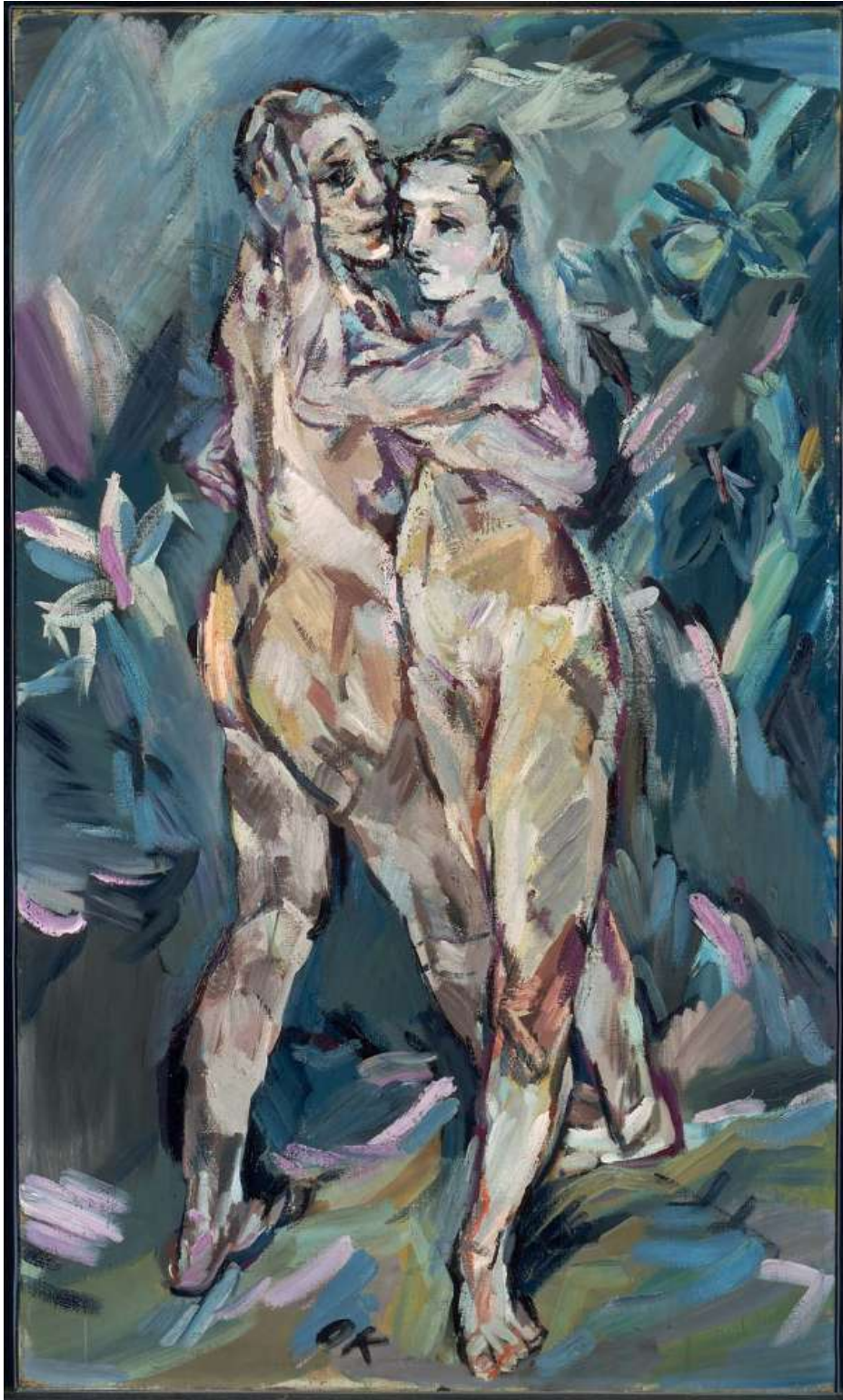


Figure 12: Oskar Kokoschka, *Two Nudes (Lovers)*, 1913, Oil on canvas, Boston, Museum of Fine Arts Boston, <http://www.mfa.org/collections/object/two-nudes-lovers-34173>.

Bibliography

- “1998 The Washington Conference on Holocaust Era Assets.” Washington, DC: U.S. Department of State, U.S. Holocaust Memorial Museum, December 3, 1998.
<https://fcit.usf.edu/holocaust/resource/assets/index.HTM>.
- “About - Commission for Art Recovery.” Accessed June 3, 2017.
<http://www.commartrecovery.org/about>.
- “About Us / Our Mission.” *World Jewish Restitution Organization*. Accessed July 22, 2017.
<http://wjro.org.il/about-wjro/about-us-our-mission/>.
- Abungu, George. “The Declaration: A Contested Issue.” *ICOM News* 57, no. 1 (2004): 4–5.
- “A Deontological Approach to Art Museums and the Public Trust.” In *Whose Muse? Art Museums and the Public Trust*, 129–50. Princeton, New Jersey: Princeton University Press, 2004.
- Akinsha, Konstantin. “The Mauerbach Scandal.” *ARTnews*, January 2, 2009.
<http://www.artnews.com/2009/02/01/the-mauerbach-scandal/>. Accessed August 15, 2017.
- “Alfred Hamilton Barr Papers [mf 1933:1208-1209].” Archives of American Art, Smithsonian Institution, n.d.
- “Alfred H. Barr, Jr. Papers [IV.B.82; Mf 3262:235].” The Museum of Modern Art Archives, New York, n.d.
- “Art Museums and the Identity and Restitution of Works Stolen by the Nazis.” Association of Art Museum Directors, May 2017. https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf. Accessed August 15, 2017.
- “Art Museums by the Numbers 2016.” American Association of Museum Directors, January 9, 2017.
<https://aamd.org/our-members/from-the-field/art-museums-by-the-numbers-2016>. Accessed August 15, 2017.
- Barron, Stephanie, Sabine Eckmann, and Matthew Affron. *Exiles + Emigrés: The Flight of European Artists from Hitler*. Los Angeles, California: Los Angeles County Museum of Art, 1997.
- Barron, Stephanie, and Peter Guenther. “*Degenerate Art*”: *The Fate of the Avant-Garde in Nazi-Germany*. Los Angeles, California: Los Angeles County Museum of Art, 1991.
- Bazyler, Michael. *Holocaust Restitution : Perspectives on the Litigation and Its Legacy*. New York: New York University Press, 2006.
- Besterman, Tristram. “Crossing the Line: Restitution and Cultural Equity.” In *Museums and Restitution : New Practices, New Approaches*, 19–36. Farham: Routledge, 2014.
- Bienkowski, Piotr. “Authority and the Power of Place: Exploring the Legitimacy of Authorized and Alternative Voices in the Restitution Discourse.” In *Museums and Restitution : New Practices, New Approaches*, edited by Louise Tythacott and Kostas Arvanitis, 37–52. Farham: Routledge, 2014.
- Boroff, Philip, and Lindsay Pollock. “Judge Slams MoMA, Guggenheim on Secret Holocaust Art Agreement.” *Bloomberg News*, June 18, 2009.
<http://www.commartrecovery.org/docs/Judge%20Slams%20MoMA,%20Guggenheim%20on%20Secret%20Holocaust%20Art%20Agreement%20-%20Bloomberg.pdf>. Accessed August 15, 2017.
- Boyd, Willard. “Museums as Centers of Controversy.” *Daedalus* 128, no. 3 (1999): 185–228.
- Bradsher, Greg. “Documenting Nazi Plunder of European Art.” *The Record*, November 1997.
<https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html>. Accessed August 15, 2017.
- . “Monuments Men and Nazi Treasures.” *Prologue* 45, no. 2 (Summer 2013): 12–21.
- Brettell, Richard. *Modern Art: 1851-1929 Capitalism and Representation*. Oxford: Oxford University Press, 2006.
- Burns, Charlotte. “MoMA Returns Expressionist Landscape after Decade-Long Detective Case.” *The Art Newspaper*, November 16, 2015. <http://theartnewspaper.com/news/museums/moma-returns-expressionist-landscape-after-decade-long-detective-case/>. Accessed August 15, 2017.

- Cachon, Sophie. "Que S'est-Il Vraiment Passé Au 21 Rue La Boétie, Dans La Mythique Galerie Rosenberg?" *Sortir Paris*, April 27, 2017. <http://www.telerama.fr/sortir/que-s-est-il-vraiment-passe-au-21-rue-la-boetie-dans-la-mythique-galerie-rosenberg,155071.php>. Accessed August 15, 2017.
- Campbell, Tom. "Democratic Aspects of Ethical Positivism." In *Judicial Power, Democracy, and Legal Positivism*, edited by Jeffrey Goldsworthy and Tom Campbell. New York: Routledge, 2017.
- Campfens, Evelien. "Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments." The Hague: Eleven International Publishing, 2015. http://www.restitutiecommissie.nl/sites/default/files/Fair_and_Just_Solutions-web-compressed.pdf. Accessed August 15, 2017.
- Carvajal, Doreen. "Dispute Over Bill to Protect Art Lent to Museums." *The New York Times*, May 21, 2012. <http://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to-museums.html>. Accessed August 15, 2017.
- "Chamberlain Papers (1939-1945), Folder 13, 176." The Museum of Modern Art Archives, New York, n.d.
- "Chamberlain Papers (1939-1945), Folder 14, 199." The Museum of Modern Art Archives, New York, n.d.
- "Chamberlain Papers (1939-1945), Folder 14, 235." The Museum of Modern Art Archives, New York, n.d.
- Chartering and registration of museums and historical societies with collections, New York State Education Law § 3.27 (n.d.).
- "Code of Ethics for Museums." *American Alliance of Museums*. Accessed June 2, 2017. <http://www.aamus.org/resources/ethics-standards-and-best-practices/code-of-ethics>.
- Cohan, William. "MoMA's Problematic Provenances." *ARTnews*, December 2011.
- Cohen, Patricia. "Suit Against MoMA Highlights Time-Limit Rule in Nazi Looting Claims." *The New York Times*, August 23, 2011. <http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html>. Accessed August 15, 2017.
- "Collections Management Policy." *Museum of Modern Art*, October 5, 2010. https://www.moma.org/momaorg/shared/pdfs/docs/explore/CollectionsMgmtPolicyMoMA_Oct10.pdf. Accessed August 15, 2017.
- Conference on Jewish Material Claims Against Germany, and World Jewish Restitution Organization. "Holocaust-Era Looted Art: A World-Wide Preliminary Overview." Holocaust Era Assets Conference. Terezin, Prague, 2009. <http://www.claimscon.org/forms/prague/looted-art.pdf>.
- Cuno, James. "Art Directors in Conversation." In *Imagining the Future of the Museum of Modern Art*. New York: Museum of Modern Art, 1998.
- . *Whose Culture? The Promise of Museums and the Debate over Antiquities*. Princeton, New Jersey: Princeton University Press, 2012.
- Curtis, Neil. "Universal Museums, Museum Objects and Repatriation: The Tangled Stories of Things." *Museum Management and Curatorship* 21, no. 2 (2006): 117–27.
- Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 (E.D. Mich. March 31, 2007).
- Dobrzynski, Judith. "Judge Rejects Seizure of 2 Schieles." *The New York Times*, May 14, 1998. <http://www.nytimes.com/1998/05/14/arts/judge-rejects-seizure-of-2-schieles.html>. Accessed August 15, 2017.
- . "The Zealous Collector - A Special Report: A Singular Passion For Amassing Art, One Way or Another." *The New York Times*, December 24, 1997. <http://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html>. Accessed August 15, 2017.
- Edson, Gary. *Museum Ethics: Theory and Practice*. Hoboken: Taylor & Francis Group, 1997.
- "Executive Order 12958." Federal Register vol.60, no.76, April 17, 1995. <https://www.gpo.gov/fdsys/pkg/FR-1995-04-20/pdf/95-9941.pdf>. Accessed August 15, 2017.

- “Exhibition ‘Who Do These Paintings Belong To?’ in France and Israel.” *Commission for the Compensation of Victims of Spoliation*, August 24, 2008. <http://www.civs.gouv.fr/news/exhibition-who-do-these-paintings-belong-to-in-france-and-israel/>. Accessed August 15, 2017.
- Feliciano, Hector. *The Lost Museum*. New York: Basic Books, 1997.
- Frankel, Simon, and Ethan Forrest. “Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense.” *Journal Of Art, Technology & Intellectual Property Law* 23, no. 2 (2013): 279–337.
- Franz, Michael. “The Limbach Commission: What Is It and Will Reforms Make a Difference?” *Apollo Magazine*, September 26, 2016. <https://www.apollo-magazine.com/the-limbach-commission-what-is-it-and-will-reforms-make-a-difference/>. Accessed August 15, 2017.
- Frehner, Matthias, and Daniel Spanke. *Modern Masters: “Degenerate” Art at the Kunstmuseum Bern*. Munich: Prestel, 2016.
- Fry, Varian. *Surrender on Demand*. New York: Random House, c1945.
- Graefe, Emily. “The Conflicting Obligations of Museums Possessing Nazi-Looted Art.” *Boston College Law Review* 51, no. 2 (March 2010): 473–515.
- Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473 (S.D.N.Y. 2010) (n.d.).
- Guilbaut, Serge. *How New York Stole the Idea of Modern Art: Abstract Expressionism, Freedom and the Cold War*. Chicago: University of Chicago Press, 1983.
- “Gurlitt Case Overview.” Accessed May 26, 2017. <http://www.lootedart.com/R4O4QY486811>.
- Hickley, Catherine. “After 26 Years, Munich Settles Case Over a Klee Looted by the Nazis.” *The New York Times*, July 26, 2017. <https://www.nytimes.com/2017/07/26/arts/design/after-26-years-munich-settles-case-over-a-klee-looted-by-nazis.html>. Accessed August 15, 2017.
- Hirschhorn, Paul. “Museum Wins Dispute over Art Allegedly Stolen by Nazis.” *CNN*, September 21, 1999. <http://www.cnn.com/US/9909/21/looted.art/>. Accessed August 15, 2017.
- “History - Claims Conference.” Accessed June 3, 2017. <http://www.claimscon.org/about/history/>.
- Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, 1621 USC (2016).
- Ireland, Tracy, and John Schofield. *The Ethics of Cultural Heritage*. Ethical Archaeologies: The Politics of Social Justice, 4. New York: Springer, 2015.
- Jungblut, Marie-Paule. *Looted!: Current Questions Regarding the Cultural Looting by the National Socialists in Europe*. Luxembourg: Musée d’histoire de la ville de Luxembourg, 2008.
- Kaplan, Isaac. “New Bill Passed Will Aid the Recovery of Nazi-Looted Art.” *Artsy*, December 13, 2016. <https://www.artsy.net/article/artsy-editorial-new-bill-passed-will-aid-the-recovery-of-nazi-looted-art>. Accessed August 15, 2017.
- Katz, Philip. “Service Despite Stress: Museum Attendance and Funding in a Year of Recession.” American Association of Museums, February 2010. <http://www.aam-us.org/docs/research/acme-2010.pdf?sfvrsn=2>. Accessed August 15, 2017.
- Kimmelman, Michael. “Museums in a Quandary: Where Are the Ideals?” *The New York Times*, August 26, 2001. <http://www.nytimes.com/2001/08/26/arts/art-architecture-museums-in-a-quandary-where-are-the-ideals.html?pagewanted=all>. Accessed August 15, 2017.
- Kiwara-Wilson, Salome. “Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories.” *DePaul Journal of Art, Technology & Intellectual Property Law* 23, no. 2 (2013): 375–425.
- Knöfel, Ulrike, and Marion Kraske. “Stealing Beauty: Dispute Rages Over Austria’s Looted Art.” *Spiegel Online*, April 4, 2008. <http://www.spiegel.de/international/europe/stealing-beauty-dispute-rages-over-austria-s-looted-art-a-545392.html>. Accessed August 15, 2017.
- Kreder, Jennifer Anglim. “Analysis of the Holocaust Expropriated Art Recovery Act of 2016.” *Chapman Law Review* 20, no. 1 (2017): 1–24.
- . “Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation.” *Kansas Law Review* 61, no. 1 (December 2012): 75–137.
- . “Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling toward the Supreme Court.” *University of Pennsylvania Law Review* 159, no. 253 (2010): 252–71.

- Lowry, Glenn. "Archives | Financial Services Committee | U.S. House of Representatives," February 12, 1998. <http://archives.financialservices.house.gov/banking/21298low.shtml>. Accessed August 15, 2017.
- Marquis, Alice Goldfarb. *Alfred H. Barr, Jr.: Missionary for the Modern*. Chicago: Contemporary Books, 1989.
- Martin, Douglas. "S. Lane Faison Jr., 98, Dies; Art Historian and Professor." *The New York Times*, November 14, 2006. <http://www.nytimes.com/2006/11/14/obituaries/14faison.html>. Accessed August 15, 2017.
- Martinez, Alanna. "Museums Respond to Biting Report on Nazi-Looted Art." *The Observer*, February 7, 2015. <http://observer.com/2015/07/museums-respond-to-biting-report-on-nazi-looted-art/>. Accessed August 15, 2017.
- Menzel v. List, 49 Nisc.2d (N.Y. Sup. Ct. 1966).
- Minovich, Alexandra. "The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time." *Columbia Journal of Law & Arts* 349, no. 27 (2004): 349–83.
- "MoMA Hires Katzenbach to Assess Restitution Claim." *ARTnews*, January 31, 2006. <http://www.artnews.com/2006/01/31/moma-hires-katzenbach-to-assess-restitution-claim/>. Accessed August 15, 2017.
- "MoMA.org | Interactives | Exhibitions | 2008 | The Museum and the War Effort: Artistic Freedom and Reporting for 'The Cause.'" Accessed May 28, 2017. <https://www.moma.org/interactives/exhibitions/2008/wareffort/>.
- "Mr. Earl A. Powell, III: Director, National Gallery of Art, United States." In "*Chapter 4: Nazi-Confiscated Art Issues*" of the *Washington Conference On Holocaust-Era Assets*, 441–572, 1998. <http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf>. Accessed August 15, 2017.
- Muller, Melissa, and Monika Tatzkow. *Lost Lives, Lost Art: Jewish Collectors, Nazi Art Theft and the Quest for Justice*. New York: Vendome, 2010.
- Murawska-Muthesius, Katarzyna, and Piotr Piotrowski. "Introduction." In *From Museum Critique to the Critical Museum*, 1–12. London: Routledge, 2016.
- Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d (D. Mass. 2010).
- Museum of Modern Art and Solomon R. Guggenheim Foundation v. Schoeps, 549 F.2d 543 (S.D.N.Y. 2008).
- "Museums for the New Millennium: A Symposium for the Museum Community," Report of a Symposium Held 5-7 September 1996, Center for Museum Studies, Smithsonian Institution, in Association with the American Association of Museums." Washington, DC: Center for Museum Studies, Smithsonian Institution, n.d.
- "Museum Standards and Best Practices - Public Trust and Accountability." *The American Alliance of Museums*. Accessed June 11, 2017. <http://www.aam-us.org/resources/ethics-standards-and-best-practices/public-trust>.
- "Nazi-Era Provenance Internet Portal." Accessed July 22, 2017. <http://www.nepip.org/>.
- "Nazi-Era Stolen Art and U.S. Museums: A Survey." Claims Conference and the World Jewish Restitution Organization, July 25, 2006. <http://art.claimscon.org/wp-content/uploads/2014/04/U.S.-Museum-Survey-report-07-25-06.pdf>.
- "New York Museum Returns Painting Stolen by Nazis after Decade-Long Battle." *The Telegraph*, November 17, 2015. <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/12001388/New-York-museum-returns-painting-stolen-by-Nazis-after-decade-long-battle.html>. Accessed August 15, 2017.
- "O Canada! Where Did You Go Wrong?" *Plundered Art: A Perspective from the Holocaust Art Restitution Project*, September 13, 2012. <http://plundered-art.blogspot.ca/search?q=glenn+lowry>. Accessed August 15, 2017.
- Ohlinger, Marie Elisabeth. "A Balancing Act: Max Beckmann and Post-War American Cultural Politics." Concordia University, 2016.

- Patterson Belknap Webb & Tyler LLP. "New York Board of Regents Adopts New Deaccessioning Rules." *Lexology*, August 28, 2012. <http://www.lexology.com/library/detail.aspx?g=569f91f1-5f52-4f6e-9025-539f1809f2d8>. Accessed August 15, 2017.
- "Paul J. Sachs Correspondence Archive." *The Museum of Modern Art Archives*, 1998. <https://www.moma.org/learn/resources/archives/EAD/Sachs/>. Accessed August 15, 2017.
- "Paul Klee. Introducing the Miracle. 1916." *The Museum of Modern Art*. Accessed July 22, 2017. <https://www.moma.org/collection/works/79614?locale=en>.
- Pearce, Susan. *Objects, and Collections: A Cultural Study*. Washington, DC: Smithsonian Institution Press, 1993.
- Peresztegi, Agnes. S. 2763, the Holocaust Expropriated Art Recovery Act – Reuniting Victims with Their Lost Heritage, § Senate Committee on the Judiciary Subcommittees on the Constitution and Oversight, Agency Action, Federal Rights and Federal Courts (2016). https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage.
- Petropoulos, Jonathan. "Bridges from the Reich: The Importance of Émigré Art Dealers as Reflected in the Case Studies of Curt Valentin and Otto Kallir-Nirenstein." *Kunstgeschichte Open Peer Reviewed Journal*, 2011, 1–77.
- "Prague Holocaust Era Assets Conference: Terezin Declaration." Prague, Czech Republic, June 30, 2009.
- "Provenance in the World War II Era, 1933 - 1945." *Smithsonian*. Accessed August 20, 2017. <http://provenance.si.edu/jsp/prep.aspx>.
- "Provenance Research Project." *Museum of Modern Art*. Accessed September 14, 2016. <https://www.moma.org/collection/provenance>.
- "R+P, Series 2, Folder 9," The Museum of Modern Art, New York.
- "Recent Acquisitions." *The National Gallery of Art*. Accessed July 27, 2017. https://www.nga.gov/content/ngaweb/Collection/recent_acquisitions.html.html.
- "Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims." World Jewish Restitution Organization, June 2015.
- "Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II-Era (1933 – 1945)." American Association of Museum Directors, June 4, 1998. <https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf>.
- Rowland, David. "Have U.S. Museums Lived up to the Promise of the Washington Conference? The Case for the Mandatory Referral of Nazi-Era Art Claims to a Neutral Art Commission?" *Rowland & Petroff: Attorneys at Law*, 2013, 149–58.
- . "Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences." *Kunst Und Recht* 3, no. 4 (2013): 83–93. doi:<https://doi.org/10.15542/KUR/2013/3-4/2>.
- Russell, Lynes. *Good Old Modern; An Intimate Portrait of the Museum of Modern Art*. New York: Atheneum, 1973.
- Sanchez, Juan Pablo. "How the Parthenon Lost Its Marbles." *National Geographic*, April 2017. <http://www.nationalgeographic.com/archaeology-and-history/magazine/2017/03-04/parthenon-sculptures-british-museum-controversy/>. Accessed August 15, 2017.
- Schoenholz Bee, Harriet, and Michelle Elligott. *Art in Our Time: A Chronicle of the Museum of Modern Art*. New York: Museum of Modern Art, 2004.
- Schoeps v. Museum of Modern Art et al (S.D.N.Y. February 2, 2009).
- Schoeps v. The Museum of Modern Art and the Solomon R. Guggenheim Foundation, Memorandum Order (n.d.). Accessed July 25, 2017.
- Schubert, Jessica. "Prisoners Of War: Nazi-Era Looted Art and the Need For Reform in the United States." *Touro Law Review* 30, no. 3 (2014): 675–95.
- Schuster, Peter-Klaus. "The Treasures of World Culture in the Public Museum." *ICOM News* 57, no. 1 (2004): 4–5.

- Siegel, Katy. *Since '45: America and the Making of Contemporary Art*. London: Reaktion Books, 2011.
- Skinner, Katharine. "Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums." *Vanderbilt Journal of Entertainment & Technology Law* 15, no. 3 (2013): 673–712.
- Slany, William Z., and Stuart Eizenstat. "U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury: Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II." Washington, DC: Supt. of Docs, U.S. Gov. Printing Office, 1998.
- Spiegler, Howard. "Portrait of Wally: The U.S. Government's Role in Recovering Holocaust Looted Art." In *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, edited by Michael Bazylar and Roger Alford. New York: New York University Press, 2006.
- "Spoliation Case Settled." *The British Museum*. Accessed June 23, 2017. http://www.britishmuseum.org/about_us/news_and_press/press_releases/2013/spoliation_case_settled.aspx.
- "Statement from the Museum of Modern Art and the Solomon R. Guggenheim Foundation Regarding Claims on Two Picasso Paintings in Their Collections." The Museum of Modern Art & The Guggenheim Foundation, December 7, 2007. http://press.moma.org/wp-content/press-archives/news/Schoeps_FinalLetter.pdf.
- Stavitsky, Gail. "Americans and the Armory Show: An Introduction." *Confrontation* 113 (2013): 118–41.
- Sylvester, Christine. *Art/Museums: International Relations Where We Least Expect It*. Boulder: Paradigm Publishers, 2009.
- Tait, Allison. "Publicity Rules for Public Trusts." *Cardozo Arts and Entertainment Law Journal* 33, no. 2 (2015): 421–72.
- Tam, Sara. "Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust." *Fordham Urban Law Journal* 39, no. 3 (2012): 850–901.
- The Association of Art Museum Directors. "Resolutions of Claims for Nazi-Era Cultural Assets." Accessed June 2, 2017. <https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info>.
- "The Austrian Art Restitution Law." Commission for Art Recovery. Accessed July 27, 2017. <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf>.
- "The Declaration on the Importance and Value of the Universal Museum. (DIVUM)." British Museum, London, 2002.
- "The Museum of Modern Art Restitutes Ernst Ludwig Kirchner's Sand Hills in Engadine to the Heirs of Max Fischer." The Museum of Modern Art, New York, November 16, 2015. http://press.moma.org/wp-content/files_mf/moma_kirchner_pressrelease.pdf. Accessed August 15, 2017.
- "The OSS and Project SAFEHAVEN — Central Intelligence Agency." Accessed May 26, 2017. <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/summer00/art04.html>.
- "The Washington Conference on Holocaust-Era Assets." Accessed June 2, 2017. <https://fcit.usf.edu/holocaust/resource/assets/index.HTM>.
- Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (2006).
- Tythacott, Louise, and Kostas Aryanitis. *Museums and Restitution: New Practices, New Approaches*. Farnham, Surrey: Ashgate, 2014.
- "Unlawful Appropriation of Objects During the Nazi Era." Accessed June 2, 2017. <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era>.
- "US Court Denies Germany's Motion to Dismiss Lawsuit Brought by Heirs of Jewish Art Dealers Persecuted by Nazis." *Artforum*, April 4, 2017. <https://www.artforum.com/news/id=67588>.

- “U.S. Museums Fail to Address Nazi-Era Stolen Art Claims.” *Claims Conference/WRJO - Looted Art and Cultural Property Initiative*. Accessed June 2, 2017. <http://art.claimscon.org/our-work/advocacy/u-s-museums-fail-to-address-nazi-era-stolen-art-claims/>.
- U.S. v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem, Opinion and Order, 663 F.2d 232 (S.D.N.Y. 2009).
- Varnadoe, Kirk. “The Evolving Torpedo: Changing Ideas of the Collection of Painting and Sculpture of the Museum of Modern Art.” In *The Museum of Modern Art at Mid-Century: Continuity and Change*, edited by Barbara Ross. New York: Museum of Modern Art, 1995.
- Vincent, Isabel. “New York Museums Have Not Returned Nazi-Seized Art.” *The New York Post*, October 7, 2012. <http://nypost.com/2012/10/07/new-york-museums-have-not-returned-nazi-seized-art/>. Accessed August 15, 2017.
- Vogel, Carol. “Two Museums Go to Court Over the Right to Picassos.” *The New York Times*, December 8, 2007. <http://www.nytimes.com/2007/12/08/arts/design/08muse.html>. Accessed August 15, 2017.
- Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Circuit 2009).
- Whiting, Cecile. *Antifascism in American Art*. New Haven: Yale University Press, 1989.
- Willette, Jeanne. “Breaking the Begats: An Anti-Teleological Approach to Alfred Barr.” Pittsburgh, Pennsylvania, 2015.
- Wood, James. “The Authority of American Museums.” In *Whose Muse? Art Museums and the Public Trust*, edited by James Cuno and Neil MacGregor, 103–28. Princeton, NJ: Princeton University Press, 2004.
- Yeide, Nancy, Amy Walsh, and Konstantin Akinsha. *The AAM Guide to Provenance Research*. Washington, DC: American Association of Museums, 2001.

APPENDICES

Appendix A: The Washington Principles

Policies :

Washington Conference Principles on Nazi-Confiscated Art 3 December 1998

Title

Washington Conference Principles on Nazi-Confiscated Art

Date

3 December 1998

Description

On 3 December 1998 the 44 governments participating in the Washington Conference on Holocaust-Era Assets endorsed the following principles for dealing with Nazi-confiscated art.

Principles

In 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.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. 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.
4. 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.
5. 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.
6. Efforts should be made to establish a central registry of such information.
7. 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.
8. 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 expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. 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.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Source

Proceedings of the Washington Conference on Holocaust-Era Assets, November 30-December 3 1998, Washington: Government Printing Office 1999.

Also available online at <http://fcit.usf.edu/holocaust/resource/assets/index.HTM>, accessed 2 April 2014.

Appendix B: The Declaration on the Importance and Value of Universal Museums

Declaration on the Importance and Value of Universal Museums

The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

Over time, objects so acquired – whether by purchase, gift, or partage – have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work's original context, but we should not lose sight of the fact that museums too provide a valid and valuable context for objects that were long ago displaced from their original source. The universal admiration for ancient civilizations would not be so deeply established today were it not for the influence exercised by the artifacts of these cultures, widely available to an international public in major museums. Indeed, the sculpture of classical Greece, to take but one example, is an excellent illustration of this point and of the importance of public collecting. The centuries-long history of appreciation of Greek art began in antiquity, was renewed in Renaissance Italy, and subsequently spread through the rest of Europe and to the Americas. Its accession into the collections of public museums throughout the world marked the significance of Greek sculpture for mankind as a whole and its enduring value for the contemporary world. Moreover, the distinctly Greek aesthetic of these works appears all the more strongly as the result of their being seen and studied in direct proximity to products of other great civilizations.

Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.

Signed by the Directors of:

The Art Institute of Chicago; Bavarian State Museum, Munich (Alte Pinakothek, Neue Pinakothek); State Museums, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art; Louvre Museum, Paris; The Metropolitan Museum of Art, New York; The Museum of Fine Arts, Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; Whitney Museum of American Art, New York; The British Museum, London

From the British Museum Web site:

www.thebritishmuseum.ac.uk/newsroom/current2003/universalmuseums.html

Appendix C: Schoeps v. Museum of Modern Art & The Solomon R. Guggenheim Foundation (2009) – Settlement Conference

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1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF NEW YORK
 -----x

3 JULIUS H. SCHOEPS, EDELGARD
 4 VON LAVERGNE-PEGUILHEN, and
 FLORENCE KESSELSTATT,,
 5 Plaintiffs,

6 v. 07 Civ. 11074 (JSR)

7 THE MUSEUM OF MODERN ART and
 8 THE SOLOMON R. GUGGENHEIM
 FOUNDATION,
 9 Defendants. Settlement Conference

10 -----x

11 New York, N.Y.
 12 February 2, 2009
 9:35 a.m.

13 Before:

14 HON. JED S. RAKOFF
 15 District Judge

16

17 APPEARANCES

18

19 BRESSLER, AMERY & ROSS P.C. (NYC)
 Attorneys for Plaintiffs
 20 BY: DAVID G. SMITHAM
 DAVID H. PIKUS
 21

22 BYRNE GOLDENBERG & HAMILTON PLLC
 Attorneys for Plaintiffs
 23 BY: JOHN J. BYRNE
 THOMAS J. HAMILTON
 24
 25

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1 dismissal of this case with prejudice?

2 MR. BYRNE: Your Honor --

3 THE COURT: Is the answer yes or no, Mr. Byrne?

4 MR. BYRNE: Yes.

5 THE COURT: Thank you. You may be seated.

6 Mr. Joseph, same question.

7 MR. JOSEPH: Yes, your Honor.

8 THE COURT: What are the terms of the settlement?

9 MR. JOSEPH: If I may, your Honor?

10 THE COURT: Yes.

11 MR. JOSEPH: The terms of the settlement are that for
12 a sum certain, which confidentiality is part of the settlement,
13 there will be complete peace between the museums and the
14 Mendelssohn-Bartholdy and Lavergne-Peguilhen heirs. The
15 settlement is not documented because we don't have signatures
16 from all of the heirs. We are assured that we have full
17 authority from the plaintiffs, so that all claims between these
18 parties, so we don't have other heirs coming out of the
19 woodwork, are involved.

20 THE COURT: And the paintings remain in the --

21 MR. JOSEPH: The paintings remain in the museums.

22 THE COURT: I'm interested that portions of this are
23 confidential. I'm looking at the letter I received from Mr.
24 Davis on January 15, 2009, just a couple of weeks ago. "The
25 museums welcome to fact that this trial is open to the public,

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1 (Case called)

2 THE CLERK: Counsel, please state your names for the
3 record.

4 MR. BYRNE: John Byrne for the plaintiffs, with Thomas
5 Hamilton, David Pikus, and David Smitham.

6 THE COURT: Good morning.

7 MR. JOSEPH: Good morning, your Honor. Gregory Joseph
8 for the museums. With me are Mr. Evan Davis and Mr. Lawrence
9 Friedman from the Cleary Gottlieb firm and Pamela Jarvis, my
10 partner.

11 THE COURT: This case was set for trial to begin
12 today. Late on Friday, in fact on Friday evening, my law clerk
13 received a telephone message from counsel saying they had
14 settled the case. There was some correspondence, and then I
15 received on Saturday a letter, signed by Mr. Byrne and Mr.
16 Joseph, stating, "This is to advise the Court pursuant to your
17 Honor's individual rule 10 that the above case has been finally
18 settled and that the Court may dismiss the case with
19 prejudice."

20 This in form is not, I think, quite what Rule 41
21 contemplates. I think it's close enough to constitute a
22 stipulation of the parties under Rule 41 of the Federal Rules
23 of Civil Procedure, but I want to be absolutely sure.

24 First, Mr. Byrne, with full authority from your
25 clients, have you and they entered into an unconditional

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1 including to members of the press. The museums are and remain
2 committed to transparency in their actions, and these
3 proceedings are no exception."

4 It's hard for me to see how keeping any aspect of the
5 settlement confidential is in accordance with the public
6 interest.

7 MR. JOSEPH: We are, of course, in the Court's hands.
8 Let me suggest, your Honor, that the museums were fully
9 prepared to begin trial today and wanted all of the facts to
10 come out. The facts will not come out, because we have agreed
11 on a settlement. A settlement can give rise to an inference
12 which is unwarranted on the part of the public.

13 The fact of settlement is not being hidden. The fact
14 that there is complete accord is not being hidden. We are not
15 trying to hide anything. But the dollar amount is something
16 which we think is commonly and appropriately a matter that
17 remains in confidence.

18 THE COURT: I don't know that this is the ordinary
19 case. The museums brought this case with very loud assertions
20 that the plaintiffs' claims were without merit, that their
21 ownership of these paintings was good and solid, and that they
22 were in effect being extorted, and they were prepared to call
23 the bluff of plaintiffs' counsel.

24 Plaintiffs' counsel with equal fervor asserted that
25 these two very distinguished New York institutions had acquired

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1 obligated to accept that dismissal.

2 With respect to keeping the terms of the settlement
3 confidential, I will think about that. I would urge the
4 parties to think about their public obligations in this
5 lawsuit.

6 We have one other matter, which is costs under local
7 rule 47.1. That rule, as I advised counsel in a letter over
8 the weekend, indicates that where, as here, a case is settled
9 and the Court is advised of the settlement after noon on the
10 prior business day, which was Friday, then the Court in its
11 discretion may assess the parties or counsel with the cost of
12 one day's attendance of the jury, a modest sum but still one
13 that serves an educative purpose if nothing else.

14 Let me hear from counsel if they oppose the assessment
15 of those costs.

16 MR. JOSEPH: If I may, your Honor?

17 THE COURT: Yes.

18 MR. JOSEPH: There were initial settlement discussions
19 before my firm was involved in the case in August. After your
20 Honor entered the summary judgment order, there was a
21 discussion between Mr. Davis and Mr. Byrne. The museums had
22 made an offer back in August which hadn't been responded to,
23 and an invitation was invited at that time, which had been
24 perhaps the first few days of January, shortly after the order
25 entered.

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1 these paintings or had been bequeathed these paintings under
2 circumstances that should have made them aware that their
3 ownership was suspect and that the evil of Nazi duress had
4 played a material part in the transfer of these paintings from
5 the original owner.

6 The public surely would want to know now and forever
7 which of those diametrically different views was true, and the
8 great crucible of a trial would have made that known. Instead,
9 what we are left with is a settlement that each side will
10 undoubtedly spin in favor of their positions and the public
11 will remain uncertain as to what the truth is in this important
12 case.

13 The museums surely, as quasi-public institutions, have
14 a responsibility, one that I think was well captured in Mr.
15 Davis's letter that I just read from. Plaintiffs' counsel for
16 their part, in making an accusation so serious and invoking the
17 weight of history on their behalf, have a responsibility to the
18 public as well, maybe not in law but in simple justice.

19 I find it extraordinarily unfortunate that the public
20 will be left without knowing what the truth is. However, rule
21 41 of the Federal Rules of Civil Procedure and the case law
22 thereunder makes it crystal clear that when the parties to a
23 civil lawsuit, a private civil action, enter into a binding
24 settlement and stipulation that the case is to be dismissed
25 with prejudice and without any conditions, this Court is

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1 this case, and that notwithstanding the parties' repeated
2 invocations of the public's interest throughout this case.
3 Nevertheless, I have no doubt about the credibility of counsel
4 in this case, so on the representations just made, I will not
5 impose costs.

6 I think on the issue of whether the settlement should
7 remain private, it probably makes sense, unless counsel
8 disagree, for the parties to, as soon as it is signed, send me
9 a copy of it, and I will keep it under seal until I have had a
10 chance to look at it. It doesn't have to be filed publicly.
11 If I determine that it is appropriate and within my power to
12 make it public, I will convene a conference with counsel so
13 that they may be heard on that further, if that's the Court's
14 inclination.

15 Any problems with that?

16 MR. JOSEPH: No, your Honor. Thank you.

17 MR. BYRNE: No, your Honor. In fact, that is related
18 to an item that I wanted to raise. Does that mean that the
19 Court will retain jurisdiction until the documentation is
20 completed in the case?

21 THE COURT: How long is it going to take you to get
22 the signatures?

23 MR. BYRNE: We are going to try to go as promptly and
24 expeditiously as possible.

25 THE COURT: That's right. Now give me a time frame.

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1 As your Honor knows from the proposed jury
2 instructions, however, prior to the summary judgment opinion
3 there was a substantial disagreement between the parties as to
4 the governing law and what presumptions might apply. That was
5 entirely clarified in the Court's summary judgment opinion.
6 Settlement discussions resumed very promptly, and the case was
7 settled within I believe about 80 hours of that opinion, with
8 discussions every day from the moment we had that opinion.

9 I would urge your Honor that the parties have in good
10 faith, from the positions that they understood they were
11 entitled to take prior to the summary judgment opinion, not
12 acted other than in good faith and it was a reasonable effort
13 to get the matter resolved. Thank you, your Honor.

14 THE COURT: Let me hear from plaintiffs' counsel.

15 MR. BYRNE: Your Honor, I would concur with that. Let
16 me clarify one point. With regard to Mr. Davis's offer, it
17 said it expired within 10 days and we let it expire. It's not
18 a question of whether it was responded to or not.

19 I would concur with Mr. Joseph, we have been engaged
20 in active settlement discussions, and this was the final
21 conclusion of it.

22 THE COURT: I have the highest respect for the counsel
23 in this case. However, I think in their representation of
24 their respective clients and in their clients' actions the
25 parties have lost sight of the public interests that attend

Appendix D: Grosz v. Museum of Modern Art (2009): Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Amended Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MARTIN GROSZ and LILIAN GROSZ,

Index No.: 09-CV-3706 (CM)(THK)

Plaintiffs,

ECF CASE

-against-

THE MUSEUM OF MODERN ART,

Defendant,

HERRMANN-NEISSE WITH COGNAC ,
SELF-PORTRAIT WITH MODEL
and REPUBLICAN AUTOMATONS,
Three Paintings by Grosz,

Defendants-in-rem.

-----X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE AMENDED COMPLAINT**

Dated: New York, New York
June 25, 2009

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*Attorneys for Plaintiffs
Martin Grosz and Lilian Grosz*

Plaintiffs, Martin Grosz and Lilian Grosz, the heirs of George Grosz (“the Heirs”), respectfully submit this memorandum of law in opposition to defendant Museum of Modern Art (“MoMA”)’s motion to dismiss the First Amended Complaint (“Complaint”).

This case involves three artworks by the deceased artist George Grosz (“Grosz”), *Max-Herrmann Neisse with Cognac*, *Self-Portrait with Model* and *Republican Automotons* (together “the Paintings”). The Paintings are currently in MoMA’s possession and located in the City of New York. Shorn of its factual backdrop, the Complaint, verified by Lilian Grosz, alleges that the Paintings were lost or stolen from Grosz or his art dealer when they fled Nazi Germany in 1933 and never returned to Grosz or his heirs. The Complaint makes four claims: (1) declaration of title; (2) conversion; (3) replevin; and (4) constructive trust.

Under New York law, a good-faith purchaser of a stolen object has no valid title, because “a purchaser cannot acquire good title from a thief. “Only the true owner’s own conduct, or the operation of law...can act to divest that true owner of title in his property...” *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 833 (E.D.N.Y. 1981) *aff’d*, 678 F.2d 1150 (2d Cir. 1982).

Grosz was directly persecuted by the Nazis for his anti-totalitarian artworks and courageous political stances. Nazi persecution included intimidating purchasers of his artworks and rendering them valueless and unsellable. He fled Nazi Germany and lost all of the artworks that he placed in the care of his Jewish art dealer, who in turn, was persecuted and died. MoMA purchased three Paintings that had been lost or stolen in Grosz’s flight from persecution.

MoMA argues that because actual Nazis did not steal the Paintings, the allegations of the Complaint are implausible. Whether the Dutch art dealer and German art critic who stole Paintings from Grosz were Nazis, Buddhists or Christian Scientists is irrelevant to title.

This action was commenced on April 10, 2009. MoMA now moves to dismiss, arguing: (1) German and Dutch accrual rules bar conversion claims; (2) New York's three-year statute of limitations has run because MoMA refused to return the Paintings prior to April 12, 2006, triggering New York's "demand and refusal rule"; and (3) accrual rules relating to bad faith acquisitions bar claims to *Hermann-Neisse with Cognac*.

A recent decision by Judge Rakoff involving a very similar fact scenario, *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) puts to bed most of MoMA's arguments. Judge Rakoff rejected many of the arguments raised by MoMA's expert Wolfgang Ernst (the same expert in that case), and permitted claims to proceed under the same theories advanced by the Heirs. On a motion to dismiss, MoMA's expert declarations should be disregarded entirely. Below, we explain why Judge Rakoff's analysis in *Schoeps*, 594 F. Supp. 2d 461 was correct and why MoMA's arguments on this motion are wrong.

Standard Applicable To Motion To Dismiss

MoMA asserts that Rule 9(b) of the Federal Rules of Civil Procedure ("FRCP") requires a heightened pleading standard to this action. Fed. R. Civ. P. 9(b) applies only to actions based on fraud or mistake. The Heirs claim no fraud or mistake. Fed. R. Civ. P. 9(b) is inapplicable.

Fed. R. Civ. P. 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atl. Corp.*, 550 U.S. 544 Even where recovery appears very remote, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), or difficult to prove, *Limited and Aberdeen Inv. Ltd.*, --- F.3d ---, 2009 WL 1587870 (2d Cir. June 9, 2009), dismissal is not an appropriate remedy.

On a motion to dismiss, the district court must limit itself to a consideration of the facts alleged on the face of the complaint, *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989); *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984), and only to documents attached as exhibits or incorporated by reference. *Chapman v. New York State Div. for Youth*, 546 F.3d 230, 234 (2d Cir. 2008)(citations omitted). “[A]dditional factual allegations contained in defendant's memorandum of law and affidavits will be disregarded.” *Raffaele v. Designers Break, Inc.*, 750 F. Supp. 611, 612 (S.D.N.Y. 1990).

Choice of Law Applicable To Motion To Dismiss

The Complaint at ¶ 24 sets forth the applicable choice of law analysis:

Since this court sits in diversity, under the *Erie* Doctrine, this court looks to New York law to determine title to the Paintings. N.Y. Est. Powers & Trusts Law § 3-5.1(b)(2) (McKinney) in turn, looks to the domicile of the decedent Grosz, here Germany, to determine title and descent of personal property.

Under the *Erie* Doctrine, New York's statute of limitations, burdens of proof, and procedural remedies apply.

A choice of law analysis is unnecessary absent an actual conflict between the laws of two relevant jurisdictions. *Schoeps*, 594 F. Supp. 2d 461 *citing Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005).

I. CONVERSION CLAIMS LIMITED BY CPLR 214 ACCRUE UNDER NEW YORK LAW ONLY UPON DEMAND BY THE TRUE OWNER AND THE POSSESSOR'S REFUSAL IN NEW YORK

The Heirs assert claims under New York law for conversion and replevin.

(Complaint ¶¶ 24, 154-157, 158-163). Demand and refusal are substantive elements of a New York cause of action for conversion and replevin. The statute of limitations in New York Civil Practice Rules and Procedure ("CPLR") 214 accrues only upon refusal, not when the right to make a demand arises. *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982); *Stone v. Williams*, 970 F.2d 1043, 1050 (2d Cir. 1992). Replevin lies when the true owner of an object demands its return and is refused. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18, 569 N.E.2d 426 (1991). To successfully plead a claim for replevin, the Heirs must allege facts showing a "superior right of possession".

The Heirs have pleaded (1) Grosz owned the Paintings when he fled Germany; (2) Grosz did not abandon the Paintings; and (3) the Paintings were never returned to Grosz or one of his legal heirs (Complaint ¶ 17, 38-39). Grosz's actions for conversion accrued only at the moment MoMA refused the Heirs' demand. Together with the allegations of

demand and refusal, the Heirs have pleaded a claim for replevin. *Menzel v. List*, 267 N.Y.2d 804, 819 (Sup. Ct. NY. Co. 1966), *modified Menzel v. List*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967) *rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742 (1969).

II. THE HEIRS HAVE NOT ALLEGED CLAIMS FOR CONVERSION UNDER GERMAN AND DUTCH LAW, THEREFORE GERMAN AND DUTCH ACCRUAL RULES DO NOT APPLY TO CLAIMS ALLEGED IN THE COMPLAINT

MoMA argues that the Heirs' claims should be dismissed because New York's borrowing statute, CPLR 202, imports German or Dutch principles of accrual and statutes of repose. This is incorrect. CPLR 202 applies only to "causes of action accruing without the state." MoMA's refusal occurred and accrued where the chattels are located, in the City of New York.

A. Under the Declaratory Judgment Act, the Heirs' Replevin Remedy Arises Under New York Law

As properly alleged in the Complaint, the Heirs are entitled to both a declaration of title and replevin under the Declaratory Judgment Act (Complaint ¶¶ 28, 150-153; 28 U.S.C.A. §§ 2201-2202 (West) (creation of remedy, further relief)). MoMA ignores the Declaratory Judgment Act. Fed. R. Civ. P. 64 provides:

(a) Remedies Under State Law-In General.

At the commencement of and throughout an action, **every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.** But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies.

The **remedies available** under this rule **include the following-however designated** and regardless of whether state procedure requires an independent action: arrest; attachment; garnishment; **replevin**; sequestration; and other corresponding or equivalent remedies.

return the Paintings prior to April 12, 2006 and that the Heirs simply “cherry-picked” a date (Motion at 17-18).

C. Lowry Wrote to Jentsch that There Was No Refusal Until MoMA’s Board Made A Final Determination

MoMA presents four letters purportedly demonstrating MoMA’s clear refusal of the Heirs’ claims. MoMA’s excerpts are misleading and do not show a refusal.

MoMA’s first letter dated July 20, 2005, states “we have now reached a point where it appears no more information [is] currently available for us to consider”. MoMA argues that “a refusal need not use the specific word ‘refuse’ so long as it clearly conveys an intent to interfere with the demander’s possession or use of his property”. *Feld v. Feld*, 279 A.D.2d 393, 395, 720 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001). But MoMA’s July 20, 2005 letter continues:

Our goal, like yours, is to do what is right and to do so in a manner that best serves the needs of George Grosz. To this end, I think the best course of action would be for use to meet together with Peter Grosz and his brother, if he is available, to determine the appropriate course of action.

(Solomon Decl. Ex. A) (emphasis supplied). The July 20, 2005 letter shows no intent to interfere with the Heirs’ possession and use of the Paintings. In *Feld*, 279 A.D.2d 393, relied on by MoMA, a son wrote to his parents in 1971 and 1974 demanding the return of property. His father wrote back refusing and stating claims to property in the son’s possession. The parents died in 1995. The *Feld* letter was an unequivocal refusal to surrender property, found to be clear enough to be determined on a motion to dismiss. *Feld*, 279 A.D.2d 393. Lowry’s July 20, 2005 letter evidences an intent to respect Grosz’s property rights and to investigate claims and is not a clear refusal. Applying the teachings of *Feld*, MoMA’s argument fails.

MoMA then cites letters of Ralph Jentsch dated January 5, 2006 and January 20, 2006 as proof that Jentsch had conceded MoMA's refusal (Motion at 18). MoMA excerpts misleading snippets. On January 5, 2006 Jentsch states:

"You stated I would be receiving a formal letter setting forth MoMA's position regarding the two works."

(Solomon Decl. Ex. C). The plain language of Jentsch's January 5, 2006 letter to Lowry clearly demonstrates that Jentsch was unaware of MoMA's position and waiting for a decision from MoMA.

Most importantly, MoMA conceals from the Court the letter of Lowry to Jentsch dated January 18, 2006 stating:

"As I have told you many times, including at our meeting in early January, **any decision on a matter like this must be considered by the Museum's Trustees**"

Lowry then explains to Jentsch that Katzenbach would be reporting to MoMA's Board and Lowry did

"not intend to communicate with you until after the Museum's Trustees receive Mr. Katzenbach's report **and have made a decision.**"

(Dowd Decl. Ex. 1)(emphasis supplied). Lowry's January 18 letter clearly indicates that MoMA had not arrived at a decision to refuse the Heirs' claims.

D. MoMA Communicated a Final Refusal To Return The Paintings on April 12, 2006

As Lowry himself indicates, any correspondence prior to April 12, 2006 was simply part of compromise negotiations. As the Complaint accurately recites, MoMA's Board decision was communicated on April 12, 2006 (Complaint ¶ 118). Thus, the present action was filed on April 10, 2009, within New York's three-year statute of

limitations for replevin. As in *Miles*, this Court should find that there was no clear refusal until April 12, 2006. 698 F.2d, 598

E. Equitable Tolling Based on Lowry's Assurances That There Was No Refusal

If the Court does not agree that MoMA did not refuse the Heirs' claims until April 12, 2006, the Heirs argue in the alternative that equitable tolling is warranted during the period of compromise negotiations from 2003 through April 12, 2006. On January 18, 2006, Lowry wrote to the Heirs telling them to wait and assuring them that MoMA had not refused their claims until the Board considered the Katzenbach report and made their decision. Lowry's January 18, 2006 letter equitably tolls the statute of limitations because the Heirs reasonably relied on it. Equitable tolling is appropriate where a plaintiff has "acted with reasonable diligence throughout the period he seeks to toll." *Smith*, 208 F.3d, 17 (per curiam). *Lord Day & Lord*, 134 F. Supp. 2d, 567. From 2003 to 2006 the letter exchanges with MoMA show diligence by the Heirs. Thus equitable tolling is appropriate and warranted.

IV. CPLR 3018 REQUIRES MoMA TO PLEAD AND PROVE AFFIRMATIVE DEFENSES SUCH AS STATUTE OF LIMITATIONS, COLLATERAL ESTOPPEL, ADVERSE POSSESSION, AND PLAINTIFFS' CULPABLE CONDUCT

Affirmative defenses are not a plaintiff's burden to prove as part of the cause of action and are thus a defendant's burden to broach, to plead and to prove. Siegel, *New York Practice* § 223 Affirmative Defenses (West 1999). CPLR 3018 requires a party to plead "all matters which if not pleaded would be likely to take the adverse party by surprise **or would raise issues of fact not appearing on the face of a prior pleading....**" MoMA vehemently disputes the allegation of the Complaint. Its motion papers are devoted largely to arguing potential affirmative defenses under German, Dutch

Appendix E: AAM Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era



GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA

Approved, November 1999, Amended, April 2001, AAM Board of Directors

Introduction

From the time it came into power in 1933 through the end of World War II in 1945, the Nazi regime orchestrated a system of theft, confiscation, coercive transfer, looting, pillage, and destruction of objects of art and other cultural property in Europe on a massive and unprecedented scale. Millions of such objects were unlawfully and often forcibly taken from their rightful owners, who included private citizens, victims of the Holocaust; public and private museums and galleries; and religious, educational, and other institutions.

In recent years, public awareness of the extent and significance of Nazi looting of cultural property has grown significantly. The American museum community, the American Association of Museums (AAM), and the U.S. National Committee of the International Council of Museums (AAM/ICOM) are committed to continually identifying and implementing the highest standard of legal and ethical practices. AAM recognizes that the atrocities of the Nazi era demand that it specifically address this topic in an effort to guide American museums as they strive to achieve excellence in ethical museum practice.

The AAM Board of Directors and the AAM/ICOM Board formed a joint working group in January 1999 to study issues of cultural property and to make recommendations to the boards for action. The report that resulted from the initial meeting of the Joint Working Group on Cultural Property included the recommendation that AAM and AAM/ICOM offer guidance to assist museums in addressing the problems of objects that were unlawfully appropriated during the Nazi era without subsequent restitution (i.e., return of the object or payment of compensation to the object's original owner or legal successor).

The efforts of the Working Group were greatly informed by the important work on the topic that had gone before. In particular, three documents served as a starting point for the AAM guidelines, and portions of them have been incorporated into this document. These include: *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)*; *ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners*; and *Washington Conference Principles on Nazi-Appropriated Art* released in connection with the Washington Conference on Holocaust-Era Assets co-hosted by the U.S. Department of State and the United States Holocaust Memorial Museum.

The Presidential Advisory Commission on Holocaust Assets in the United States (PCHA) was created in June 1998 to study and report to the president on issues relating

to Holocaust victims' assets in the United States. AAM and the Association of Art Museum Directors (AAMD) worked with the PCHA to establish a standard for disclosure of collections information to aid in the identification and discovery of unlawfully appropriated objects that may be in the custody of museums. In January 2001, the PCHA issued its final report, which incorporated the agreed standard for disclosure and recommended the creation of a searchable central registry of the information museums disclose in accordance with the new standard. AAM and AAMD agreed to support this recommendation, and these guidelines have been amended to reflect the agreed standard for disclosure of information.

Finally, AAM and AAM/ICOM acknowledge the tremendous efforts that were made by the Allied forces and governments following World War II to return objects to their countries of origin and to original owners. Much of the cultural property that was unlawfully appropriated was recovered and returned, or owners received compensation. AAM and AAM/ICOM take pride in the fact that members of the American museum community are widely recognized to have been instrumental in the success of the post-war restitution effort. Today, the responsibility of the museum community is to strive to identify any material for which restitution was never made.

General Principles

AAM, AAM/ICOM, and the American museum community are committed to continually identifying and achieving the highest standard of legal and ethical collections stewardship practices. The *AAM Code of Ethics for Museums* 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."

When faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount. Museums should develop and implement policies and practices that address this issue in accordance with these guidelines.

These guidelines are intended to assist museums in addressing issues relating to objects that may have been unlawfully appropriated during the Nazi era (1933-1945) as a result of actions in furtherance of the Holocaust or that were taken by the Nazis or their collaborators. For the purposes of these guidelines, objects that were acquired through theft, confiscation, coercive transfer, or other methods of wrongful expropriation may be considered to have been unlawfully appropriated, depending on the specific circumstances.

In order to aid in the identification and discovery of unlawfully appropriated objects that may be in the custody of museums, the PCHA, AAMD, and AAM have agreed that museums should strive to: (1) identify all objects in their collections that were created before 1946 and acquired by the museum after 1932, that underwent a change of ownership between 1932 and 1946, and that were or might reasonably be thought to

have been in continental Europe between those dates (hereafter, “covered objects”); (2) make currently available object and provenance (history of ownership) information on those objects accessible; and (3) give priority to continuing provenance research as resources allow. AAM, AAMD, and PCHA also agreed that the initial focus of research should be European paintings and Judaica.

Because of the Internet’s global accessibility, museums are encouraged to expand online access to collection information that could aid in the discovery of objects unlawfully appropriated during the Nazi era without subsequent restitution.

AAM and AAM/ICOM acknowledge that during World War II and the years following the end of the war, much of the information needed to establish provenance and prove ownership was dispersed or lost. In determining whether an object may have been unlawfully appropriated without restitution, reasonable consideration should be given to gaps or ambiguities in provenance in light of the passage of time and the circumstances of the Holocaust era. AAM and AAM/ICOM support efforts to make archives and other resources more accessible and to establish databases that help track and organize information.

AAM urges museums to handle questions of provenance on a case-by-case basis in light of the complexity of this problem. Museums should work to produce information that will help to clarify the status of objects with an uncertain Nazi-era provenance. Where competing interests may arise, museums should strive to foster a climate of cooperation, reconciliation, and commonality of purpose.

AAM affirms that museums act in the public interest when acquiring, exhibiting, and studying objects. These guidelines are intended to facilitate the desire and ability of museums to act ethically and lawfully as stewards of the objects in their care, and should not be interpreted to place an undue burden on the ability of museums to achieve their missions.

Guidelines

1. Acquisitions

It is the position of AAM 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.

- a) Standard research on objects being considered for acquisition should include a request that the sellers, donors, or estate executors offering an object provide as much provenance information as they have available, with particular regard to the Nazi era.
- b) Where the Nazi-era provenance is incomplete or uncertain for a proposed acquisition, the museum should consider what additional research would be prudent or necessary to resolve the Nazi-era provenance status of the object before acquiring it. Such research may involve consulting appropriate

sources of information, including available records and outside databases that track information concerning unlawfully appropriated objects.

- c) In the absence of evidence of unlawful appropriation without subsequent restitution, the museum may proceed with the acquisition. Currently available object and provenance information about any covered object should be made public as soon as practicable after the acquisition.
- d) If credible evidence of unlawful appropriation without subsequent restitution is discovered, the museum should notify the donor, seller, or estate executor of the nature of the evidence and should not proceed with acquisition of the object until taking further action to resolve these issues. Depending on the circumstances of the particular case, prudent or necessary actions may include consulting with qualified legal counsel and notifying other interested parties of the museum's findings.
- e) AAM acknowledges that under certain circumstances acquisition of objects with uncertain provenance may reveal further information about the object and may facilitate the possible resolution of its status. In such circumstances, the museum may choose to proceed with the acquisition after determining that it would be lawful, appropriate, and prudent and provided that currently available object and provenance information is made public as soon as practicable after the acquisition.
- f) Museums should document their research into the Nazi-era provenance of acquisitions.
- g) Consistent with current practice in the museum field, museums should publish, display, or otherwise make accessible recent gifts, bequests, and purchases, thereby making all acquisitions available for further research, examination, and public review and accountability.

2. Loans

It is the position of AAM that in their role as temporary custodians of objects on loan, museums should be aware of their ethical responsibility to consider the status of material they borrow as well as the possibility of claims being brought against a loaned object in their custody.

- a) Standard research on objects being considered for incoming loan should include a request that lenders provide as much provenance information as they have available, with particular regard to the Nazi era.
- b) Where the Nazi-era provenance is incomplete or uncertain for a proposed loan, the museum should consider what additional research would be prudent or necessary to resolve the Nazi-era provenance status of the object before borrowing it.
- c) In the absence of evidence of unlawful appropriation without subsequent restitution, the museum may proceed with the loan.

- d) If credible evidence of unlawful appropriation without subsequent restitution is discovered, the museum should notify the lender of the nature of the evidence and should not proceed with the loan until taking further action to clarify these issues. Depending on the circumstances of the particular case, prudent or necessary actions may include consulting with qualified legal counsel and notifying other interested parties of the museum's findings.
- e) AAM acknowledges that in certain circumstances public exhibition of objects with uncertain provenance may reveal further information about the object and may facilitate the resolution of its status. In such circumstances, the museum may choose to proceed with the loan after determining that it would be lawful and prudent and provided that the available provenance about the object is made public.
- f) Museums should document their research into the Nazi-era provenance of loans.

3. Existing Collections

It is the position of AAM that 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. Recognizing that resources available for the often lengthy and arduous process of provenance research are limited, museums should establish priorities, taking into consideration available resources and the nature of their collections.

Research

- a) Museums should identify covered objects in their collections and make public currently available object and provenance information.
- b) Museums should review the covered objects in their collections to identify those whose characteristics or provenance suggest that research be conducted to determine whether they may have been unlawfully appropriated during the Nazi era without subsequent restitution.
- c) In undertaking provenance research, museums should search their own records thoroughly and, when necessary, contact established archives, databases, art dealers, auction houses, donors, scholars, and researchers who may be able to provide Nazi-era provenance information.
- d) Museums should incorporate Nazi-era provenance research into their standard research on collections.
- e) When seeking funds for applicable exhibition or public programs research, museums are encouraged to incorporate Nazi-era provenance research into their proposals. Depending on their particular circumstances, museums are also encouraged to pursue special funding to undertake Nazi-era provenance research.
- f) Museums should document their research into the Nazi-era provenance of objects in their collections.

Discovery of Evidence of Unlawfully Appropriated Objects

- g) If credible evidence of unlawful appropriation without subsequent restitution is discovered through research, the museum should take prudent and necessary steps to resolve the status of the object, in consultation with qualified legal counsel. Such steps should include making such information public and, if possible, notifying potential claimants.
- h) In the event that conclusive evidence of unlawful appropriation without subsequent restitution is found but no valid claim of ownership is made, the museum should take prudent and necessary steps to address the situation, in consultation with qualified legal counsel. These steps may include retaining the object in the collection or otherwise disposing of it.
- i) AAM acknowledges that retaining an unclaimed object that may have been unlawfully appropriated without subsequent restitution allows a museum to continue to care for, research, and exhibit the object for the benefit of the widest possible audience and provides the opportunity to inform the public about the object's history. If the museum retains such an object in its collection, it should acknowledge the object's history on labels and publications.

4. Claims of Ownership

It is the position of AAM that museums 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. Each claim should be considered on its own merits.

- a) Museums should review promptly and thoroughly a claim that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution.
- b) In addition to conducting their own research, museums should request evidence of ownership from the claimant in order to assist in determining the provenance of the object.
- c) If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner.
- d) If a museum receives a claim that a borrowed object in its custody was unlawfully appropriated without subsequent restitution, it should promptly notify the lender and should comply with its legal obligations as temporary custodian of the object in consultation with qualified legal counsel.
- e) When appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution.

- f) AAM acknowledges that in order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.

5. Fiduciary Obligations

Museums affirm that they hold their collections in the public trust when undertaking the activities listed above. Their 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.

- a) Toward this end, museums should develop policies and practices to address the issues discussed in these guidelines.
- b) Museums should be prepared to respond appropriately and promptly to public and media inquiries.

Commitment of AAM

As part of its commitment to identifying and disseminating best practices, AAM will allocate resources:

- a) to disseminate these guidelines widely and frequently along with references to other guidelines, principles, and statements that exist on the topic
- b) to track the activity and purpose of the relevant databases and other resources and to compile bibliographies for dissemination to the United States museum community
- c) to collect examples of best practices and policies on Nazi-era provenance research and claims resolution from the museum field, both in the United States and abroad, as guidelines for other museums
- d) to make the above information available to the museum community through reports, conference sessions, and other appropriate mechanisms
- e) to assist in the development of recommended procedures for object and provenance information disclosure
- f) to provide electronic links from AAM's Web site to other resources for provenance research and investigate the feasibility of developing an Internet tool to allow researchers easier access to object and provenance information about covered objects in museum collections.
- g) to encourage funding of Nazi-era provenance research.

Appendix F: Holocaust Expropriated Art Recovery Act of 2016 (HEAR)

130 STAT. 1524

PUBLIC LAW 114–308—DEC. 16, 2016

Public Law 114–308
114th Congress

An Act

Dec. 16, 2016
[H.R. 6130]

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Holocaust
Expropriated Art
Recovery Act
of 2016.
22 USC 1621
note.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Holocaust Expropriated Art Recovery Act of 2016”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the “greatest displacement of art in human history”.

(2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that “steps should be taken expeditiously to achieve a just and fair solution” to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), which expressed the sense of Congress 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.”

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants “to ensure that their legal systems or alternative processes, while taking into account the

different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.” The Declaration also urged participants to “consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.”

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., *Detroit Institute of Arts v. Ullin*, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government’s exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, 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.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress 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.

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To 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.

(2) To 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.

SEC. 4. DEFINITIONS.

In this Act:

(1) **ACTUAL DISCOVERY.**—The term “actual discovery” means knowledge.

(2) **ARTWORK OR OTHER PROPERTY.**—The term “artwork or other property” means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) **COVERED PERIOD.**—The term “covered period” means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) **KNOWLEDGE.**—The term “knowledge” means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) **NAZI PERSECUTION.**—The term “Nazi persecution” means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

SEC. 5. STATUTE OF LIMITATIONS.

Deadline.

(a) **IN GENERAL.**—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, 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 later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

(b) **POSSIBLE MISIDENTIFICATION.**—For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

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(c) **PREEXISTING CLAIMS.**—Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(d) **APPLICABILITY.**—Subsection (a) shall apply to any civil claim or cause of action that is—

(1) pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal or for which the time to file an appeal has not expired; or

(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026. Time period.

(e) **EXCEPTION.**—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if— Time period.

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(f) **RULE OF CONSTRUCTION.**—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.

(g) **SUNSET.**—This Act 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. Any civil 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

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statute of limitations or any other Federal or State defense at law relating to the passage of time.

Approved December 16, 2016.

LEGISLATIVE HISTORY—H.R. 6130 (S. 2763):

SENATE REPORTS: No. 114-394 (Comm. on the Judiciary) accompanying S. 2763.
CONGRESSIONAL RECORD, Vol. 162 (2016):

Dec. 7, considered and passed House.
Dec. 9, considered and passed Senate.

