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Simon J. Frankel

Ethan Forrest

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MUSEUMS' INITIATION OF DECLARATORY JUDGMENT ACTIONS AND ASSERTION OF STATUTES OF LIMITATIONS IN RESPONSE TO NAZI-ERA ART RESTITUTION CLAIMS—A DEFENSE

Simon J. Frankel and Ethan Forrest*

ABSTRACT

Since the reunification of Germany brought greater access to information about the history and location of artworks that changed hands during the Nazi era, numerous restitution claims have been asserted to works held by U.S. museums. In a few instances, U.S. museums faced with such claims have initiated declaratory judgment actions seeking to quiet title to the works and have also invoked statutes of limitations or laches to bar the claims. Some recent commentary in law reviews and elsewhere has faulted museums for such conduct, contending that museums are obliged to retribute to claimants any works to which a Holocaust-related claim has been asserted, or to litigate claims “on the merits,” without invoking so-called “technical defenses” such as statutes of limitations or laches. This article argues that such a view ignores the complex nature of both the claims asserted and the fiduciary obligations of museums to protect the assets they hold in trust and avoid unnecessary depletion of them. Any thoughtful approach must acknowledge that each claim must be considered on its historical merits. Some such claims are valid and based on sound provenance research, as they involve works of art demonstrably stolen by the Nazis and sought by the families

* Simon J. Frankel is a partner with Covington & Burling LLP in San Francisco and a lecturer-in-law at Stanford Law School. Ethan Forrest, a former summer associate at Covington & Burling LLP, is a 2012 graduate of Stanford Law School. Covington & Burling LLP was counsel for the Museum of Fine Arts, Boston in the *Museum of Fine Arts, Boston v. Seger-Thomschitz* case discussed below. The views expressed here are those of the authors only, and do not necessarily reflect the views of Covington & Burling LLP or any of its clients. Mr. Frankel is grateful to Jim Snipes of Covington & Burling LLP for thoughtful comments on the issues discussed here, and to Christopher Miller, also of Covington & Burling, for extensive research assistance.

from whom they were taken. Other meritorious claims might involve works with key gaps in provenance, which, while not directly probative, support suspicion about the circumstances under which the original owners parted with the works—such as an early sale by a European dealer known to sell Nazi-confiscated artworks. However, some other claims may not appear meritorious after careful research, such as those that involve families who pursued restitution of some works of art after World War II but did not pursue other works that they knew of and that their families had parted with at some point—suggesting that the families themselves did not believe that those works had been wrongfully taken. In short, not all claims to recover artworks that changed hands in the Nazi era are equal. Beyond this, museums have fiduciary obligations not borne by private individuals who are also good faith purchasers. Museums have both a duty to take all reasonable steps to protect the assets they hold in trust and ethical obligations to the claimants who assert ownership of works long held by museums. While museums must take all Nazi-era art restitution claims seriously, as their codes of ethics demand, a museum may conclude after diligent research that a particular claim is not meritorious, indicating that the museum holds good title to the work. In such circumstances, there is no legal or ethical bar to museums initiating litigation to quiet title to works, and no bar to a museum taking all reasonable steps to prevail in such litigation at minimal expense—to avoid depleting trust assets unnecessarily—including by invoking statutes of limitations or laches where appropriate. Notably, in the very few cases where museums have initiated litigation to defeat claims to works in their collections, each museum has had a strong evidentiary reason for believing both that the claim was not meritorious and that the claim was time-barred. In contrast, there are many more instances where museums, faced with claims by the heirs of Holocaust victims, have voluntarily restituted works to claimants or amicably reached monetary settlements that allow the museums to retain the works at issue.

I. INTRODUCTION

In conjunction with the Holocaust, the Nazis carried out perhaps the most systematic art theft in history.¹ The Nazis' methodical efforts to collect artworks, and in particular to dispossess Jews of all their belongings, has led to a plethora of claims by Holocaust victims and their heirs to recover artworks lost during that period.² The works that changed hands during the Nazi era have come—often through many transfers, over many years—into the collections of both individuals and museums, primarily in Europe and the United States.³ Over the past two decades, particularly since the reunification of Germany and the establishment of the Washington Principles of 1998, scholars and potential claimants have had greater access to information about artworks that changed hands during the Nazi era, leading to more claims to recover artworks.⁴

In a few instances, U.S. museums faced with such claims to works in their collections have responded by initiating declaratory judgment actions seeking to quiet title, and have also invoked statutes of limitations or laches to bar the claims.⁵ Some recent law review commentaries, as well as private blog posts, have found fault with such museum conduct.⁶ These commentators—

1. See generally MICHAEL J. KURTZ, *AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE'S CULTURAL TREASURES* (2006); HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997); LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

2. See, e.g., Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DIS. RES. 243, 243-56 (2006) (discussing the history of the Holocaust art restitution movement and describing the way some restitution claims have moved through the courts).

3. See *id.*

4. See *id.*

5. See *infra* § IV.A (discussing these cases).

6. E.g., Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OREGON L. REV. 37, 37-47 (2009) (arguing that museums' defense of their collections against certain Holocaust-

particularly Jennifer Anglim Kreder and Bert Demarsin—have suggested that museums are obliged either to retribute to claimants any works to which a Holocaust-related claim has been asserted, or to litigate the claim “on the merits” without invoking so-called “technical defenses,” such as statutes of limitations or laches, which might defeat the claim at an early stage of litigation.⁷

era art restitution claims is unethical and against U.S. policy); Jennifer Anglim Kreder, Essay, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENUMBRA 253, 253-55 (2011) (same); Bert Demarsin, *Let's Not Talk about Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 117, 160-65, 185 (2011) (accusing U.S. museums of ignoring ethical obligations and “raising technical defenses if such might allow museums to retain possession of Nazi era looted pieces”); see also Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75, 103-18 (2012) (suggesting a complicity between courts and museums against “true owners” of contested art works); Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. REV. COLLOQUY 315, 324 (2011) (“Rather than look into the thorny cases, courts seem to be willing to engage in judicial abdication of their responsibility . . .” (citations omitted)); Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 633, 691 (criticizing statutes of limitation as “a major exception to the traditional *nemo dat* doctrine” that purchasers cannot acquire title from thieves, and criticizing New York courts’ recognition of the statute of limitations and laches defenses because “Holocaust survivors will most likely no longer prevail in any attempt to obtain recovery of their stolen heirlooms”); see also Raymond Dowd, *Art Law: Boston Museum of Fine Arts: Sues Heirs of Jews to Keep Stolen Property, Hides Evidence*, COPYRIGHT LITIGATION BLOG (July 20, 2011), <http://copyrightlitigation.blogspot.com/2011/07/art-law-boston-museum-of-fine-arts-sues.html> (accusing the Museum of Fine Arts, Boston of unethically suing Holocaust victims’ heirs to retain allegedly stolen property).

7. See, e.g., Kreder, *The New Battleground*, *supra* note 6, at 47 (“In contrast to the optimistic hopes in 1998 to settle all [Holocaust-era art] claims expressed, we have seen a new trend emerge whereby current possessors of art displaced during the Holocaust, including museums, have been the first to file suit to quiet title, raising technical defenses.”); Kreder, *Guarding the Historical Record*, *supra* note 6, at 254 (stating a preference for resolution of cases “on the merits” rather than on “technical grounds”); Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NORTHWESTERN L. REV. COLLOQUY 315, 331 (2011) (suggesting that “technical defenses” are not “just and fair”); Demarsin, *Let's Not Talk about Terezin*, *supra* note 6, at

Indeed, Professor Kreder has contended in numerous articles that museums act contrary to applicable ethical guidelines when they litigate against Nazi era art restitution claims and assert time bar defenses.⁸

While perhaps morally compelling to a point, this view ignores two critical features of claims to recover artworks that changed hands during the Holocaust and are now held by U.S. museums. First, as with all legal claims, not all claims to recover such works of art are equal. Some claims are valid and based on sound provenance research, as they involve works of art demonstrably stolen by the Nazis. Other meritorious claims might involve works with key gaps in provenance, which, while not directly probative, may support suspicion about the circumstances under which the original owners parted with the works—such as in an early sale by a European dealer known to sell Nazi-confiscated artworks. However, some other claims are not meritorious at all. For example, some cases involve families that willingly parted with works of art while conditions in Germany or other countries deteriorated (but before the Nazis were systematically stealing works of art), creating some ambiguity as to whether the sale was coerced. Other claims concern families that pursued restitution of some works of art after World War II but did not pursue other works that they knew of and that their families had parted with at some point, suggesting that the family members themselves did not believe that certain works had been wrongfully taken. Any thoughtful approach to these issues must acknowledge that not all Nazi-era art restitution claims should be treated equally.

Second, the view that United States museums somehow act improperly when they initiate or vigorously defend litigation involving stolen Nazi-era artwork discounts the truly difficult choices that museums must make in dealing with Nazi-era art

160 (juxtaposing the defenses of laches and statutory limitation against museum commitment to waive defenses when equitable); *see also* Dowd, *supra* note 6 (“the MFA bringing a ‘declaration of title’ action is completely stupid, immoral and unethical”).

8. *See, e.g.*, Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record*, *supra* note 6, at 83 (dismissal of cases “without addressing the merits” “contraven[es] . . . museums’ own ethics guidelines”); Kreder, *The New Battleground*, *supra* note 6, at 37-47.

claims in light of their institutional obligations. As discussed below, museums have professional responsibilities as museums; fiduciary obligations to the public that oblige them to take all reasonable steps to protect the assets they hold in trust; and ethical obligations to the claimants who assert ownership of works long held by museums. While museums must take all Nazi-era art restitution claims seriously, as their codes of ethics demand, a museum may conclude after diligent research that a claim is not meritorious, indicating that the museum holds good title to the work. In such circumstances, there is no legal or ethical bar to museums initiating litigation to quiet title to works. Nor is there any bar to museums taking all reasonable litigation steps to prevail in such litigation at minimal expense—including by invoking statutes of limitations or laches where appropriate. Indeed, it would be inconsistent with museums' obligation to safeguard their assets to require such institutions to fully litigate apparently unmeritorious claims despite an obvious time bar.

Despite a few critics' broadsides against museums, the available evidence does not suggest museums have engaged in improper conduct in this arena. In the very few cases where museums have initiated litigation and invoked limitations periods to defeat claims to works in their collections, each museum has had a strong evidentiary reason for believing both that the claim was not meritorious and that the claim was time-barred. In contrast, there are far more instances where museums, faced with claims by the heirs of Holocaust victims, have voluntarily restituted the works to the claimants or amicably reached monetary settlements that allow the museums to retain the works at issue—even in instances where the museum could have asserted a time bar.

This article will explore the legal and ethical considerations governing museums' responsibilities when confronted with Nazi-era art claims, arguing that it is proper for museums to initiate litigation and to invoke time-based defenses when faced with a claim that provenance research shows to be weak or unsubstantiated. First, we provide basic historical background concerning the Nazis' systematic looting of artworks and the changing policies that have increased claimants' abilities to locate and assert claims to missing art in the decades since World War II. Second, we describe the legal and policy considerations governing

museums' responses to Nazi-era art claims. We examine museums' fiduciary obligations to the public and the professional codes of ethics that guide museums' conduct. We also focus on the interests of fairness and equity that statutes of limitations and laches serve, and we show that, in the few cases where museums have advanced so-called "technical defenses," there were prudent and good faith reasons for doing so. Finally, we contrast these few cases where U.S. museums initiated litigation with the many instances where museums have responded with voluntary restitution or fair compensation for the artworks, evidencing that museums treat meritorious claims fairly and appropriately.

II. HISTORICAL BACKGROUND OF NAZI LOOTING AND CHANGING POLICIES

Between 1933 and 1945, the Nazis embarked on a systematic pillaging of Europe's art and artifacts. Some sources estimate that they looted between one-fourth and one-third of Europe's art. Their looting was not incidental or isolated. Rather, it was part of a long-term, bureaucratic process, well documented in the literature on this subject.⁹ The Nazis, seeking both to destroy "degenerate" art and to disenfranchise and persecute Jewish people, created entire legal structures based around stripping Jewish people of their legal rights and their possessions, including art.¹⁰ The Nazis painstakingly covered some of their tracks, for example by forcing Jewish people to sell their art collections under false pretenses of legality; as a result much stolen art was dispersed around the world, while other works were hidden away.¹¹

9. See generally KURTZ, *supra* note 1; FELICIANO, *supra* note 1; PETROPOULOS, *supra* note 1; NICHOLAS, *supra* note 1.

10. Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 473-74 (citing Kaye, *Avoidance and Resolution of Cultural Heritage Disputes*, *supra* note 2, at 243-44; David Wissbroecker, *Six Klimts, a Picasso & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 39, 40 (2004); Owen Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 27, 30 (1999)).

11. *Id.* at 473-74 & nn.1-13.

The movement to recover Nazi-looted art arguably began during and after World War II, when the Allies worked to return stolen works to their countries of origin or sometimes directly to their owners.¹² In the decades after the War, organizations like the Claims Conference began to work for international agreements and protocols to process claims for the restitution of property stolen by the Nazis.¹³ In the 1980s, European nations such as Austria began to release public lists of Nazi-looted art and other property, and to make public the details of their processes for returning that property to its owners.¹⁴ In the 1990s, however, an increased international focus on Nazi-looted art resulted in concentrated worldwide efforts to develop new laws and policies meant to expedite restitution of Nazi-looted art.¹⁵ The United States, Germany, and Switzerland all pledged to open their archives of lists and records of stolen art, which was made easier by the Nazis' scrupulous tracking of what they had stolen.¹⁶

As discussed below, in the late 1990s, international agreements like those developed at the Washington Conference on Holocaust-Era Assets and later international meetings helped to drive public discourse and international agreements on the proper way to proceed with claims for Nazi-looted art. In addition, museums began to develop codes of ethics to govern their acquisition, deaccessioning, and lending activity with a mind toward making their processes just, fair, transparent, and efficient. Many museums, nations, and interested nonprofits also began to host searchable, online archives of unprovenanced art, art that changed hands in Europe between 1933 and 1945, and other helpful

12. E.g., Pell, *supra* note 10, at 37 (discussing World War II-era Allied art restitution projects like the Monuments, Fine Arts, and Archive Services unit and external restitution).

13. *History of the Claims Conference*, CLAIMS CONF., <http://www.claimscon.org/index.asp?url=history> (last visited Aug. 9, 2011).

14. See, e.g., Douglas C. McGill, *Austria Sets Up System to Yield Nazi-Held Art*, N.Y. TIMES, Dec. 3, 1985, <http://www.nytimes.com/1985/12/03/arts/austria-sets-up-system-to-yield-nazi-held-art.html>.

15. See, e.g., Kaye, *Avoidance and Resolution*, *supra* note 2, at 260-61.

16. See Thomas Lippman, *44 Nations Pledge to Act on Art Looted by the Nazis*, WASH. POST, Dec. 4, 1998, at A2.

information.¹⁷ At that point it became far easier for claimants to discover the basis for their ownership claims to works that had belonged to them or their families, and to locate works they or their families had once owned—and so to assert restitution claims to works now held by museums.

III. LAW AND POLICY CONSIDERATIONS GOVERNING MUSEUMS' RESPONSES TO NAZI-ERA ART CLAIMS

The historical reality of the Nazis' confiscation of art unavoidably creates a morally charged context for considering how current holders of works that changed hands in that period respond to restitution claims. This historical background appears to have fueled the charge by critics that museums have applied "technical defenses" of statutes of limitations or laches to resolve cases efficiently and economically—the implication being that museums undertake such defenses, on some level, to cheat claimants or take from them an opportunity to litigate their claims on the merits.¹⁸ Nonetheless, any thoughtful consideration of how museums have responded to such restitution claims must consider the broader duties of a museum—both the museum's fiduciary obligations of loyalty and care to the public and to its trust property as well as the applicable professional codes of ethics that guide museums' conduct. In addition, any substantial analysis of these issues must consider the policy reasons behind the defenses of statute of limitations and laches—rather than simply dismissing them as "technical defenses." These doctrines are meant to serve the interests of fairness and equity, procedural values that gain meaning here not just from the claimant's situation but also from the museum's fiduciary duties and codes of ethics. We consider these issues in turn.

17. *See id.*

18. For an example of such an argument, *see* Kreder, *Guarding the Historical Record*, *supra* note 6, at 253-55.

A. Fiduciary Duties of Museums

We start with the particular characteristics of museums that necessarily shape their responses to restitution claims. Broadly speaking, a museum is “a permanent, non-profit institution, essentially educational or aesthetic in purpose, with professional staff, which acquires objects, cares for them, interprets them, and exhibits them to the public on some regular schedule.”¹⁹ In the United States, some museums are federal, state, or local government agencies, but most are “charitable trusts, charitable corporations, or nonprofit corporations”—organizations created for the public benefit.²⁰ Such museums seek, broadly, “to serve the public through art and art education,” to help “convey[] the rich complexity of human experience,” and to foster cultural diversity.²¹ Board members and directors of these museums are trustees—they are bound by the fiduciary duties of their museums, their trusts, and the beneficiaries of their trusts (if the museum is a public nonprofit) are the members of the general public.²²

As a general matter, under state law, the fiduciary duties of a trustee of a charitable trust include the duty

“to take reasonable steps to assume and maintain control of the trust property; to use reasonable care and skill to preserve the trust property; to take reasonable steps to realize on claims that are a part

19. ASS’N OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICE IN ART MUSEUMS 9 (1971), *quoted in* Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 COLUM.-VLA J.L. & ARTS 175, 176 (1983).

20. *See* Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT’L & COMP. L. 409, 451-52 (discussing the evolving goals of public museums).

21. *See, e.g., Values*, ASS’N OF ART MUSEUM DIRECTORS, <http://www.aamd.org/about/> (last visited July 30, 2011).

22. Gerstenblith, *Fiduciary Duties*, *supra* note 19, at 176-77. As Patty Gerstenblith notes, while those responsible for the management of museums may have many titles, they are nevertheless “trustees,” nomenclature that also helps to distinguish them from those professionals who have the title “director” but are responsible to the museum trustees. *See id.* at 177 n.5.

of the trust property; [and] to defend [against] actions that may result in a loss to the trust estate, unless it is reasonable not to make such defense.”²³

The trustee is duty-bound to administer trust property solely in the beneficiary’s interest and “to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”²⁴ The duty of loyalty requires trustees to be loyal to their museum’s charitable purpose—generally public education, cultural preservation, and so on.²⁵ The duty of care requires

23. RESTATEMENT (SECOND) OF TRUSTS § 379 (1959) (citations omitted); *see, e.g.*, NY EST. POWERS & TRUSTS LAW § 11-1.1 (McKinney 2011) (describing New York’s fiduciary duties).

24. CAL PROB. CODE §§ 16002, 16006 (West 2011) (“The trustee has a duty to administer the trust solely in the interest of the beneficiaries . . . The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”); *see also, e.g.*, NY EST. POWERS & TRUSTS LAW § 8-1.1 (trustee must ensure that the trust renders the public benefit for which it has earned its charitable status), *repealed by In re Fleet Nat. Bank* 864 N.Y.S. 2d 706 (2008) (holding that “provisions of EPTL § 8-1:1, to the extent that they may be in conflict with the [Surrogate’s Court Procedure Act], must by implication, be deemed to have been repealed).

Professor Gerstenblith has noted the conflict among some academics and the “sparse case law” regarding exactly how charitable corporations’ trustees or directors’ conduct should be judged, because charitable trustees are generally expected to fulfill a standard of “utmost loyalty to the trust,” with no self-dealing allowed, whereas corporate directors may “engage in self-interested transactions with the corporation so long as there is disclosure and the interested director can establish fairness to the corporation.” Gerstenblith, *Acquisition and Deacquisition*, *supra* note 20, at 417-20 & nn.41-56 (giving a thorough overview of the nonprofit-corporate debate regarding museum trustees’ fiduciary duties and the relevant standards). We do not delve into this debate here, but assume application of a trust standard—a more demanding standard that reflects the strong public duties and nonprofit ethics that shape a museum’s trust status. *See* Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 494 nn.173-75 (2010).

25. *See* Gerstenblith, *Acquisition and Deacquisition*, *supra* note 20, at 416; *see also* Gerstenblith, *Fiduciary Duties*, *supra* note 19, at 177; CAL PROB. CODE §§ 16002, 16006 (“The trustee has a duty to administer the trust solely in the interest of the beneficiaries . . . The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”); *see also, e.g.*, NY EST. POWERS & TRUSTS LAW § 8-1.1 (trustee

trustees to “be attentive to the management and preservation of the museum’s physical assets (the building and, in the case of a museum, its collections) and monetary assets (endowment and other financial investments).”²⁶

The obligation to preserve trust assets has two overlapping and critical implications here. First, consider a museum that owns a work that was duly accessioned into its collection and that is then the subject of a claim that it was taken by the Nazis from an original owner and is now owned by the heirs of that owner. In responding to such a claim, the museum must thoroughly investigate the provenance of the work and the claim asserted, to determine if the restitution claim is well-grounded; it must also consider the costs or benefits to the museum itself of retaining or restituting the work, as well as the value or risks posed to the museum’s beneficiaries, the public.²⁷ Put simply, a museum *cannot*, consistent with its trustees’ duty of care, deaccession a work in response to a restitution claim unless the museum’s investigation concludes that the claim is meritorious.

Second, if it is necessary for a museum to litigate against a claim that the museum concludes is not meritorious, the duty to preserve trust assets compels the museum to seek to litigate the issue as efficiently as possible. That is, having done its diligence and determined on the facts that its acquisition of a work included good title, a museum is required to employ the most efficient and economical means possible to avoid protracted, expensive litigation that the museum reasonably believes will ultimately result in its title to the work being confirmed.²⁸

must ensure that the trust renders the public benefit for which it has earned its charitable status).

26. Gerstenblith, *Acquisition and Deacquisition*, *supra* note 20, at 416; *see also* CAL PROB. CODE §§ 16002, 16006; NY EST. POWERS & TRUSTS LAW § 8-1.1.

27. *See* Gerstenblith, *Acquisition and Deacquisition*, *supra* note 20, at 420; Graefe, *supra* note 10, at 493-98.

28. *See, e.g.*, CAL PROB. CODE §§ 16002, 16006 (“The trustee has a duty to administer the trust solely in the interest of the beneficiaries . . . The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.”); *see also, e.g.*, NY EST. POWERS & TRUSTS LAW § 8-1.1 (trustee must ensure that the trust renders the public

A critical feature of public museums is their responsibility to the public—the concept of the public trust—which means that, because museums' ultimate duties are to educate the public and preserve the objects of human culture, museums cannot make the decision to deaccession a work lightly.²⁹ Rather, museums have a legal duty to research claims made for works in their collections diligently and thoroughly, and cannot simply decide to deaccession works based on anything less than careful provenance research. The assertion that museums have some kind of duty to return works simply because they are subject to restitution claims is unfounded. The general rule here, as one commentator has noted, is that a museum faced with a restitution claim must “ascertain the facts, sift them carefully in light of trust responsibilities, and be prepared to defend its action as prudent and taken in good faith.”³⁰

B. Professional Codes of Ethics

A museum's decision of whether or not to litigate against a claim should not be taken lightly, and must be guided by a set of general but compelling codes of ethics that balance the unique hardships of Holocaust victims and heirs with the duties museums have to the public at large. In 1998, after several Congressional hearings considered legislation that would have set legal requirements for provenance research and established a standard for returning stolen works, two major museum professionals' associations—the American Alliance of Museums and the Association of Art Museum Directors—developed self-regulatory codes of ethics specifically concerning art that changed hands

benefit for which it has earned its charitable status); see generally MARIE C. MALARO, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 235 (1998).

29. See Gerstenblith, *Fiduciary Duties*, *supra* note 19 at 192 (introducing the concept of the public trust, “that once an object is put into the public domain in the form of a charitable gift or trust, the object cannot later be returned to private hands”); see also Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions*, 33 *HASTINGS COMM. & ENT. L.J.* 407, 414-18 (2011) (discussing duties of museums to the public good).

30. MALARO, *supra* note 28, at 235.

during the Nazi/World War II era.³¹ These codes of ethics are not binding, nor do they commit museums to a position that requires either a presumption of claimants' correctness or the immediate return of claimed works. However, they do establish general guidelines for resolving claims of ownership related to items in the museum's custody quickly, equitably, and appropriately.

The American Alliance of Museums, formerly the American Association of Museums (the "AAM"), represents a broad scope of museums and museum employees, sets standards for the museum industry, advocates for museum interests, and shares knowledge about the museum industry. It published a general Code of Ethics for Museums (the "Code") in 1991 and amended it in 2000.³² The Code is AAM's formal statement of the ethical principles that museums and their employees should observe.³³ These principles center on the idea that "[f]or museums, public service is paramount."³⁴ By subscribing to the Code, the AAM states, "[m]useums . . . affirm their chartered purpose, ensure the prudent application of their resources, enhance their effectiveness, and maintain public confidence."³⁵ The Code states specifically that museum governance is a public trust, as discussed above,³⁶ and that all museum activities related to the museum's collections and its physical, human, and financial resources must be in the service of the public. Specifically, the Code requires museums to conduct all acquisitions, deaccessions, and loans with the good of the public in mind.³⁷

The Code serves as the background principles for the several sets of Ethical Guidelines disseminated by the AAM, including one concerning "The Unlawful Appropriation of Objects During

31. See, e.g., Gerstenblith, *Acquisition and Deacquisition*, *supra* note 20, at 437.

32. AM. ASS'N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 1 (2000), available at <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics-for-museums>.

33. See *id.*

34. *Id.* at 2.

35. *Id.*

36. See *id.* at 2; see also Gerstenblith, *Fiduciary Duties*, *supra* note 19, at 192-93 (discussing the public trust).

37. See CODE OF ETHICS FOR MUSEUMS, *supra* note 32, at 3.

the Nazi Era,” which was approved in 1999 and amended in 2001.³⁸ This set of Guidelines reasserts the Code’s emphasis on the public trust and states that “ethical stewardship is paramount.” The Guidelines encourage museums to catalogue objects in their collections, primarily European paintings and Judaica, that were acquired after 1932, that changed ownership between 1932 and 1946, and that were (or might reasonably be thought to have been) in Europe during those dates.³⁹ It also urges museums to make provenance information for those objects available online, and to give priority to continuing provenance research as resources allow.⁴⁰

The Guidelines also urge museums to consider all questions of provenance on a case-by-case basis, with a mind toward cooperation and reconciliation, and to proceed carefully with any claims regarding such items.⁴¹ Specifically, the Guidelines require museums to conduct their own research on any disputed item’s provenance, in addition to requesting information from claimants.⁴² They also remind museums that, pursuant to their fiduciary obligations, “[t]heir stewardship duties and their responsibilities to the public they serve require that any decision to acquire, borrow, or dispose of objects be taken only after the completion of appropriate steps and careful consideration.”⁴³ These requirements and suggestions are meant to reconcile museums’ fiduciary duties with the unique demands of Holocaust victims and heirs, essentially by amplifying what museums arguably must already do given their fiduciary duties.⁴⁴

Likewise, the Association of Art Museum Directors (the “AAMD”), an organization founded to set professional standards

38. AM. ASS’N OF MUSEUMS, GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA I (2001), *available at* http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/aa_m_guidelines.pdf.

39. *Id.* at 2.

40. *Id.* at 2-3.

41. *Id.* at 3.

42. *Id.*

43. *Id.* at 7.

44. *See* GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA, *supra* note 38, at 7.

for museums and their directors, has disseminated several papers meant to establish guidelines for museums faced with claims for art in their collections that changed hands during the Nazi era.⁴⁵ The *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945)*⁴⁶ and the AAMD's position paper *Art Museums and the Identification of Works Stolen by the Nazis*⁴⁷ should be read in conjunction with the AAMD's regularly updated guideline document *Professional Practices in Art Museums*⁴⁸ and the *AAMD Policy on Deaccessioning*.⁴⁹ Together these documents, like the AAM Guidelines, suggest that museums analyze their collections for works that they acquired during or shortly after the Nazi era, and works that may have changed hands (or that have provenance gaps) during that era.⁵⁰ These documents also suggest that claims be addressed quickly and cooperatively, and that museums consider, on a fact-sensitive basis, issues of how disputes and deaccessioning might affect both museums' interests and their duties to the public.⁵¹

45. *About AAMD*, ASS'N OF ART MUSEUM DIRECTORS, <http://www.aamd.org/about/> (last visited Aug. 16, 2011).

46. ASS'N OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE SPOLIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933-1945) (June 4, 1998), *available at* <http://www.aamd.org/papers/guideln.php>.

47. ASS'N OF ART MUSEUM DIRECTORS, ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS (May 2007), *available at* http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf.

48. ASS'N OF ART MUSEUM DIRECTORS, PROFESSIONAL PRACTICES IN ART MUSEUMS (2011), *available at* <http://www.aamd.org/papers/documents/2011ProfessionalPracticesinArtMuseums.pdf>.

49. ASS'N OF ART MUSEUM DIRECTORS, AAMD POLICY ON DEACCESSIONING (June 9, 2010), *available at* http://www.aamd.org/papers/documents/FinalDeaccessioning_Report_6_25_10.pdf.

50. *See* REPORT OF THE AAMD TASK FORCE, *supra* note 46; PROFESSIONAL PRACTICES IN ART MUSEUMS, *supra* note 48, at 4, 8; AAMD POLICY ON DEACCESSIONING, *supra* note 49, at 4-9; ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS, *supra* note 47, at 2-4.

51. *See* REPORT OF THE AAMD TASK FORCE, *supra* note 46; PROFESSIONAL PRACTICES IN ART MUSEUMS, *supra* note 48, at 4, 8; AAMD POLICY ON

A final, significant, code of ethics is the one developed by the International Council of Museums (“ICOM”), an organization founded in 1946 as an international NGO to build a network of museums and museum professionals to set standards in museums’ design, management, and collections organization, and to carry out international missions in, for example, fighting the illicit trafficking of cultural goods.⁵² ICOM’s Code of Ethics does not include specific language on Holocaust-era art or Nazi looting.⁵³ However, it does demand that museums exercise every effort in investigating the provenance of all gifts, loans, bequests, or exchanges, and also states that museums should deaccession works only with the fullest understandings of those works’ significance, character, legal standing, and “any loss of public trust.”⁵⁴ ICOM has, however, published a document that makes several recommendations concerning works of art belonging to Jewish owners—specifically, works belonging to Jewish owners that had been confiscated during World War II.⁵⁵ Like the AAM and AAMD documents described above, the ICOM recommendations urge museums to investigate and identify works obtained “during or just after the Second World War, that might be regarded as of dubious provenance,” to address the drafting of procedures for publicizing and returning those objects, and to “actively address” the return of all such objects to their rightful owners.⁵⁶

Further, two international agreements have responded to the question of museums’ legal and ethical obligations when faced

DEACCESSIONING, *supra* note 49, at 4-9, ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS, *supra* note 47, at 2-4.

52. *ICOM in Brief*, INT’L COUNCIL OF MUSEUMS, <http://icom.museum/who-we-are/the-organisation/icom-in-brief.html> (last visited Aug. 18, 2011); *ICOM Missions*, INT’L COUNCIL OF MUSEUMS, <http://icom.museum/who-we-are/the-organisation/icom-missions.html> (last visited Aug. 18, 2011).

53. *See generally* INT’L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2004), *available at* http://icom.museum/fileadmin/user_upload/pdf/Codes/code2006_eng.pdf.

54. *Id.* §§ 2.3 (provenance and due diligence), 2.13-.15 (deaccessioning).

55. INT’L COUNCIL OF MUSEUMS, ICOM RECOMMENDATIONS CONCERNING THE RETURN OF WORKS OF ART BELONGING TO JEWISH OWNERS (Jan. 14, 1999), *available at* <http://www.lootedartcommission.com/OXSHQE36019>.

56. *Id.*

with claims targeted at works in museum collections. One such agreement, established in 1998, is the document generally referred to as the Washington Conference Principles, which were delineated at the Washington Conference on Holocaust-Era Assets.⁵⁷ The second major agreement, established in 2009 and based largely on the Washington Conference Principles, is the Terezin Declaration on Holocaust Era Assets and Related Issues, established at the Prague Conference on Holocaust Era Assets.⁵⁸ Like the museum codes of ethics described above, these two international agreements are non-binding and generally, not specifically, prescriptive.⁵⁹ They do not grant either party—the art’s possessor or its claimant—presumptions of correctness.⁶⁰ Rather, they allow for the fact that while Holocaust victims (or heirs) and museums often face unique factual circumstances for each claim, not all claims are equal.

The Washington Principles—not established as museum codes of ethics but rather as general guidelines for any disputes over Nazi-era art—are substantively a list of eleven non-binding principles meant to adapt to any member country’s respective laws and help guide countries’ developments of rules regarding the return of Nazi-era art.⁶¹ Like the AAM and AAMD codes of ethics, the Washington Principles encourage parties to analyze and identify art in their possessions that was produced or changed hands during the Nazi era (paying special attention to gaps and ambiguities in provenance), to make their practices and records

57. U.S. DEP’T OF STATE & U.S. HOLOCAUST MEMORIAL MUSEUM, PROCEEDINGS OF THE WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART app. G ¶¶ 1-11, at 971-72 (1998), *available at* <http://fcit.usf.edu/holocaust/resource/assets/heacappe.pdf> (hereinafter “WASHINGTON CONFERENCE PRINCIPLES”).

58. U.S. DEP’T OF STATE BUREAU OF EUROPEAN & EURASIAN AFFAIRS, PRAGUE HOLOCAUST ERA ASSETS CONFERENCE: TEREZIN DECLARATION (June 30, 2009), *available at* <http://www.state.gov/p/eur/rls/or/126162.htm> (hereinafter “TEREZIN DECLARATION”).

59. WASHINGTON CONFERENCE PRINCIPLES, *supra* note 57, at 971-72 (specifically non-binding); TEREZIN DECLARATION, *supra* note 58 (same).

60. *See* WASHINGTON CONFERENCE PRINCIPLES, *supra* note 57, at 971-72; TEREZIN DECLARATION, *supra* note 58.

61. WASHINGTON CONFERENCE PRINCIPLES, *supra* note 57, at 971-72.

transparent (including by creating centralized records), and to publicize and restitute art found to have been stolen.⁶² When stolen art is found, or when claimants come forward to ask that allegedly stolen works be restituted, the Washington Principles encourage expedient, just, and fair solutions subject to fact-specific analyses.⁶³

Recognizing the Washington Principles' significance and reaffirming the need for just, fair solutions to disputes over Nazi-era art with due consideration to the unique circumstances of Holocaust victims and heirs, the Terezin Declaration—again a non-binding agreement—asks member countries to “continue and support intensified systematic provenance research,” specifically by publishing relevant information broadly and establishing mechanisms to help claimants in their searches.⁶⁴ Like the Washington Principles, the Terezin Declaration encourages member countries to work within their own laws in establishing these solutions.⁶⁵ As a point on which many commentators have focused, the Terezin Declaration states that museums should “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.*”⁶⁶

Some scholars argue that this language effectively prohibits museums from employing so-called “technical means” or “technical defenses” such as statutes of limitations when responding to Holocaust-era art claims.⁶⁷ Courts have rejected this

62. *Id.*; see also *supra* notes 45-51 and associated text (discussing AAM and AAMD codes of ethics).

63. WASHINGTON CONFERENCE PRINCIPLES, *supra* note 57, at 971-72.

64. TEREZIN DECLARATION, *supra* note 58.

65. *Id.*

66. *Id.* (emphasis added); see also, e.g., Brief for Amicus Curiae American Jewish Congress et al. as Amici Curiae Supporting Plaintiffs-Appellants and Reversal, *Grosz v. Museum of Modern Art*, (2d Cir. Dec. 16, 2010) (No. 10-257-cv), 2010 WL 2601991, at 10-11 (citing the Terezin Declaration for the principle that museums should not use technical defenses at law, but should only argue claims on their merits).

67. See Kreder, *The New Battleground*, *supra* note 6, at 38-39; see also Demarsin, *Let's Not Talk about Terezin*, *supra* note 6 at 160-65.

argument, as described below, and the structure of the declaration does the same.⁶⁸ “Just and fair solutions,” as we argue throughout this article, do not mean only those that advantage claimants; just and fair solutions include justice and fairness for museums and the public as well. Further, as explained below, museums have only advanced “technical defenses” in cases where detailed provenance research established the weakness of the underlying restitution claim.

Despite their non-binding nature, however, all of these codes and international agreements are influential and widely adopted.⁶⁹ They provide valuable guidance for what museums are already obliged to do by their fiduciary obligations to the public: to ensure that their collections, as well as their acquisitions, deaccessioning, and loan policies, are lawful; to address claims for restitution of museum property promptly, ethically, and equitably; and to balance any possible loss of museum property or capital against both their fiduciary and ethical obligations to the public at large and their duties—legal, moral, and professional—to anyone who asserts a claim to a work in the museum’s collection.

Moreover, any claim that may remove a work from a museum collection or cause a museum to expend time and money must account for the fact that museums are public institutions, and that any loss to a museum is arguably a loss to the public as well.⁷⁰ Claimant-museum relationships are not bilateral. They are triangular, with the public providing the third point of consideration.⁷¹ If a work is discovered to have been stolen during the Nazi period (that is, taken by the Nazis or looted), then the museum and its public will benefit from resolution of the object’s status, either through return of the property to the rightful owner or

68. See *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1, 13-14 (1st Cir. 2010); see also *infra* § IV.A (discussing this and other cases).

69. See Sue Chen, Note, *Art Deaccessions and the Limits of Fiduciary Duty*, 14 ART, ANTIQUITY & LAW 103, 113-14 (2009) (discussing the adoption and influence of museums’ codes of ethics).

70. See Thompson, *Cultural Losses and Cultural Gains*, *supra* note 29.

71. Cf. Gerstenblith, *Fiduciary Duties*, *supra* note 19, at 192 (discussing the public trust in the context of a museum’s relationship to its own duties and to the public at large).

through the museums' lawful acquisition of the object.⁷² But a museum must serve the public by resisting claims that do not raise true issues of ownership, thereby resolving title to works in its collection in a visible, binding fashion.

The U.S. Department of State's Special Envoy for Holocaust Issues, Douglas Davidson, recently suggested that a museum's public duty, alongside the guidelines and codes described above, effectively creates to a duty to avoid litigation by entering alternative dispute resolution, if not to an immediate duty to return.⁷³ This view ignores the other half of museums' public duty, to take all reasonable steps to preserve trust assets when appropriate. While in many cases museums can and do choose negotiation and mediation in preference to litigation (as set out in detail below), the court system remains in particular cases an appropriate and ethical option for museums involved in disputes over Nazi-era art, where the museum's provenance research undermines the claim and the claimant refuses to withdraw it. In such instances, the museum's public duty may compel a decision to litigate the claim.

Professor Kreder has argued that the fact that a few museums have filed declaratory judgments against some claimants and asserted time bar defenses indicates that museums are exploiting legal rules in contravention of their own codes of ethics and even United States executive policy.⁷⁴ This argument, not fully defined

72. See Graefe, *supra* note 10, at 497 & nn.206-07; Shirley Foster, *Prudent Provenance—Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 147 (2001) (“In the context of Nazi-looted art however, the public is often in favor of deaccessioning art stolen during the Holocaust. The trustees have to weigh the gain in public sentiment against the loss of a painting that benefits the public. . . Perhaps the greater common good would be served if the museum abides by established property laws and returns a work to which it never had good title.”) (internal citations omitted).

73. See Douglas Davidson, Special Envoy for Holocaust Issues, U.S. Dep't of State, Remarks at the New York County Law Association Symposium on “Should Stolen Holocaust Art Be Returned?” (Mar. 25, 2013), *available at* <http://www.state.gov/p/eur/rls/rm/2013/mar/206719.htm>.

74. Kreder, *Guarding the Historical Record*, *supra* note 6, at 253 (“Now, museums are using American courts to shut down inquiries into [allegedly looted art's history] by blocking claims on technical grounds, contrary to their own ethics guidelines and U.S. executive policy.”) (internal citations omitted);

in any available published article, essentially assumes that *any* museum response employing “technical grounds”—generally statutes of limitations and laches—to defeat claims for allegedly looted art in a museum’s collection is unethical either because such responses do not address claims of ownership “openly, seriously, responsively, and with respect for the dignity of all parties involved,” or because any technical response is forbidden either by museums’ codes of ethics or United States policy.⁷⁵

First, while we discuss “technical defenses” in more detail below, it bears emphasis here that no code of ethics prohibits a museum from asserting any particular grounds to defeat a claim that it concludes is meritless after duly researching the provenance of the allegedly looted work, consistent with the museum’s codes of ethics, and sharing the findings of that research with the claimant. Neither the codes of ethics nor the international agreements discussed above forbid museums from engaging in certain practices, such as initiating litigation or asserting time bar defenses, when confronted with claims that, when researched according to the museum’s ethical obligations, are found lacking. To be sure, museums may not employ such means indiscriminately and without due consideration of the claims at issue.⁷⁶ But there is no bar to museums using such strategies judiciously, reasonably, and in good faith.

Second, there is no sound basis for asserting that museums contravene executive or international policy when asserting time bar defenses to claims for allegedly Nazi-looted art that do not appear meritorious. Professor Kreder has pointed to the international Principles described above, as well as the United

Kreder, *The New Battleground*, *supra* note 6, at 56-75 (raising the same argument); *see also* Demarsin, *Let’s Not Talk about Terezin*, *supra* note 6 at 160-61 (similar).

75. *See* GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA, *supra* note 38; *See* Kreder, *Guarding the Historical Record*, *supra* note 6, at 253; Kreder, *The New Battleground*, *supra* note 6, at 56-75.

76. *See, e.g.*, WASHINGTON CONFERENCE PRINCIPLES, *supra* note 57, at 971-72 (requiring museums to be careful, reasonable, and thorough—among other things—in addressing claims for restitution); CODE OF ETHICS FOR MUSEUMS, *supra* note 32 (same).

States' post-World War II policy of "reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."⁷⁷ Effectively the same argument was advanced and rejected in *Museum of Fine Arts, Boston v. Seger-Thomschitz* before the First Circuit. There the claimant contended that the Massachusetts statute of limitations was preempted by these commitments of the executive branch. The claimant cited the Supreme Court's decision in *American Insurance Association v. Garamendi* for the holding that "state law must give way" when it is in "clear conflict" with an "express federal policy" in the foreign affairs context.⁷⁸

The First Circuit, however, found this principle inapposite because the executive commitments cited—the Washington Principles and the Terezin-Declaration—were not "express," and moreover, even if they were, the Massachusetts statute of limitations, modified by the discovery rule, would not have conflicted with them.⁷⁹ Critically, these declarations are, as the First Circuit found, "phrased in general terms evincing no particular hostility toward generally applicable statutes of limitations."⁸⁰ They tend to encourage standards of reasonableness, justice, and fairness, none of which implies (let alone requires) a specific course of action in litigation.⁸¹

Moreover, although the Terezin Declaration does state a preference that Nazi-era art disputes be resolved "based on the facts and merits" rather than on legal technicalities, that language is "too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitations," the First Circuit found.⁸² Indeed, the Terezin Declaration recognizes that all

77. See Kreder, *Guarding the Historical Record*, *supra* note 6, at 259 & nn.39-42 (citing germane post-war court decisions that referred to U.S. policies of the era, and citing the Washington Principles); see also *id.* at 258-260 (discussing the trajectory of U.S. policy regarding restitution of Holocaust-era assets lost under force or duress).

78. See *Seger-Thomschitz*, 623 F.3d at 13-14 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421-25 (2003)).

79. *Id.*

80. *Id.*

81. *Id.* at 13.

82. *Id.*

relevant issues be considered, and that some legal provisions that may impede the restitution of art may still apply.⁸³ Accordingly, the First Circuit recognized that time bar defenses may be appropriate in particular factual contexts; certainly, had the parties to that Declaration wished definitively to ban such defenses, they would have done so.⁸⁴

C. “Technical Defenses” and the Interests of Fairness and Equity

Statutes of limitations are legislatively defined procedural limits on civil and criminal actions.⁸⁵ Professor Kreder in particular has criticized the assertion of statutes of limitations in actions for the restitution of Nazi-era artworks, on the grounds that a time bar defense may deprive parties of the opportunity to resolve claims on their merits.⁸⁶ However, statutes of limitations are crafted to promote the interests of fairness and equity between *both* parties, and specifically, as the seminal article on the topic states, the “primary consideration underlying [statutes of limitations] is undoubtedly one of fairness to the defendant.”⁸⁷ Justice Jackson’s

83. *Id.*

84. *See Seger-Thomschitz*, 623 F.3d at 13.

85. *See generally Developments in the Law: Statutes of Limitations*, 6 HARV. L. REV. 1177 (1950) (providing the seminal overview of statutes of limitations in American law).

86. *E.g.*, Kreder, *Guarding the Historical Record*, *supra* note 6, at 260-69 (criticizing Holocaust-era art restitution holdings based on statutes of limitations); *id.* at 253-55 (arguing that invocation of “technical defenses” is virtually always unethical); *see also* Demarsin, *Let’s Not Talk about Terezin*, *supra* note 6 at 164-65 (similar); Therese O’Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EURO. J. INT’L L. 49, 65-67 (2011) (criticizing statutes of limitations on equitable grounds and suggesting that such statutes may shift burdens onto wronged original owners). *Cf.* Stephen K. Urice, *Elizabeth Taylor’s Van Gogh: An Alternative Route to Restitution of Holocaust Art*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 10 (2011) (“In a number of disputes . . . the cases have been decided not on the merits or by findings of facts that clarify the history of the works in question, but, instead, by successful assertion of a statute-of-limitations defense.”).

87. *Developments in the Law: Statute of Limitations*, *supra* note 85, at 1185.

classic formulation of the policy reasons behind statutes of limitations remains the guide for any discussion:

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.⁸⁸

The underlying purposes of statutes of limitations, then, are intended to allow for and encourage adjudication of claims on the merits, when that is possible. As has been long recognized, statutes of limitations aim to discourage potential claimants from sleeping on their rights. When, however, that has occurred, statutes of limitations presume that the passage of time will limit the availability of evidence and make it difficult if not impossible for disputes to be adjudicated “on the merits”—that is, based on all the evidence from all witnesses and sources that once might have been brought to bear. Critics of statutes of limitations in this context complain that dismissal of claims based on a time bar

88. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944); *see also* *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citing *Order of R.R. Telegraphers*, 321 U.S. at 348-49); *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (same); *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965) (same); *Chase Secs. Co. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri K&T R.R. Co. v. Harriman*, 227 U.S. 657, 672 (1913) (same); *Bell v. Morrison*, 26 U.S. 351, 360 (1828) (“[A statute of limitations] is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses.”).

precludes “addressing the merits.”⁸⁹ But it is the passage of time—and the loss of evidence it inevitably brings—that precludes adjudication “on the merits.”

As time passes, “the merits” of a case become harder to access. Often, all that remains is attenuated evidence that is “hard to disprove, and easy to fabricate.”⁹⁰ Statutes of limitations embody the judgment of legislatures that, at some point, against this prejudicial progression, defendants should be allowed to bring to bear a presumption which our legal tradition has generally found to be true: that “claims which are valid, are not usually allowed to remain neglected.”⁹¹ And in this way, “statutes of limitation supply the place of evidence lost or impaired by lapse of time”⁹² As the Supreme Court has repeatedly emphasized, decisions based on statutes of limitations *are decisions on the merits*;⁹³ they are decisions based on the evidence that if the delaying party knew of its rights, it would not have sat on them for so long.⁹⁴ Applied to the present context, the passage of time beyond an applicable statutory period also can be evidence that the

89. *E.g.*, Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, supra note 6, at 83.

90. *Bell*, 26 U.S. at 360.

91. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868); *see also* *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-301 (1922) (quoting *Riddlesbarger*, 74 U.S. at 390).

92. *Oregon Lumber*, 260 U.S. at 299-301 (“The defense of the statute of limitations is not a technical defense but substantial and meritorious. . . . Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary.”) (citing *Bell*, 26 U.S. at 360, *Hanger v. Abbott*, 6 Wall. 532, 538; *Wood v. Carpenter*, 101 U. S. 135, 139; *Riddlesbarger*, 74 U.S. at 390, *United States v. Chandler-Dunbar Co.*, 209 U. S. 447, 450); *see also* *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (“Statutes of limitation are vital to the welfare of society and are favored in the law. . . . *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.”) (emphasis added).

93. *See, e.g.*, *U. S. v. Kubrick*, 444 U.S. 111, 117 (1979); *Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938); *Oregon Lumber*, 260 U.S. at 299-301.

94. *See, e.g.*, *Kubrick*, 444 U.S. at 117; *Guar. Trust*, 304 U.S. at 136; *Oregon Lumber*, 260 U.S. at 299-301.

prior putative owners did not believe they owned the art in question because, had they, they would have brought a claim earlier. Hence, the distinction between “technical defenses” and rulings “on the merits” begins to fade, and, in a sense, decisions based on statutes of limitations *are* decisions based on the evidence—or, in some respects, the presumed *lack* of evidence.

Like statutes of limitations, the equitable doctrine of laches prevents a claimant from bringing stale claims. But unlike a statute of limitations, laches is not a legislative creation but a judge-made device of the common law. Based on the same reasoning as statutes of limitations, laches recognizes that “time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; [laches, therefore] operates by way of presumption in favor of the party in possession.”⁹⁵

Here, too, labeling the defense as merely “technical” obscures the deep consideration of merits that underlies its operation. Though decrying absolutely any application of the doctrine in the context of restitution claims, Professor Demarsin concedes, “[a]n equitable defense, laches requires proof of *actual staleness*, consisting in loss of evidence, material and detrimental changes in position of the defendant, or other circumstances that would lead to special harm if the relief sought by the claimant was granted.”⁹⁶ But even where the defendant establishes these elements, a plaintiff’s “[l]ong acquiescence and laches . . . can[] be excused . . . by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the [court].”⁹⁷ In the museum context, courts will not deem a claim for restitution time-barred under the doctrine of laches unless the plaintiff, *through no fault of the museum*, inexcusably delayed in bringing the case in a

95. *Wagner v. Baird*, 48 U.S. 234, 258-59 (1849) (cited by *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 217 (2005)).

96. Demarsin, *Has the Time (of Laches) Come?*, *supra* note 6 at 628-29 (emphasis in original). Professor Demarsin further admits that the passage of time prejudices defendants more than plaintiffs, although he laments that this proves “more advantageous to the defendant” in the laches inquiry. *Id.* at 687.

97. *Wagner*, 48 U.S. at 258 (citations omitted).

way that resulted in actual harm to the museum. Laches, then, asks the court to hold open its doors only to those who come in clean conscience, good faith, and diligence.⁹⁸

Accordingly, when employed by a museum guided by ethical principles that insist on the return of stolen or questionable artworks, whose fiduciary obligations demand that they rigorously consider any action that might require deaccessioning of artworks or cultural objects, statutes of limitations and laches provide necessary, just, and equitable checks on certain claims. These defenses allow museums to keep works to which they have valid claims—without unnecessarily devoting trust assets to avoidable litigation.

Moreover, statutes of limitations are not employed by courts in an unforgiving manner. Rather, to address the seemingly harsh result of having rights cut off entirely through the passage of time, legislatures and courts have adopted exceptions to limitations periods intended to allow some claims to proceed. For current purposes these exceptions generally fall into two areas, the “demand-and-refusal rule” primarily applied in New York⁹⁹ and the “discovery rule” applied in most other states.¹⁰⁰ Under the

98. *Id.* Notably, at least one commentator has lamented that the New York “demand-refusal rule, coupled with a laches defense that stresses the unreasonableness, rather than the length, of the delay, tilts the balance too unfairly in favor of [party bringing the restitution claim], particularly when such [a claimant] is not diligent whereas the bona fide purchaser is.” Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution To Disputes Over Title*, 31 N.Y.U. J. INT’L L. & POL. 15, 28 (1998).

99. *E.g.*, *Kunstsammlungen zu Weimer v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982) (demand-and-refusal rule applied to stolen World War II-era art); *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 45 (S.D.N.Y. 1990) (demand-and-refusal rule applied to Turkish cultural property objects); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991) (demand-and-refusal rule applied to Chagall allegedly stolen from the Met); *Menzel v. List*, 267 N.Y.S. 2d 804, 809 (1966) (demand-and-refusal rule applied to Holocaust heirs’ Chagall paintings that had been looted by the Nazis).

100. *E.g.*, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288-89 (7th Cir. 1990), *cert. denied*, 502 U.S. 941 (1991) (discovery rule applied to mosaics stolen from a church in Cyprus); *O’Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980) (discovery rule applied to art allegedly stolen from painter Georgia O’Keeffe).

demand-and-refusal rule, the limitations period only begins to run after the owner demands a return of the work—because only then does the good faith holder of the work become a wrongdoer.¹⁰¹ Under the discovery rule, the limitations period begins to run only after the owner learns (or, in the exercise of reasonable diligence, should have learned) of the existence of a claim to the work and the good-faith purchaser's possession of the work.¹⁰²

As a practical matter, these doctrines mean that statutes of limitations can cut off an otherwise valid claim only where a potential claimant has constructive notice of a claim and then still fails to pursue it for the statutory period. As the cases discussed below make clear, the passage of time *does* often lead to the loss of evidence. It is therefore far from obvious that application of the statute of limitations to bar stale claims will necessarily create unfairness—at least where, as in these cases, many decades have passed since the events at issue, it may in fact avoid unfairness.

IV. HOW MUSEUMS HAVE RESPONDED TO RESTITUTION CLAIMS IN PRACTICE

Critics of how museums have responded to restitution claims have argued—sometimes lacing their analysis with accusations that museums' decisions are “stupid, immoral, and unethical”—that museums have essentially used “technical defenses” to evade real issues.¹⁰³ These arguments are misplaced. As explained above, the legal and policy principles behind statutes of limitations, museums' fiduciary obligations, and codes of ethics

101. See *Menzel*, 267 N.Y.S. 2d at 809.

102. See, e.g., *O'Keefe*, 416 A.2d at 870.

103. Dowd, *supra* note 6 (accusing the Boston Museum of Fine Arts of unethically suing Holocaust victims' heirs to retain allegedly stolen property, though the First Circuit had held that the museum had good title and that the heirs' claim was unfounded); see Kreder, *The New Battleground*, *supra* note 6, at 37-47 (arguing that museums' defense of their collections against certain Holocaust-era art restitution claims is unethical and against U.S. policy); Kreder, *Guarding the Historical Record*, *supra* note 6, at 253-55 (2011) (same); see also Demarsin, *Has the Time (of Laches) Come?*, *supra* note 6 at 691 (“henceforth, [heirs of] Holocaust survivors will most likely no longer prevail in any attempt to obtain recovery for their stolen heirlooms”).

are meant to balance the relationship of claimants, museums, and the public, with due deference given to the uniqueness of Holocaust victims' and heirs' claims. But the real proof lies in a careful consideration of how museums actually have responded to restitution claims. Critics point selectively to a few cases in which museums have chosen to litigate against weak or obviously unmeritorious restitution claims. In fact, we are only aware of a handful of cases—a tiny minority of documented restitution claims—where museums have initiated litigation and invoked time bar defenses. Far more frequently, museums faced with restitution claims have opted to resolve such claims by mutual agreement, whether by restituting the work voluntarily, purchasing the disputed work from the claimant, or creating lending agreements for disputed works in their collections after researching claims brought for those works' return.¹⁰⁴

*A. Cases in Which Museums Have Responded to Claims by
Initiating Litigation*

To address what a few commentators have found so noteworthy, we review the small number of cases in which museums have responded to claims for works in their collections with declaratory judgment actions and invocation of statutes of limitations or laches.

As an initial matter, we briefly consider the procedural propriety of museums, when faced with restitution claims they conclude are not meritorious, initiating declaratory judgment actions.¹⁰⁵ Under the Federal Declaratory Judgment Act, a federal court may “declare the rights and other legal relations of any interested party

104. See *Thompson, supra* note 29 at 426-27 (“the history of claims against museums show that museums have always been reluctant to enter the courtroom for restitution claims. In fact, museums generally allow the lawsuit to proceed only when they are convinced that the work in question was not looted.”); *Urice, supra* note 86 at 10 (“More than eighty percent of the fifty claims involving museums have settled out of court. In all but one of those settlements either the work of art was restituted or its value (or an agreed portion of its value) was paid to the claimant.”).

105. See, e.g., *Kreder, Fighting Corruption of the Historical Record, supra* note 6 at 109-114.

seeking such declaration” where there is an “actual controversy” between parties.¹⁰⁶ This procedure “permits an early adjudication of the rights and legal remedies involved in a dispute . . . This remedy permits parties to minimize the accrual of avoidable losses and damages, and affords a party threatened with a lawsuit an opportunity to seek an adjudication without waiting for the opposition to institute proceedings.”¹⁰⁷ In particular, where a claimant asserts that a work long held by a museum actually belongs to him or her—and presses this claim even after being presented with the results of provenance research showing the museum appears to hold good title—the museum should not have to wait for the claimant to file suit. The availability of declaratory judgment proceedings allows the museum to address a cloud upon title to the work, which otherwise may make it problematic for the museum to lend the work for exhibition at other venues until the dispute is resolved. It is therefore unclear what is improper about museums initiating litigation against parties that threaten litigation against museums, at least where the museums have established a strong basis for asserting their continued ownership of the works at issue.

I. Toledo Museum of Art v. Ullin and Detroit Institute of Arts v. Ullin

*Toledo Museum of Art v. Ullin*¹⁰⁸ and *Detroit Institute of Arts v. Ullin*¹⁰⁹ represented two museums’ responses to one family’s claims of ownership to paintings owned by the museums. We discuss the two cases together because the same claimants were involved and the cases reached the same resolutions.

In *Toledo Museum of Art v. Ullin*, heirs of Martha Nathan, a Jewish woman who was the widow of a prominent German Jewish

106. 28 U.S.C. § 2201 (2006).

107. 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 57.04[3] (3d ed. 2007); see *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (affirming Act’s constitutionality).

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

109. *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007).

art collector, asserted a claim of ownership to the Gauguin painting *Street Scene in Tahiti*, held by the Toledo Museum of Arts (“TMA”).¹¹⁰ Ms. Nathan had inherited her husband’s art collection after his death in 1922.¹¹¹ His will had stated that Ms. Nathan could eventually sell some of the works she inherited in order to meet her needs.¹¹² In 1937, Ms. Nathan fled Nazi persecution in Germany and acquired French citizenship in Paris, returning to Germany in 1938 to sell her house, which at that point contained several paintings, but not the Gauguin painting at issue, which she had previously sent to Switzerland.¹¹³ The Nazis forced Ms. Nathan to turn over the paintings that were still in Germany.¹¹⁴ She moved permanently to Switzerland around 1939, but before that, in December 1938, she had sold some of her artworks, including the Gauguin painting, to a group of prominent European art dealers she had known for years—Justin Thannhauser, Alexander Ball, and George Wildenstein.¹¹⁵ The three collectors purchased the Gauguin for about \$6,900. As the court stated regarding the sale and the TMA’s later purchase of this painting:

In short, this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime. Several months later, in May 1939, TMA purchased the Painting from Wildenstein & Co. for U.S. \$25,000. TMA has had the Painting on display in Ohio and internationally since 1939 with Martha Nathan noted as prior owner.¹¹⁶

110. *Toledo Museum*, 477 F. Supp. 2d at 804-05.

111. *Id.* at 804.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 804-05.

116. *Toledo Museum*, 477 F. Supp. 2d at 805.

After World War II and the fall of the Nazi regime, Ms. Nathan pursued claims for her losses resulting from Nazi persecution, “including the exit tax she paid, the sale of her home for less than its fair market value, the six paintings she turned over to the Stadel Art Institute, and the household items she left in storage in France.”¹¹⁷ For more than forty years, the Nathan estate successfully pursued these claims, but it never claimed ownership of the Gauguin painting in question until 2004, five years after the AAM’s guidelines had been established.¹¹⁸ At that point the TMA provided the Nathan heirs with information about the Gauguin painting’s provenance before it brought a declaratory judgment action to quiet title to the painting, arguing that over sixty-six years had passed since its purchase of the painting, meaning that the Nathans’ heirs’ claim of ownership was barred by Ohio’s four-year statute of limitations.¹¹⁹ The defendant heirs counterclaimed for conversion, restitution, and declaratory judgment, demanding possession of the Gauguin or compensation for their alleged loss.¹²⁰

The court noted that while Martha Nathan and her estate had diligently pursued claims for other lost properties from the end of World War II and onward, they had never challenged the 1939 Gauguin sale or the subsequent sale to TMA, which long displayed the painting with Martha Nathan explicitly noted as its prior owner.¹²¹ Indeed, the court stated,

Martha Nathan knew better than anyone the facts surrounding her own purported sale. . . . Any fraud, duress, or wrongdoing would or should have been known at the time the art dealers’ [sic] acquired the painting. Even if, for some unexplained reason, she could not discover any wrongdoing at the time, once the chaos of World War II Europe subsided, a reasonable and prudent person would have made

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 807-08.

further inquiry into the terms of her sale to the art dealers.¹²²

The court imputed this knowledge to Martha Nathan's heirs, and noted that even if it had not done so, the heirs should have made inquiries into the Gauguin's provenance long before.¹²³ An accounting of Ms. Nathan's estate had been made after her death in 1958; her executor made additional Holocaust-related claims for several decades after that; and the public debate about Nazi-era artworks should have been enough to put the Nathans' heirs on notice, since they knew Ms. Nathan had sustained, and pursued actions on, wartime losses.¹²⁴ Therefore, under the discovery rule, the defendants should by reasonable diligence have discovered Ms. Nathan's claim against TMA, whether in 1938 at the painting's first sale, in 1939 at TMA's purchase of it, by Martha Nathan's death in 1958, or at the latest when Congress publicized the issue of Nazi-era assets (especially artworks) in 1998.¹²⁵ Since they brought no such claims even when they reasonably should have known about them, the court held their claims time-barred.¹²⁶ Notably—and contrary to some commentators' argument that claimants in such cases should be allowed to take their cases to trial on the merits—the court noted that the claimants could prove no set of facts entitling them to relief.¹²⁷

The second case involving the Nathan heirs, *Detroit Institute of Arts v. Ullin*, proceeded along similar lines.¹²⁸ There the claim involved a Van Gogh painting, *Les Becheurs*, which Martha Nathan had similarly taken to Switzerland in 1938 and sold to the three art dealers mentioned above, Thannhauser, Ball, and

122. *Toledo Museum*, 477 F. Supp. 2d at 807 (footnote omitted).

123. *Id.*

124. *Id.*

125. *Id.* at 807-08.

126. *Id.* at 808-09.

127. Compare Kreder, *Guarding the Historical Record*, *supra* note 6 (arguing that statute of limitations claims ignore the facts), with *Toledo Museum*, 477 F. Supp. 2d at 808-09 (examining the factual record and concluding that no set of facts could entitle the claimants to relief).

128. See *Detroit Inst.*, 2007 WL 1016996 at *1.

Wildenstein.¹²⁹ As with the Gauguin, neither Ms. Nathan, her executor, or her heirs had brought claims for the Van Gogh painting, although they had brought many for other property, including the paintings that Ms. Nathan had been forced to give up after she returned briefly to Germany.¹³⁰ The Detroit Institute of Art (the “DIA”) had possessed the Van Gogh since 1969, after receiving it as a bequest from an art collector who had purchased it from the three art dealers in 1938.¹³¹ The Nathans’ heirs demanded the painting from the DIA in 2004. The DIA investigated their claims and the provenance of the Van Gogh, rejected the claim, and filed a declaratory judgment action to quiet title, after which the defendant heirs counter-claimed for conversion, restitution, and declaratory judgment.¹³²

The DIA then moved to dismiss the counter-claim because Michigan’s three-year statute of limitations had long since run against the heirs.¹³³ The court found that Michigan does not apply the discovery rule in conversion claims because of “public policies favoring finality in commercial transactions, protecting a defendant from stale claims, and requiring a plaintiff to diligently pursue his claim.”¹³⁴ Accordingly, the court held that the heirs’ claim had accrued in 1938—meaning that the statute of limitations on all their claims had run—and that, even if the statute of limitations had not run, the Nathans’ heirs should reasonably have discovered a possible cause of action regarding the Van Gogh in the 1970s, when Ms. Nathan’s estate’s executor had made additional claims regarding the Nathan family’s wartime losses.¹³⁵

In both of these cases, the critical facts were that the paintings had been part of transactions separate from any forced sales, and that the claimants’ families had known of these transactions but

129. *Id.*

130. *Id.* at *2.

131. *Id.* at *1.

132. *Id.* at *2.

133. *Id.*

134. *Detroit Inst.*, 2007 WL 1016996 at *3 (quoting *Brennan v. Edward D. Jones & Co.*, 626 N.W. 2d 917, 920 (Mich. 2001)).

135. *Id.* at *3-4.

never included them in any claims for restitution after the War.¹³⁶ The museums had publicly displayed their paintings, including information about Martha Nathan's ownership of them, for decades, and had provided the claimants with the provenance research on which the museums based their claims for retention.¹³⁷ In these circumstances, it is doubtful that the museums could have, consistent with their fiduciary duties, decided to reconstitute the paintings in any event. Rather, the museums' thorough review of the available facts about the paintings' histories compelled the defense of the museums' ownership, and the use of the most economical and efficient litigation approach—invocation of time bars to obviously stale claims. Their “technical defenses” were not, therefore, unethical means of protecting ill-gotten art; they were tools in the museums' defenses of trust property, and appropriately invoked in the public interest. As noted above, not all claims are equal, and these were unmeritorious claims that were appropriately adjudicated at an early stage.

2. Museum of Modern Art v. Schoeps

In *Museum of Modern Art v. Schoeps*, the claimant was a grandnephew of prominent Jewish banker and art collector Paul von Mendelssohn-Bartholdy. He asserted ownership of two Picasso paintings, *Boy Leading a Horse* and *Le Moulin de la Galette*, which resided respectively in the collections of New York's Museum of Modern Art and the Solomon R. Guggenheim Foundation.¹³⁸ Mendelssohn-Bartholdy had owned the paintings until around the time of his death in 1935, when he sold them to Justin Thannhauser, the same art dealer from the Toledo Museum

136. *Toledo Museum*, 477 F. Supp. 2d at 807-08 (Martha Nathan and her executor diligently pursued claims for other paintings from her collection but not the paintings the claimants sought); *Detroit Inst.*, 2007 WL 1016996 at *3-4 (similar).

137. *Toledo Museum*, 477 F. Supp. 2d at 805 (TMA shared provenance information); *Detroit Inst.*, 2007 WL 1016996 at *2 (DIA researched the claimants' request before moving to protect its ownership of the paintings).

138. *Schoeps v. Museum of Modern Art*, 549 F. Supp. 2d 543, 544-45 (S.D.N.Y. 2008).

and Detroit Institute cases.¹³⁹ Thannhauser sold *Boy Leading a Horse* to the collector William S. Paley in 1936, and in 1964 Paley donated the painting to the Museum of Modern Art. Thannhauser himself donated *Le Moulin de la Galette* to the Guggenheim Foundation in 1963.¹⁴⁰ In 2007, Julius Schoeps, Mendelssohn-Bartholdy's grand-nephew, asserted ownership against both museums for the paintings, and the two museums initiated an action for declaratory relief against Schoeps.¹⁴¹ The museums argued in part that Mendelssohn-Bartholdy had gifted the two paintings to his second wife in 1927, thereby excluding them from his will (which was executed in 1935) and so precluding Schoeps from being able to make claims to them.¹⁴²

Schoeps did not argue that Thannhauser coerced the von Mendelssohn-Bartholdy family in order to precipitate the sale of the paintings, nor did he contend that the Nazis forced the sale to the Jewish Thannhauser.¹⁴³ Instead, he claimed that Paul von Mendelssohn-Bartholdy or his wife, Elsa, sold the paintings due to financial distress caused by Nazi persecution.¹⁴⁴ In response, the museums cataloged evidence establishing that the von Mendelssohn-Bartholdys were worth the equivalent of between \$5 million and \$10 million at the time of the transfer, not counting their extensive art collection; that they owned and lived in palaces, not the least of which is now the German president's home; that they enjoyed great social prestige at the time the paintings were sold, despite Paul's Jewish ancestry; that Elsa also came from an aristocratic German family and was considered "Aryan" according to Nazi racial classifications; that Paul was one of two senior partners of Mendelssohn Bank, one of Germany's most important private banks and part of the consortium that enabled the foreign borrowing behind Germany's rearmament; and that the banking

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 545.

143. Memorandum of Law in Support of the Museum of Modern Art and the Solomon R. Guggenheim Foundation's Motion for Summary Judgment at 12, *Schoeps v. Museum of Modern Art*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074), 2008 WL 4679447.

144. *Id.*

business made significant profits until the time of Paul's natural death (and although it had suffered losses, those losses were based in the Great Depression and the economic woes of Weimar and predated the Nazi regime).¹⁴⁵ There was considerable evidence contradicting the notion that the paintings were wrongfully acquired by an art dealer preying upon the von Mendelssohn-Bartholdy's economic and social duress.

Unpersuaded that the von Mendelssohn-Bartholdy family would have asserted a claim to the paintings, the museums asserted the defense of laches, arguing that "reasonable diligence" would have counseled Schoeps and his ancestors to bring claims earlier, "while relevant witness[es] to the event in question were still alive."¹⁴⁶ The museums catalogued considerable evidence that prior generations did not believe they had a valid claim to the paintings. For example, shortly after Paul's death, Elsa who had purchased and collected art in her own right, had two appraisal inventories done of the forty-two paintings in her collection.¹⁴⁷ She annotated those appraisals in her own handwriting, noting the pieces that had been "verloren" or lost.¹⁴⁸ Neither *Moulin* nor *Boy*—a massive seven-by-four foot piece that had been prominently displayed at the entryway to the dining room, so that its absence would have been acutely felt—were listed or so marked.¹⁴⁹ Moreover, Elsa

was not shy about bringing claims when she thought she had been wronged Before the end of the war, she litigated over being charged . . . 750 [Reichsmark] for the cancellation in official records of a property encumbrance. After the war, she made an unsuccessful restitution claim for the von Mendelssohn-Bartholdy country estate . . . which had been seized by the Red Army. . . . During the

145. *Id.* at 12-15.

146. Answer and Affirmative Defenses at 27, *Schoeps v. Museum of Modern Art*, (S.D.N.Y. 2008) (No. 07 CV 11074); *see Schoeps*, 549 F. Supp. 2d at 549.

147. *See* Memorandum of Law, *supra* note 143 at 15.

148. *Id.*

149. *Id.*

war, she could have been helped in pursuing claims by her second husband, Imperial Count von Kesselstatt, who was a Luftwaffe pilot and a member of the aristocracy. After the war, they lived comfortably in Switzerland, and would have been able to report any claim to the Swiss or German authorities. . . . If Elsa thought the Paintings had been stolen rather than sold, she would have reported their theft to the authorities.¹⁵⁰

The same was true of Schoeps's grandmother and mother, and Paul Mendelssohn-Bartholdy's other sisters: all of them knew of the importance and value of the von Mendelssohn-Bartholdy art collection and had enjoyed a position that would have allowed them to assert claims to any works they believed had been misappropriated.¹⁵¹

Given these basic facts about the history of the paintings and the family, it was certainly reasonable for the museums to conclude that the original owners and their immediate heirs did not believe they retained an ownership claim to the paintings. It was therefore appropriate for the museums not to reconstitute the paintings, but to assert their ownership of the works—and to seek to do so in as efficient a manner as possible by invoking a time bar defense. Indeed, for the reasons discussed above, it would have been inconsistent with the museums' duties for them simply to reconstitute the works, given the results of their provenance research. However, the court never ultimately decided whether the equities supported the defense of laches. The court found there were disputed issues of fact on laches and so set the issue to be resolved after the trial; however, the parties settled before the fact-intensive hearing could occur.¹⁵²

150. *Id.* at 16.

151. *Id.* at 19.

152. *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009) (case settled on morning of trial). The settlement was confidential, at the insistence of the claimant. *See Schoeps v. Museum of Modern Art*, 599 F. Supp. 2d 532 (S.D.N.Y. 2009); *see also Benjamin Weiser, Heirs' Secrecy in Settlement Over Picassos Baffles Judge*, N.Y. TIMES, Mar. 24, 2009, at A25.

3. Museum of Fine Arts, Boston v. Seger-Thomschitz

Most recently, in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, the Museum of Fine Arts in Boston (“MFA”) filed a declaratory judgment action in response to a claim from Dr. Claudia Seger-Thomschitz, who asserted ownership of the 1913 Oskar Kokoschka painting *Two Nudes (Lovers)*.¹⁵³

The Kokoschka painting had been owned in the 1920s and 1930s by Dr. Oskar Reichel, a Jewish doctor and art collector in Vienna.¹⁵⁴ In 1939, Reichel transferred the ownership of the Kokoschka and several other works to Otto Kallir, a Jewish gallery owner to whom Reichel had earlier consigned the Kokoschka painting for sale on numerous occasions; Kallir by then had transferred ownership of his own gallery to a non-Jewish person and moved to Paris.¹⁵⁵ One of Reichel’s sons, Raimund, later wrote that his father had agreed with Kallir that Kallir would provide money to Reichel’s sons in America.¹⁵⁶ According to Raimund, Kallir sent Hans money for the Kokoschka and the other paintings.¹⁵⁷ Kallir later settled in New York, opening a gallery there in 1945, and sold the Kokoschka painting to another gallery.¹⁵⁸ That gallery eventually sold the painting to a third gallery, which then sold the painting to a private owner who, after owning the work for many years, bequeathed it to the MFA in 1973.¹⁵⁹ From then on, the MFA displayed the painting almost continuously, occasionally loaning it to other museums in the United States and internationally.¹⁶⁰

After living in South America for several decades, Raimund Reichel returned to Vienna in 1982 and later designated Dr. Claudia Seger-Thomschitz—the claimant—as his heir.¹⁶¹ The two were not blood relatives and it is unclear how they knew each

153. *Seger-Thomschitz*, 623 F.3d at 2.

154. *Id.* at 3.

155. *Id.*

156. *Id.* at 4.

157. *Id.*

158. *Id.* at 4.

159. *Seger-Thomschitz*, 623 F.3d at 4.

160. *Id.*

161. *Id.*

other.¹⁶² When Raimund died in 1997, Seger-Thomschitz became Oskar Reichel's sole surviving heir.¹⁶³ She allegedly learned in 2003 that the Nazis had confiscated some of Oskar Reichel's works, when the Historical Museum of the City of Vienna contacted her to notify her that it was going to turn over to her several works by the artist Anton Romako that had been owned by Oskar Reichel.¹⁶⁴ The museum stated that it was doing so because Reichel had apparently been forced to sell the Romako paintings to Kallir's Neue Gallery in 1939, after Otto Kallir had transferred ownership of the gallery.¹⁶⁵

In 2006 an American attorney contacted Seger-Thomschitz to inform her of the Kokoschka painting at the MFA. The next year, through that attorney, Seger-Thomschitz demanded that the MFA return the painting to her.¹⁶⁶ Upon receipt of this claim, the MFA "undertook 'an exhaustive effort to research and document the provenance of the [Kokoschka] in order to ascertain whether [Seger-Thomschitz's] claim . . . appeared valid or not.'"¹⁶⁷ This work included "[visiting] approximately ten museums and governmental archives around the world and [corresponding] with numerous other museums and archives."¹⁶⁸ Following this investigation, the MFA concluded that the transfer of the painting from Dr. Reichel to Kallir was valid—and, critically, was regarded by the Reichel family as valid after the war.¹⁶⁹ Notably, the Reichel sons sought after the war to recover some artworks lost by their father, but never asserted a claim to the Kokoschka painting, although it was documented that they knew of their father's ownership of the work and the circumstances under which he had transferred it to Kallir.¹⁷⁰ When Seger-Thomschitz refused to withdraw her claim to the painting, the MFA filed for declaratory judgment to quiet title to the work; Seger-Thomschitz

162. *Id.*

163. *Id.*

164. *Id.* at 5.

165. *Seger-Thomschitz*, 623 F.3d at 5.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

counterclaimed to obtain the painting.¹⁷¹ The MFA moved for summary judgment on the theory that Seger-Thomschitz's counterclaims were barred by Massachusetts' three-year limitations period.¹⁷²

The District Court, applying the discovery rule, granted the MFA's motion for summary judgment, finding both that the Reichel sons could have asserted a claim to the painting long ago, if they thought such a claim appropriate, and that Seger-Thomschitz should have known about the basis for any cause of action against the MFA more than three years before she filed her action.¹⁷³ On appeal, the First Circuit found that the Kokoschka painting's location had been no secret—it had been listed in several published books and at least one official catalogue raisonne of Kokoschka's works as being in the MFA's possession.¹⁷⁴ Likewise, the Getty Provenance Index showed that the painting belonged to the MFA.¹⁷⁵ This, the court stated, indicated “that the MFA's possession of the Painting [had] long been discoverable with minimal diligence.”¹⁷⁶ Considering the question of “when the Reichel family should have known that Dr. Reichel formerly owned the Painting and gave it up under conditions that may have amounted to duress,” the court noted that letters Raimund wrote in the 1980s demonstrated that he had been familiar with his father's ownership of the painting and the transfer of it to Kallir; nonetheless, he did not file a restitution or compensation claim for the work, even as he filed claims listing other paintings his father had owned—specifically, works by Romako.¹⁷⁷

Resting its decision on Seger-Thomschitz's knowledge of the painting, the court noted that the Museums of Vienna's 2003 notice to her that it would return the Romako paintings should also have given her notice that she would have had a claim to any other paintings owned by Dr. Reichel—and she could easily have

171. *Seger-Thomschitz*, 623 F.3d at 5.

172. *Id.*

173. *Id.*

174. *Id.* at 8.

175. *Id.*

176. *Id.*

177. *Seger-Thomschitz*, 623 F.3d at 8.

discovered that the Kokoschka was such a painting. The facts that Reichel had owned the painting and that it was then in the MFA's possession were ascertainable with minimal effort.¹⁷⁸ The First Circuit, thus, found that Seger-Thomschitz's claim to the painting was time-barred.¹⁷⁹

In her critique of the MFA's conduct and the First Circuit's decision, Professor Kreder has conflated the history of the Romako paintings with that of the Kokoschka, arguing that the Viennese government's own assessment that the Romakos had been subject to a forced sale should mean that the Kokoschka had as well.¹⁸⁰ But the historical record established both that the different paintings were subjects of very different transactions and that the Reichel sons—in a far better position to know than we today—did not regard the two transactions in the same way. As the First Circuit noted, Raimund Reichel had listed the Romakos but not the Kokoschka in his restitution claims for financial compensation after the war, and the family did not pursue any other investigation of the Kokoschka painting, whose whereabouts and provenance had been easily ascertained for years.¹⁸¹

Indeed, while Professor Kreder cites to Seger-Thomschitz's Counterclaim for historical facts,¹⁸² the litigation established that numerous critical factual assertions in that pleading were incorrect. In particular, the First Amended Answer and Counterclaim asserted that Oskar Reichel's family had no knowledge of his ownership of the Kokoschka painting at the time of the *Anschluss*; had no knowledge of the circumstances under which Reichel had transferred the painting to Kallir; received no compensation from

178. *Id.* at 9.

179. *Id.*

180. Kreder, *Guarding the Historical Record*, *supra* note 6, at 269 (“Thus, whereas the Viennese government returned paintings because ‘[i]t is certain’ their path from Dr. Reichel though Mr. Kallir occurred ‘due to . . . persecution,’ a U.S. federal court in Boston effectively elevated the public’s enjoyment of the paintings over the need to unwind transactions that financed genocide.”) (citing First Amended Answer and Counterclaim, Exhibit 1, at 2, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 WL 6506658 (D. Mass. July 24, 2008) (No. 08-10097)).

181. *Seger-Thomschitz*, 623 F.3d at 8.

182. *See id.*

Kallir for the painting; and could not reasonably have located the whereabouts of the painting after the war.¹⁸³ As set out in the text (and reflected in the court opinions), the MFA's provenance research established each of these assertions was not true. Faced with Seger-Thomschitz's claim, the MFA had a fiduciary obligation to investigate the basis for the claim. Having done so—and having found the claim was unfounded and shared the results of that research with the claimant—the museum could not, consistent with its duty to preserve trust assets, deaccession the painting and give it to Seger-Thomschitz. Not all claims are equal.

In closing its opinion, the First Circuit returned to the purposes of statutes of limitations:

Inescapably, statutes of limitations are somewhat arbitrary in their choice of a particular time period for asserting a claim. Yet statutes of limitations cannot be fairly characterized as technicalities, and they serve important interests: “. . . although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.”¹⁸⁴

The *Seger-Thomschitz* case itself illustrates this justification for limitation periods: Raimund Reichel was intimately familiar with this father's art collection in the 1930s, and he lived until 1997. Had he brought a claim to the Kokoschka in his lifetime, he could have provided critical additional evidence concerning the painting's history. But of course, the available evidence that the MFA reviewed in its extensive provenance research demonstrated that the reason Raimund made no such claim in his lifetime is that he did not believe his father's 1939 transfer of the painting to Kallir was invalid. In these circumstances, the MFA was not

183. First Amended Answer and Counterclaim, *supra* note 180, at 19-24.

184. *Id.* at 14 (citation omitted).

required to protract more than necessary the time and expense of responding to Seger-Thomschitz's unmeritorious claim, nor was it prohibited from dispensing with the claim as quickly and economically as possible. Indeed, it had a fiduciary duty to do so.¹⁸⁵

185. We add a brief note on one other recent decision where a museum did not initiate litigation but, once sued, asserted and prevailed on a statute of limitations defense in response to claims against it. *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473 (S.D.N.Y. 2010), *aff'd*, No. 10-257 (2d Cir. Dec. 16, 2010), involved a claim by heirs of artist Georg Grosz to three paintings by Grosz that had long been held by MoMA. Upon receiving the heirs' demand in November 2003, the museum retained a former U.S. attorney general to investigate thoroughly the claims and the paintings' provenance and prepare a report to the museum's board. *Id.* at 484-85. His report concluded that MoMA had no obligation to return the paintings. *Id.* at 485. After the museum refused to return the paintings, the claimants waited more than three years to bring suit—which barred the suit under New York's demand-and-refusal application of its three-year statute of limitations. *Id.* at 481-88. The heirs alleged that the three paintings had all been taken by the Nazis from Grosz's dealers in Germany and Holland in the 1930s. *Id.* at 478-80. Notably, George Grosz lived in New York after the war, and in 1953 he had seen one of the paintings at MoMA. While he noted in two letters to family that the painting had been "stolen from me," he never contacted anyone at MoMA to claim the work and did not otherwise assert a claim to them in his lifetime. *Id.* at 480-81. In addition, Ralph Jentsch, the managing director of the Grosz Estate and its representative in demanding the paintings from MoMA, was the author of the catalogue raisonné for the artist and so likely more familiar with Grosz's works than any other living person. *Id.* at 481. He had asserted claims to other works of the artist as early as 1995, but did not pursue the works long at MoMA until nearly a decade later. See Robin Pogrebin, *Met Won't Show a Grosz at Center of a Dispute*, N.Y. TIMES, Nov. 15, 2006, <http://www.nytimes.com/2006/11/15/arts/design/15gros.html?>

Another case, *Von Saher v Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2009), and its decision on remand, 862 F. Supp. 2d 1044 (C.D. Cal. 2012), is worth noting here for the sake of completeness. The museum in *Von Saher* did not initiate the litigation, and the central issue of the litigation—whether the foreign affairs doctrine preempted specific California statutes that extended the statute of limitations for Holocaust-era art recovery claims—sets *Von Saher* apart from this paper's main considerations. In any event, it is clear that the claim in *Von Saher* was time-barred, even though the historical record discussed by the *Von Saher* courts does not make clear the strength of the underlying claim for recovery.

B. Cases Where Museums Have Responded to Claims with Voluntary Restitution or Fair Compensation for the Works

While a few commentators criticize museums for their “aggressive” litigation strategies in the few cases just described, they pay little attention to the far greater number of cases in which museums have responded to restitution claims by returning works to the heirs of original owners or reaching a financial settlement with the heirs—without litigation. In fact, beginning in 1998, with Congress’ focus on Nazi-era art theft and the development of the museum codes of ethics described above, it appears that museums have initiated active litigation in response to a restitution claim four times, as described above. In four additional instances, museums have been sued and settled by agreeing to return the work or to a lending or purchase arrangement.¹⁸⁶ But in the vast majority of circumstances, museums have either voluntarily returned claimed works after researching their provenances, or reached lending or purchase agreements with the claimants.¹⁸⁷ These works include valuable paintings by Monet and Rubens; the museums involved include those such as the MFA and the Toledo Museum of Art, which have faced the ire of critics for choosing to litigate in other cases to clear title to works in their collections.

The fact that museums have responded to most claims by returning, purchasing, or borrowing the works at issue hardly demonstrates that museums have acted improperly in responding to restitution claims. Rather, it is exactly what should occur given

186. See Stephen W. Clark & Eliza Jacobs, *Litigation Update: Legal Issues in Museum Administration 2012—Case Summaries Appendix*, in ALI-ABA COURSE OF STUDY: LEGAL ISSUES IN MUSEUM ADMINISTRATION MAR. 19-21, 245-291 (2012) (listing cases).

187. See *id.*; see also Urice, *supra* note 86, at 9 (“More than eighty percent of the fifty claims involving museums have settled out of court. In all but one of those settlements either the work was restituted or its value (or an agreed portion of its value) was paid to claimant”); Thompson, *supra* note 29 at 426-27 (“When the record [of ownership] is less clear, museums often return a claimed work, even if they do not believe fully that the claimant is entitled to it. Thus, a critic of one of the most well-known restitution specialists . . . has said that his restitution tactics are almost like blackmail because museums are so afraid of the bad publicity, they feel they have no choice.”).

the framework of laws and duties described above: museums have marshaled their resources to study the provenances of claimed works and, when it appears those works were indeed stolen or forcibly taken from original owners, returned the works to the families or heirs—while litigating as efficiently as possible where the claims did not appear meritorious. We review here a representative sample of instances in which museums have voluntarily returned, purchased, or borrowed works to which claimants have asserted ownership and then provide a table of all of the known situations where museums have come to mutually agreeable solutions for claimed works for which their research did not indicate that the museum had good title.¹⁸⁸

In 2005, the Virginia Museum of Fine Arts returned a painting by Jan Mostaert, *Portrait of a Courtier* (16th Century), to the descendants of the Czartoryski family in Poland.¹⁸⁹ The Czartoryski family had transferred its painting from the Goluchow Museum to safekeeping in Warsaw in 1939, where the Nazis seized it in 1941 before moving it to a castle in Austria after the Warsaw Uprising in 1944.¹⁹⁰ The painting made its way to a gallery in New York in 1948, which sold it to a collector who gave the painting to the Virginia Museum in 1949.¹⁹¹ While researching the provenance of works in its collection that had changed hands in Europe between 1933 and 1945, the Virginia Museum discovered the fact of the painting's looting and promptly returned the painting to the Polish Embassy on behalf of the Czartoryski family's heirs.¹⁹²

188. It bears emphasis that the information presented here likely underestimates the proportion of restitution claims that museums resolve amicably. Whereas every litigated restitution claim is a matter of public record, there are likely amicable resolutions that go unnoticed.

189. Tara Burghart, *Web Helps People Recover Plundered Art*, WASH. POST, June 17, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/17/AR2006061700418.html>.

190. *Jan Mostaert – Portrait of a Courtier*, POLISH MINISTRY FOREIGN AFF. (Dec. 15, 2005), <http://www.msz.gov.pl/Jan,Mostaert,-,Portrait,of,a,Courtier,3883.html> (on file with the Journal).

191. *Id.*

192. Burghart, *supra* note 189.

More recently, in 2010, the Museum of Fine Arts in Boston returned *The Entombment of Saint Vigilius*, a 14th Century embroidered panel, to the Museo Diocesano Tridentino in Italy, from which it had disappeared during World War II.¹⁹³ The MFA had purchased the panel from an Italian art dealer in 1946, and its provenance remained unknown until 2008, when the Abegg-Stiftung, a Swiss arts foundation and museum, gave notice to the MFA that the panel was part of a series that had hung at the Diocesano Tridentino.¹⁹⁴ The museum proceeded to research this claim with the help of the Museo Diocesano Tridentino, and reached an agreement among all parties to return the panel.¹⁹⁵

In 2011, Los Angeles' Getty Museum returned a 1640 painting, *Landscape with Cottage and Figures*, by Pieter Molijn, which it had purchased in good faith in 1972, to the heirs of Jacques Goudstikker, a Jewish art dealer who fled the Netherlands in 1940 and died in an accident shortly thereafter.¹⁹⁶ Goudstikker's collection, which he left behind in the Netherlands, was looted by Hermann Goering and the Nazis, and his collection dispersed around the world.¹⁹⁷ The Getty, researching the provenance of its collection with the aid of Goudstikker's heirs, learned that the Molijn painting had been among those looted by Goering before it had eventually made its way to the Getty.¹⁹⁸ The Getty promptly returned the work, which joined a traveling exhibition of art reclaimed from the Goudstikker collection.¹⁹⁹

These instances of voluntary return are only illustrative examples of the almost two-dozen occasions on which museums

193. Press Release, Museum of Fine Arts, Bos., MFA Returns 14th Century Embroidery to the Museo Diocesano Tridentino in Trent, Italy, at 1 (Dec. 17, 2010), available at <http://www.mfa.org/sites/default/files/Press%20release%20Museo%20Diocensano%20Tridentino.pdf>.

194. *Id.* at 2.

195. *Id.*

196. Mike Boehm, *Getty Museum Agrees to Return Painting Looted by Nazis*, L.A. TIMES, Mar. 29, 2011, <http://articles.latimes.com/2011/mar/29/entertainment/la-et-getty-painting-20110329>.

197. *Goudstikker: "At Long Last, Justice,"* PR NEWSWIRE, Feb. 6, 2006, available at <http://www.prnewswire.co.uk/cgi/news/release?id=163251>.

198. Boehm, *supra* note 196.

199. *Id.*

have responded to art claims exactly as they should: with close research and cooperation, following their codes of ethics' and fiduciary obligations' requirements both to honor the unique situations of Holocaust victims and their heirs, and to avoid unnecessarily deaccessioning trust property or depriving the public of the opportunity to see and study important works of art. In some of these situations, as described above, museums have decided that claims they received were valid, and that the works in question should be returned. In many other situations, museums have concluded the claims were well-founded, and so have turned over the works; alternatively, to minimize the museum's loss of trust property, to avoid limiting the public's access to artistic and cultural works, and to make claimants whole, museums have arranged purchase agreements or lending agreements with claimants.

For example, in June 2000, the Art Institute of Chicago receive a claim for the sculpture *Bust of a Youth* (1630) by Francesco Mochi from the heirs of Federico Gentili di Giuseppe, a Jewish Italian living in France who died of natural causes in 1940.²⁰⁰ As both parties agreed, the Institute had purchased the sculpture in good faith in 1941 from a London sculpture dealer who had purchased it at an auction after di Giuseppe's death.²⁰¹ After it received the claim of the Gentili di Giuseppe heirs, the Institute studied the provenance of the Mochi sculpture.²⁰² It learned that the Gentili di Giuseppe family had probably lost Gentili di Giuseppe's art collection as a result of Vichy France's racist laws, and that other museums, including the Louvre, had returned art that they had purchased art from the auction at which the sculpture dealer had purchased the Mochi sculpture.²⁰³ Agreeing that this provenance indicated that the work had not been legitimately transferred after Gentili di Giuseppe's death, the Institute made an agreement with the Gentili di Giuseppe heirs to purchase a portion of the family's

200. Alan Artner & Ron Grossman, *Museum, Heirs Settle WWII-era Art Dispute*, CHI. TRIBUNE, June 13, 2000, http://articles.chicagotribune.com/2000-06-13/news/0006130237_1_heirs-art-institute-auctioned.

201. *Id.*

202. *Id.*

203. *Id.*

interest in the sculpture and accept the remainder as a donation, allowing the Gentili di Giuseppe heirs to be compensated and the Institute to retain the work.²⁰⁴ This was not mere compromise—a spokesperson for the Gentili di Giuseppe family said after the deal that the Institute’s behavior had been “exemplary,” and that the agreement had established a “pattern of good faith” that aided the family in recovering lost artworks from other museums.²⁰⁵

Several American museums have reached amicable settlements with the heirs of Jakob and Rosa Oppenheimer, a Jewish couple who owned and operated the Margraf concern, a consortium of Berlin art galleries, the stock of which was forcibly sold in 1935. The Smithsonian Institution and the San Diego Museum of Art were the first American museums to reach financial settlements for works of art that had been included in these auctions, in 2002 and 2004, respectively.²⁰⁶ A particularly creative solution was reached with the Oppenheimer heirs in 2009 by Hearst Castle, a California state park and museum. The Oppenheimers’ attorney had discovered that Hearst Castle possessed three 16th century Venetian paintings—by Jacopo Tintoretto, Giovanni Cariani, and Paris Bordone—which had been included in the 1935 sales, and filed a claim for their return in 2007.²⁰⁷ In 2009, through the State of California, Hearst Castle returned the Tintoretto and Cariani paintings to the heirs, replacing them with photographic reproductions, and agreed with the family to keep and display the Bordone painting at the museum in an exhibition about Nazi looting.²⁰⁸ In 2011, the Museum of Fine Arts, Boston and the

204. *Id.*

205. *Id.*

206. See SMITHSONIAN, THE FREER GALLERY OF ART AND THE ARTHUR M. SACKLER GALLERY: WORLD WAR II ERA PROVENANCE PROJECT, 1933-1945 24-25 (2011), available at <http://www.asia.si.edu/collections/downloads/provenance022211.pdf>; Steven Kern, *Peter Paul Rubens’s Allegory of Eternity: A Provenance Research Case Study*, in VITALIZING MEMORY: INTERNATIONAL PERSPECTIVES ON PROVENANCE RESEARCH 148-53 (2004).

207. Peter Fimrite, *3 Nazi-Confiscated Works Found at Hearst Castle*, S.F. CHRON., Apr. 11, 2009, http://articles.sfgate.com/2009-04-11/bay-area/17191336_1_nazis-heirs-jewish-family/.

208. Associated Press, *California Returns Art to Heirs of Holocaust Victims*, NBCNEWS.COM, Apr. 10, 2009, <http://www.msnbc.msn.com/id/>.

Philadelphia Museum of Art reached financial settlements with the Oppenheimer heirs after discovering that five 17th-century Italian tapestries owned by the two museums had also been forcibly sold in 1935. Both institutions had proactively contacted the Oppenheimer heirs' attorney, after discovering the Nazi-era provenance of the tapestries in the course of research on their collections.²⁰⁹

Below, in Table 1, we briefly list all of the situations of which we are aware in which museums have responded to restitution claims with purchase or lending agreements, or voluntary restitution.

Table 1: List of Museums' Voluntary Restitutions, Purchases, and Lending Agreements.²¹⁰

<p>1. Wadsworth Athenaeum, Hartford, CT (1998): Restituted <i>The Bath of Bathsheba</i> by Jacopo Zucchi to the Italian Government. The painting had been taken from an Italian Embassy during or immediately after World War II.²¹¹</p>
<p>2. Seattle Art Museum, Seattle, WA (1999): After being sued by the heirs of Paul Rosenberg for recovery of Matisse's painting <i>Odalisque</i> (1928), the museum commissioned a study of the work's provenance by the Holocaust Art Restitution Project. Based on the results of that research, the museum agreed to return the work to the heirs.²¹²</p>
<p>3. Art Institute of Chicago, Chicago IL (2000): Paid the heirs of Mr. Gentili</p>

30159151/ns/us_news-life/t/calif-returns-art-heirs-holocaust-victims/.

209. See *Nazi-Era Provenance Research*, MUSEUM OF FINE ARTS, BOS., www.mfa.org/collections/provenance (last visited Mar. 23, 2013) (with further links to the press release); *1960-91-1 Object Information*, AAMD OBJECT REGISTRY, <http://aamdojectregistry.org/node/644> (last visited Mar. 23, 2013).

210. The events in Table 1, as well as other cases of note, are helpfully catalogued in Clark & Jacobs, *Litigation Update*, *supra* note 185, at 245-91.

211. Hilton Kramer, *Even After Four Centuries, Caravaggio's a Knockout*, N.Y. OBSERVER, June 8, 1998, <http://www.observer.com/1998/06/even-after-four-centuries-caravaggios-a-knockout>.

212. See Press Release, Seattle Art Museum, SAM to Return Matisse *Odalisque* to Rosenbergs (June 14, 1999), *available at* <http://www.museum-security.org/99/029.html>. The museum pursued claims against Knoedler & Co., the New York dealer from which the museum's donor had purchased the Matisse, and ultimately settled with the dealer. See Clark & Jacobs, *supra* note 185 at 249-50.

di Giuseppe for a partial interest in *Bust of a Youth* by Francesco Mochi (circa 1630) and accepted the remaining partial interest as a donation from the heirs. Mr. di Giuseppe had died of natural causes in France in 1940, but his art collection was then sold at public auction under order of the French Court.²¹³

4. North Carolina Museum of Art, Raleigh, NC (2000): Paid the heirs of Philipp von Gomperz \$600,000 for *Madonna and Child in a Landscape* by Lucas Cranach the Elder. The painting had been looted from Mr. von Gomperz in October 1940.²¹⁴

5. Museum of Fine Arts, Boston, MA (2000): The MFA paid the heirs of Mr. Gentili di Giuseppe for a partial interest in *Adoration of the Magi* by Corrado Giaquinto (circa 1725) and accepted the remaining partial interest as a donation from the heirs.²¹⁵

6. Denver Museum of Art, Denver, CO (2000): Restituted *The Letter*, from the School of Gerard Ter Borch (17th Century), to the daughter of Paul Hartog, a Jewish banker from Berlin who was forced to sell the painting in 1934 and later died in a concentration camp.²¹⁶

7. National Gallery, Washington, D.C. (2000): Restituted *Still Life with Fruit and Game* by Frans Snyders (circa 1615-20) to the Edgard Stern family, which became aware of the painting through the Gallery's website. The painting had

213. Artner & Grossman, *supra* note 199.

214. STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 201 (2003). There were some press accounts suggesting the museum returned the painting to von Gomperz's heirs, but in fact a settlement was reached that allowed the museum to retain the work. See AAMD OBJECT REGISTRY No. 2000.3, <http://aamdojectregistry.org/node/57> (last visited April 7, 2013); see also Emily Yellin, *North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft*, N.Y. TIMES, Feb. 6, 2000, <http://www.nytimes.com/2000/02/06/us/north-carolina-art-museum-says-it-will-return-painting-tied-to-nazi-theft.html>.

215. Charles Leroux, *Boston Museum Settles Holocaust-Era Art Claim*, CHI. TRIBUNE, Oct. 21, 2000, http://articles.chicagotribune.com/2000-10-21/news/0010210195_1_claims-holocaust-museum.

216. Leigh Rich, *Heir to Get Painting Confiscated by Nazis*, JWEEKLY.COM (Nov. 10, 2000), <http://www.jweekly.com/article/full/14467/heir-to-get-painting-confiscated-by-nazis>.

been confiscated from the Stern collection in Paris by the Nazis and traded by Goering to Haberstock.²¹⁷

8. Princeton University Art Museum, Princeton, NJ (2001): Along with the dealer who sold the painting to the museum, the museum agreed to pay the fair market value of the painting *St. Bartholomew* by Bernardino Pinturicchio to the heirs of Gentili di Guiseppe, whose art collection was ordered sold at auction by a French court after his death in 1940; the museum retains the painting.²¹⁸

9. Springfield Library and Museum Association, Springfield, MA (2001): The Museum returned *Spring Sowing* (circa 1567) to the Italian government after learning that it had disappeared during World War II after being loaned from the Uffizi Gallery to the Italian Embassy in Warsaw.²¹⁹

10. Metropolitan Museum of Art, New York, NY (2001): The museum paid an undisclosed amount to Henry H. Newman, who claimed that *The Garden of Monet's House in Argenteuil* by Claude Monet had been purchased by his grandfather in Germany in 1940 and kept in a bank vault during the War.²²⁰

11. Los Angeles County Museum of Art, Los Angeles, CA (2002): LACMA returned a late Medieval Persian textile to a Polish foundation from which a similar work had been looted during World War II after research confirmed that the textile at LACMA was the same one that had been looted.²²¹

12. Detroit Institute of Arts, Detroit, MI (2002): In the course of considering acquisition of *A Man o' War and Other Ships off the Dutch Coast* by Ludolf Backhuysen (1692), the museum learned the painting had been left in an Amsterdam bank vault by Jewish collector who left the Netherlands in 1942 and then turned over to a Nazi-controlled entity. The museum and the English

217. *National Gallery to Return a Family's Painting Looted by the Nazis*, N.Y. TIMES, Nov. 21, 2000, <http://www.nytimes.com/2000/11/21/arts/21PAIN.html>.

218. Marilyn Marks, *Art Museum Reaches Agreement on Painting Sold During World War II Era*, NEWS AT PRINCETON (June 13, 2001), <http://www.princeton.edu/main/news/archive/A97/94/04S20/index.xml>.

219. Martha Lufkin, *The Springfield Museum Sues Knoedler*, THE ART NEWSPAPER, Oct. 12, 2003, available at <http://www.lootedart.com/news.php?r=MLUMO1850971>.

220. *Newman Claim Against Metropolitan Museum*, INT'L FOUND. FOR ART RESEARCH, http://www.ifar.org/case_summary.php?docid=1179703220 (last accessed Aug. 19, 2011).

221. Suzanne Muchnic, *Museum to Return Artwork Looted by Nazis*, L.A. TIMES, Mar. 7, 2002, <http://articles.latimes.com/2002/mar/07/local/me-linen7>.

gallery from which it was buying the picture then negotiated the sale of the painting from the heirs of the pre-war owner.²²²

13. Vizcaya Museum and Gardens, Miami, FL (2002): In response to a claim from the National Museum of Warsaw, returned the painting *Holy Trinity, Seat of Mercy*, attributed to George Pencz. The work had been removed from the National Museum of Warsaw without authorization during World War II.²²³

14. Museum of Fine Arts, Boston, MA (2004): Restituted the panel painting *Virgin and Child* to Anna Konopka Unrug of Poland in response to the claim for the painting received from the Ministry of Foreign Affairs of the Republic of Poland on behalf of Unrug. The painting had been in the family's Warsaw apartment and was plundered during the Uprising of 1944. The claim was in response to information the MFA had posted on its website concerning the painting's history.²²⁴

15. San Diego Museum of Art, San Diego, CA (2004): Reached a settlement with heirs of Rosa and Jakob Oppenheimer that would allow Rubens' *Allegory of Eternity* to remain in the museum's collection.²²⁵

16. Smithsonian Institution (Freer Gallery of Art), Washington, D.C. (2004): After receiving a claim in 2000 from the heirs of Rosa and Jakob Oppenheimer, the Smithsonian reached a financial settlement that allowed the institution to retain a Chinese bronze ritual vessel.²²⁶

17. Virginia Museum of Fine Arts, Richmond, VA (2004): The museum returned *Portrait of Jean d'Albon* by Corneille de Lyon (16th century) to the heir of an Austrian collector whose collection had been seized by the Gestapo during the war.²²⁷

222. *Looted Painting Enters DIA Collection, Owners Compensated*, MAINE ANTIQUE DIG. (2002), http://maineantiquedigest.com/articles_archive/articles/oct02/dial002.htm (on file with the author).

223. *See Provenance Research*, VIZCAYA MUSEUM & GARDENS, <http://www.vizcayamuseum.org/gallery-provenance.asp> (last visited Mar. 23, 2013).

224. *See* MUSEUM OF FINE ARTS, BOS., *supra* note 209.

225. *See* Clark & Jacobs, *supra* note 185, at 253-54.

226. *See* Press Release, Smithsonian's Freer and Sackler Galleries, Freer and Sackler Galleries Launch Web Site for World War II Provenance Project, available at <http://www.asia.si.edu/press/past/prProvenance.htm>; accord, SMITHSONIAN, *supra* note 217, at 24-25.

227. *VMFA Will Return French Painting to Collector's Heirs*, ANTIQUES & ARTS ONLINE (June 8, 2004), http://antiquesandthearts.com/wrappersstory.asp?file=2004-06-08__10-26-23.xml&event=shows (on file with author).

18. Virginia Museum of Fine Arts, Richmond, VA (2005): The museum learned in the course of provenance research that *Portrait of a Courtier* by Jan Mostaert (16th Century) had been seized by the Nazis in 1941. The museum then turned the painting over to the Polish Embassy on behalf of the representative of the former owners' descendants.²²⁸

19. Kimball Art Museum, Fort Worth, TX (2006): After learning that the Vichy Government had seized the contents of the home of Anna Jaffe, including *Glaucus and Scylla* by J.M.W. Turner (1841), and that the painting had been sold at an auction of "Jewish property" in July 1943, the museum restituted the painting to the representative of the Jaffe heirs.²²⁹

20. Metropolitan Museum of Art, New York, NY (2007). The museum returned the drawing *Interior of Church* from the School of Pieter Neeffs the Elder (16th century) to the grandson of a Czech lawyer whose collection was looted by the Nazis when they imprisoned him in 1939.²³⁰

21. Minneapolis Institute of Art, Minneapolis, MN (2008): After extensive provenance research, the museum determined that *Smoke Over Rooftops* by Fernand Leger (1911) had been taken as part of a collection confiscated by the Nazis from Alphonse Kann, a major French collector; the museum turned the painting over to an organization of the heirs of Kann.²³¹

22. Hearst Castle, San Simeon, CA (2009): After learning from the Oppenheimer family's attorney that three of the Castle's paintings, *Portrait of Alvise Vendramin* by Jacopo Tintoretto (16th Century), *Portrait of a Bearded Gentleman* by Giovanni Cariani (16th Century), and *Venus and Cupid* by Paris Bordone (16th Century), had been liquidated by the Nazis and later sold at auction. The museum returned the former two paintings and replaced them with photographic reproductions, and retained the latter one for use in an exhibit about Nazi-looted art.²³²

228. Clarke Bustard, *Nazi-Looted Art to Be Returned: Virginia Museum Will Give 1500s Flemish Painting to Poland*, RICHMOND TIMES DISPATCH, Sept. 24, 2005, <http://www.lootedart.com/news.php?r=MLIAIT466581>.

229. *Turner Returned: A Persistent Heir Gets Back a Looted Masterpiece*, THE ECONOMIST, Apr. 7, 2007, <http://www.economist.com/node/8958224>.

230. Press Release, N.Y. Holocaust Claims Processing Office, *Looted Drawing Returned to Heirs of Original Owner* (Oct. 30, 2007), available at <http://www.claims.state.ny.us/pr071030.htm>.

231. Dave Itzikoff, *Painting Stolen by Nazis Is Returned to Heirs*, N.Y. TIMES, Nov. 6, 2008, at C2.

232. See Associated Press, *California Returns Art to Heirs of Holocaust Victims*, *supra* note 208.

23. Metropolitan Museum of Art, New York, NY (2009): The museum returned the painting *City on a Mountain Lake*, attributed to a follower of the Flemish artist Tobias Verhaecht (16th Century), to the heirs of a Czech lawyer whose collection had been looted by the Nazis.²³³

24. Museum of Fine Arts, Boston, MA (2010): The museum returned the 14th Century embroidered panel *The Entombment of Saint Vigilius* to the Museo Diocesano Tridentino in Italy after learning in 2008 that the panel had been looted from Trent during World War II.²³⁴

25. Indiana University Art Museum, Bloomington, IN (2011): The museum returned the *Flagellation of Christ*, a panel painting by an unknown artist of the Cologne School of the 1480s, to the Jadgsschloss Grunewald museum in Berlin. Responding to an inquiry from the Prussian Palaces and Gardens Foundation, the museum undertook extensive provenance research on the painting, ultimately discovering that the work was one of more than a dozen paintings that had disappeared from the Berlin museum during the summer of 1945.²³⁵

26. J. Paul Getty Museum, Los Angeles, CA (2011): The museum returned the painting *Landscape with Cottage and Figures*, by Pieter Molijn (17th Century), to the heirs of Jacques Goudstikker, a Jewish art dealer who had fled the Netherlands before the Nazi invasion in 1940. The painting had been in Goudstikker's inventory at the time of the invasion, and had never been part of a World War II restitution process.²³⁶

27. Jane Voorhees Zimmerli Art Museum at Rutgers University, New Brunswick, NJ (2011): The museum returned the painting *Portrait of a Young Man* by Hans Baldung Grien (1509) to Simon Goodman, whose grandparents had traded the painting for safe passage out of Europe before Nazi officers confiscated the art and deported the Gutmanns to separate camps, where they died.²³⁷

28. Museum of Fine Arts, Boston, MA (2011): The MFA reached a confidential agreement with the heirs and the estate of Jewish art dealer Walter Westfeld, after determining that a 17th-Century Dutch painting in its collection, *Portrait of a Man and a Woman in an Interior* by Eglon van der Neer (c. 1665-67) had been owned by Westfeld and probably sold under duress. The Museum

233. Press Release, N.Y. Holocaust Claims Processing Office, *supra* note 230.

234. See Press Release, Museum of Fine Arts, Bos., *supra* note 193.

235. See Clark & Jacobs, *supra* note 186 at 260.

236. See Boehm, *supra* note 196.

237. Clark & Jacobs, *Litigation Update*, *supra* note 186 at 259.

posted an image of the painting online in 2000 to highlight uncertainties about its provenance, was contacted by Westfeld's nephew, Fred Westfield, in 2004, and had since been working with Westfield to understand the painting's history.²³⁸

29. Museum of Fine Arts, Boston, MA (2011): Reached a financial settlement with the heirs of Jakob and Rosa Oppenheimer, allowing the museum to retain four seventeenth-century tapestries, which were included in a forced sale in Berlin in 1935.²³⁹

30. Philadelphia Museum of Art, Philadelphia, PA (2011): Reached a financial settlement with the heirs of Jakob and Rosa Oppenheimer, allowing the museum to retain a seventeenth-century tapestry that had been included in a forced sale in Berlin in 1935.²⁴⁰

31. Toledo Museum of Art, Toledo, OH (2011): The museum returned a porcelain sea nymph, centerpiece of an elaborate 3000-piece table service made for Heinrich von Bruehl, prime minister of Polish King and Saxon Elector Augustus III, to Friedrich Leopold von Bruehl after it had been discovered that some of the art that the von Bruehl family had lent to Dresden's museums, including the porcelain nymph, had been confiscated by the Nazis during WWII.²⁴¹

32. Cummer Museum of Art and Gardens, Jacksonville, FL (2012): In September 2012, the Cummer Museum returned two porcelain pieces (a teapot and a coffeepot) to the heirs of Gustav Von Klemperer, with the agreement that the museum could continue to display the pieces for one year.²⁴²

These varied resolutions underscore our theme that not all claims are—or should be treated as—equal. Even when faced with apparently meritorious claims, museums reached agreement with claimants on a wide-range of outcomes, including simple return, lending arrangements, purchase agreements, and partial donations coupled with partial purchase. These outcomes appear to reflect

238. *Id.* at 259-60.

239. *See* MUSEUM OF FINE ARTS, BOS., *supra* note 209 (with further links to the press release).

240. AAMD OBJECT REGISTRY, *supra* note 209.

241. *Id.*

242. *See* Holly Keris, *Cummer Returns Nazi Loot to Family*, CUMMER MUSEUM ARTS & GARDENS BLOG (Oct. 15, 2012) <http://blog.cummer.org/2012/10/cummer-returns-nazi-loot-to-family/>.

the different regimes governing museums' conduct—their fiduciary duties to preserve trust assets, their obligations to preserve their collections for the public, and also their duties to investigate restitution claims thoroughly and respond accordingly. Most important, however, the different outcomes reflect museums' diligent and good faith assessment of the claims at issue. Where provenance investigation establishes the merit of the ownership claim, museums do not hesitate to reconstitute the work to the heirs of the original owner, or to work out some other mutually satisfactory arrangement.²⁴³

V. CONCLUSION

The above discussion is essentially an extended response to the unsupported assertions of a few commentators that museums act unethically when they litigate or vigorously defend claims for the restitution of art in their collections that changed hands during the Nazi era. Such contentions fail to consider museums' fiduciary obligations and codes of ethics, as well as the policy reasons for the “technical defenses” some commentators deride. These structures, as we have seen, require museums to exercise thorough diligence in their research of restitution claims—but do not require museums to treat all claims equally. To the contrary, museums' fiduciary obligations and governing codes of ethics require them to investigate each restitution claim thoroughly and to act accordingly, consistent with the fiduciary obligation to preserve trust assets. Consequently, if a claim appears without merit after careful research—and some do—a museum can be confident in its decision to seek to dispose of the claim through litigation. Beyond this, a broad examination of the resolution of recent Nazi-era restitution claims refutes any suggestion that museums are

243. The contrast between the large number of voluntary restitutions or resolutions by museums and the few instances of litigation is even more dramatic when one considers the fact that, while every instance of a museum initiating litigation and asserting a time bar will be public, the same is not true of each instance of voluntary restitution. Such private settlements will not necessarily come to light, so that there may well be even more examples where museums have investigated the provenance of a piece and decided that a negotiated return or other settlement was appropriate.

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frequently and aggressively choosing to litigate restitution claims and to invoke statutes of limitations. There are only a few such cases, and they involved very weak restitution claims. When such circumstances arise, it is entirely appropriate for museums, as guardians of the public trust, to refuse restitution claims and to attempt to defeat such claims as expeditiously as possible.

