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Keynote: Restoration of a Culture: A California Lawyer's Lengthy Quest to Restitute Nazi-Looted Art

Donald S. Burris

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Donald S. Burris, Esq.[†]

More than six decades after World War II, the terrible ghosts of the Holocaust have not disappeared. The perverse ideology that led to the horrors of the Holocaust still exists and, throughout our continents, racial hatred and ethnic intolerance stalk our societies. Therefore, it is our moral and political responsibility to support Holocaust remembrance and education in national, as well as international frameworks, and to fight against all forms of intolerance and hatred.[1]

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† Founding and Managing Partner, Burris, Schoenberg & Walden, LLP. I would like to thank and recognize Zachary Shufro, a third-year student at UNC School of Law and a member of the editorial board of the North Carolina Journal of International Law. In addition to serving as an incredibly well-prepared narrator to the entire program presented at the law school, Zach was always available with both practical and substantive advice and, in my case, served as a fine researcher and a real "right-hand man." I would further be remiss if I did not give substantial credit at the outset to my Florida-based colleagues, Clarissa Rodriguez and Laura Reich, of Reich Rodriguez, P.A. in Miami, Florida, who have tirelessly worked with me in researching the development of the American and European legal principles in this developing area involving the potential legal remedies for illegal and widespread seizure of art by the Nazi authorities, in providing a structure for our firm's national Cultural Preservation section, and for their further creative and careful assistance in helping me fine-tune this article. Please bear in mind that any ultimate errors rest with me. Finally, I would like to recognize my good friend and colleague, Larry Kaye of Herrick Feinstein, LLP, in New York City, for his pioneering work for many years in the recovery of Nazi-looted art and cultural theft in general. Larry was not able to be with us during this special seminar on "Patrimony in Peril." He is, however, here in spirit as an honors graduate of the University of North Carolina Class of 1967 and as a loyal Tar Heel for in excess of fifty years since his graduation.

1 Letter from former Czech Ambassador to Israel Miloš Pojar to the Organizing Committee for the "Holocaust Era Assets' Conference (Feb. 9, 2009), http://www.shoahlegacy.org/basic-documents-and-information/holocaust-era-assets-conference-2009 [https://perma.cc/WRR8-9L76]. This conference, which took place in Prague, Czech Republic, from June 26–30, 2009, is commonly referred to as the "2009 Prague Conference" or the "2009 Terezin Conference."

I. Introduction & Overview

I am honored to have been invited by the University of North Carolina Journal of International Law to introduce a subject that has been the major focus of my legal work for over twenty years: that portion of my career during which I have served as a "looted art attorney" on behalf of victims of the Holocaust and their families who have had valuable art treasures stolen from them by the Nazis, the most malevolent art thieves in recorded history. At the same time, I am humbled by the thought of how courageous and resourceful many of our clients, and their deceased relatives, had to be to endure the horrible Nazi era and still be willing to fight for their post-World War II cultural rights. In this context I would be remiss if I did not begin by honoring the late Maria Altmann, a courageous individual whom I was privileged to serve for so many years standing with my partner, Randy Schoenberg, in convincing the federal appellate tribunals, including the United States Supreme Court, that she deserved her day in the American courts. Randy has fortunately continued to serve as "Of Counsel" to my firm while he pursues his philanthropic activities in the art and music fields. As I often do in the course of my lectures, I would ask that, in this case, my readers, as opposed to my students, reflect for a moment on the photograph of the inimitable Maria Altmann, whose quiet

determination continues to inspire me.

This article is designed to complete a trilogy of articles[2] about my work as one of a comparatively small cadre of international lawyers who have devoted substantial time and resources to work as best they can under various legal systems, in order to provide some justice to the victims of Nazi persecution and their families. Since it could take hundreds of pages to cover this topic, which spans events of eighty-six years, i.e. from 1933 to 2019, in an adequate manner—and since at least some of the events, particularly the cases that Randy and I personally participated in, such as the *Altmann*[3] case (which put us on the "Holocaust recovery map"), have been well-covered in other articles and specialized books—in this article, I attempt to provide a brief but comprehensive mixed summary, overview, and current analysis of looted art law in America, with some personal insights based on our firm's years of work in this area.[4]

II. Nazi Looting: A Historical Perspective

The Nazi program for the confiscation of highly valuable art, often referred to as "Nazi plunder,"[5] from within Germany, from

2 *See* Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Bennigson, Portrait of Wally, Von Saher and Their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394 (2016); Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041 (2005). I also was a presenter and gave a talk before the International Society of Barristers, on March 26, 2019, at the group's annual meeting in Tucson, Arizona. *See* Donald S. Burris, *Unfinished Business of the Twentieth Century: The Quest for the Recovery of Nazi-Looted Art*, 52 INT'L SOC'Y BARRISTERS Q. 1 (2019).

3 Republic of Austria v. Altmann, 541 U.S. 677 (2004).

4 This article primarily focuses on looted art in the context of Nazi plunder leading up to and during the Second World War (1933–45). For a discussion of the comparative contexts of Nazi plunder and indigenous stolen artifacts, see generally Marc Masurovsky, *A Comparative Look at Nazi Plundered Art, Looted Antiquities, & Stolen Indigenous Objects*, 45 N.C. J. INT'L L. 497 (2020). For a discussion of looted art in the context of archaeological artifacts, see generally Leila Amineddoleh, *The Politicizing of Cultural Heritage*, 45 N.C. J. INT'L L. 333 (2020) (dealing with the role of politics in shaping narratives of cultural heritage repatriation from the United States to Iran); Patty Gerstenblith, *Provenience & Provenance Intersecting with International Law in the Market for Antiquities*, 45 N.C. J. INT'L L. 457 (2020) (discussing the application of the international laws concerning looted art to the context of plundered archaeological artifacts); Karin Orenstein, *Risking Criminal Liability in Cultural Property Transactions*, 45 N.C. J. INT'L L. 527 (2020) (discussing the intersection of laws governing looted art, provenance, and American criminal law).

5 PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED

virtually all of the conquered European territories, and from their Jewish inhabitants, in particular, has accurately been recognized as the greatest systematic displacement of art, if not the most audacious property crime, in human history.[6] Furthermore, while conquerors from the time of Alexander the Great and their soldiers have engaged in regular and incidental acts of thievery with regard to a conquered people's cultural artifacts throughout history,[7] the wholesale pillaging carried out from 1933 to 1945, rather than an incidental and spontaneous by-product of the military invasions, represented part of an official and systematic Nazi governmental policy to have their soldiers[8] and/or their civilian sycophants loot and plunder art and to destroy any "alternative" culture. Indeed, many then-current Nazi propaganda-commentators have unabashedly referred to the need to eradicate **all** forms of Jewish culture in Europe.[9] Many commentators have pointed to Maria

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STATES, PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS (Dec. 2000), https://govinfo.library.unt.edu/pcha/

PlunderRestitution.html/html/Home_Contents.html [https://perma.cc/5GWB-GXKG].

6 Martin Gayford, *Cracking the Case of the Nazis' Stolen Art*, THE TELEGRAPH (Nov. 9, 2013), https://www.telegraph.co.uk/news/worldnews/

europe/germany/10437728/Cracking-the-case-of-the-Nazis-stolen-art.html [https://perma.cc/37YA-9SJ6] (discussing how Nazis "had profited from perhaps the greatest organised [sic] art theft in modern history, one that continued for years and was supervised by an agency of the German state.").

7 Ivan Lindsay, *From Napoleon to the Nazis: The 10 Most Notorious Looted Artworks*, THE GUARDIAN (Nov. 13, 2014), https://www.theguardian.com/

artanddesign/2014/nov/13/10-most-notorious-looted-artworks-nazis-napoleon [https://perma.cc/7DSM-5GXD].

8 From the earliest days of the Third Reich, military units known as the "Kunstschutz" were organized to loot not just valuable art works but also precious metals in various forms and other items of cultural significance and were further directed to oppress the citizens of any conquered land. *See Cultural Wars – Meet Nazi Germany's 'Monuments Men',* MILITARYHISTORYNOW.COM (Jan. 31, 2014), https://militaryhistorynow.com/2014/01/31/culture-wars-meet-nazi-germanys-monuments-men/ [https://perma.cc/YL7X-85YX]. *See also* Marvin C. Ross, *The Kunstschutz in Occupied France*, 6 C. ART J. 336 (May 1946).

9 It is well-documented that this Nazi fanatical preoccupation with destroying Jewish culture also extended to the economic condition of Jewish business owners, particularly in fields where they had achieved great success. *See, e.g.*, Dina Gold, *Jewish German Fashion Industry Flourished, Then Perished under Nazi Rule*, B'NAI BRITH MAG. 1, 10 (Winter 2019), https://www.bnaibrith.org/uploads/1/1/6/9/116999275/2019_bbm_winter_printmag-vol133.pdf [https://perma.cc/3MN5-T6LX] (discussing the "golden age" of German high fashion, created in substantial part by Jewish designers and business owners, and its

Altmann's oft-referenced suggestion, made famous by its recital in the "Women in Gold" movie, that on an individual level Adolf Hitler was primarily driven by his failure to become a successful art student at the Vienna Academy of Fine Arts.[10] While this statement remains in part accurate, it is also an undebatable fact that the Nazi authorities from the outset individually, and as a collective group, dedicated themselves to controlling the cultural and creative lives of first the German, and later the occupied countries' populaces, and to particularly demonizing Germany's (and the other countries') Jewish populations. A prime target of their leaders, taking their cue from Hitler himself, was virtually any "modern" art such as Cubism and Dadaism works which he considered degenerate and reflective of a decadent Weimar Republic culture, and any works by Jewish artists.[11] By contrast, acceptable works by the standards imposed by Hitler and the other Nazi authorities included classical portraits and landscapes.[12] Joseph Goebbels, the head of Nazi Germany's propaganda ministry, in turn was quoted as characterizing the unacceptable modern artists as "garbage."[13]

At the same time that Nazi authorities were carrying out this horrendous policy of removing Jewish artists and art collections from the mainstream art world, their political leaders were exhibiting their avariciousness, hypocrisy, and simple outright greed in looting valuable works for their own benefit or to curry favor with others above them in the Nazi chain of command.[14] No better representation of this combined ideological policy and

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destruction under Nazi rule).

10 *See, e.g.*, Zuzanna Stanska, *The Story of Unrealized Hitler's Art Museum in Linz*, DAILY ART MAG. (May 27, 2017), https://www.dailyartmagazine.com/story-hitlers-art-museum/ [https://perma.cc/9WWR-FXJT] (discussing Hitler's failure to gain admission to the Vienna Academy of Fine Arts).

11 Gayford, *supra* note 6.

12 Ursula A. Ginder, *Munich 1937: The Development of Two Pivotal Art Exhibitions*, UCSB HISTORY 133C (Mar. 18, 2004), http://marcuse.faculty.history.ucsb.edu/classes/133c/133cproj/04proj/GinderNaziArt047.htm [https://perma.cc/8ZUX-TKE9].

13 Michael Glover, *Nazi Art Theft: How Hitler's Art Dealer Amassed Looted Paintings to Save His Own Skin*, THE INDEPENDENT (Nov. 7, 2017), https://www.independent.co.uk/arts-entertainment/art/features/hitler-hildebrand-gurlitt-cornelius-gurlitt-nazi-art-theft-a8041501.html [https://perma.cc/J2SK-B78N].

14 *See* Andrew Johnson, *Goering's Lost Art*, THE INDEPENDENT (Feb. 1, 2009), https://www.independent.co.uk/arts-entertainment/art/news/goerings-lost-art-1522536.html [https://perma.cc/QH78-64D7].

personal avarice exists than the example of Hermann Goering, the malevolent and avuncular head of the Luftwaffe, who was famous for commandeering freight cars filled with priceless seized works to be shipped to his garish Carinhall estate,[15] and/or gifted to the highest of Nazis, even on occasion transferred to Hitler's reputedly vast private collection.[16] In fact, one of the other recognized motives of the Nazi seizures was to collect works for the proposed Fuhrermuseum, self-evidently named to honor Hitler, which was to be erected in the post-war era in Linz, Austria,[17] close to Hitler's birthplace of Braunau am Inn, once the Nazis had completed their conquest of the Allied European nations. As it turned out, a number of the valuable pieces seized in 2014 from Cornelius Gurlitt's Munich apartment[18] turned out to be plundered works, which were being held for ultimate placement at the planned Fuhrermuseum.

One of the difficulties for my colleagues, me, and our very able researchers in tracing these thefts is the varying ultimate destinations of the looted art. Even those works which were diabolically plundered by forcing a coerced sale of Jewish assets (a so-called "judenauktionen")[19] often disappeared, or were destroyed (for the Nazi's sick version of "fun" or otherwise) intentionally or as a by-product of the European conflict. Hundreds of thousands of the works, which were not seized by individual and greedy "high" Nazis, or overtly (and/or covertly) by Nazi troops and officials who often acted in part through various "official" Nazi organizations set up in Germany and the occupied countries, were catalogued and stored in all types of allegedly "safe surroundings" such as salt mines, church belfries and cellars, warehouses, castles, deep basements in chateaus, basements and attics in large residences,[20]

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15 *Id.*

16 Henry Samuel, *Hermann Goering's 'Full Catalogue' of Looted Nazi Art Published for First Time*, THE TELEGRAPH (Sept. 30, 2015), https://www.telegraph.co.uk/history/world-war-two/11900625/Hermann-Goerings-full-catalogue-of-looted-Nazi-art-published-for-time.html [https://perma.cc/9UKK-S2WG].

17 Stanska, *supra* note 10.

18 *See infra* notes 58–59 and accompanying text.

19 Kirsten Scharnberg, *Art Institute Takes Initiative on Works Looted in Nazi Era*, CHI. TRIB. (Nov. 10, 2000), https://www.chicagotribune.com/news/ct-xpm-2000-03-10-0003100107-story.html [https://perma.cc/8WRE-4TNN].

20 Anne Rothfeld, *Nazi Looted Art: The Holocaust Records Preservation Project*, 34 PROLOGUE MAG., No. 2 (Summer 2002), https://www.archives.gov/publications/prologue/2002/summer/nazi-looted-art-1.html

and also in certain designated central depots such as the well-known Jeu de Paume in Paris, where the courageous Rose Valland secretly inventoried the seized works.[21] A widely circulated premise is that, before Europe was freed from the Nazi oppressors, looters used at least 1,000 different venues for the storing of the looted art and other items stolen from Jewish families.[22]

While many works were ostentatiously left on display by Nazi elites, a number of them, theoretically including the "degenerate art" that was banned from being kept in Germany, were actively traded by the Nazi's middlemen,[23] in occupied France and in neutral countries such as Switzerland,[24] to help finance the expanded and increasingly expensive war effort. Other valuable works were obtained from successful Jewish dealers by "purchasing" them for a fraction of their true value under the most extreme duress, i.e., the threat of total confiscation or even deportation to a concentration camp.[25]

Finally, a not insubstantial portion of the seized works was

[https://perma.cc/L299-VU2G].

21 *Monuments Men: On the Front Line to Save Europe's Art, 1942-1946: James Rorimer and Rose Valland*, THE SMITHSONIAN, https://www.si.edu/spotlight/monuments-men/monuments-men%3Arorimerandvalland [https://perma.cc/FU54-TK59].

22 *See* Rothfeld, *supra* note 20.

23 *See*, *e.g.*, SUSAN RONALD, HITLER'S ART THIEF 174 (St. Martin's Press 2015) ("The four official riders of the apocalypse that befell Germany's contemporary art in 1937 were Hildebrand Gurlitt, Karl Bucholz, Ferdinand Moller, and Berenard A. Bohmer."). The author focuses on Cornelius Gurlitt's role in the looting process, and points out that in order to further control the flow of "degenerates" looted art, a few favored dealers were granted the exclusive all-encompassing rights to deal with the paintings. *See also* NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART (2017).

24 *See, e.g.*, ALAN RIDING, AND THE SHOW WENT ON: CULTURAL LIFE IN NAZI-OCCUPIED PARIS 164 (Knopf 2010) (discussing how "neutral Switzerland" sold degenerate art and was "open to all kinds of business."). Switzerland was the site of a very well-known degenerate art auction at the Galerie Fischer in Lucerne in 1939. The country has also been tagged by a number of Holocaust researchers as an important and often secretive repository for the trading and concealing of degenerate art. *See, e.g.*, Catherine Hickley, *Swiss Making Slow Progress Returning Nazi-Looted Art*, SWISSINFO (Nov. 28, 2018), https://www.swissinfo.ch/eng/crime-and-restitution_swiss-make-slow-progress-returning-nazi-looted-art/44566000 [https://perma.cc/L7ZC-MKBY] (describing Switzerland's slow-going efforts to address the issue of looted art); *Nostra Culpa*, THE ECONOMIST (Mar. 28, 2002), https://www.economist.com/europe/2002/03/28/nostra-culpa [https://perma.cc/PLM2-QXV4] (describing the findings of an independent commission into Switzerland's relations with the Nazis during World War II).

25 *See* Scharnberg, *supra* note 19.

characterized by the Nazi authorities as "degenerative art," officially banned from being stored in Germany but approved to be used as bargaining pieces to trade for art deemed worthy of possession."[26] Again, much of the degenerate art was hypocritically displayed either in private settings such as Goring's Carinhall estate or at the officially discredited official "Degenerate Art Exhibition of 1937," in the Haus der Kunst—the show's inherent popularity virtually shocked the Nazi authorities.[27]

Basically, the Nazis rejected a wide swath of priceless art and sculpture that was considered unacceptable and avant-garde.[28] As noted above, leading the way were the attacks by Hitler in *Mein Kampf* on all forms of modern art.[29] A considerable number of the "unacceptable" works were officially sanctioned by the four "favored traders."[30] Others were catalogued and entered in the "Degenerate Art Exhibition" in Munich on July 19, 1937,[31] one day after the opening of the contrasting "Great German Art Exhibition," which included only so-called acceptable works such as German country scenes and depictions of "Aryan" warriors.[32] Both the contemporary and current commentators have commented on the extremely different physical settings of the two exhibits.[33] The latter Great German Exhibition was housed in a modern, clean and upscale gallery and officially opened by Adolf Hitler.[34] By contrast, the Degenerate Art Show, which focused on German (and at least in part Jewish) artists, was intentionally opened in an older and less suitable building, the rooms narrow and dark.[35] Many of the works were either left unframed or half-covered with insulting slogans designed to show, among other things, the purportedly "disgusting"

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26 *See* Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 473 (2010); *see also* RONALD, *supra* note 23, at 179–81.

27 *See* Ginder, *supra* note 12.

28 *See id.*

29 *See id.* (noting that Hitler called forms of modern art "the degenerate excess of insane and depraved humans.").

30 *See* RONALD, *supra* note 23, at 174.

31 Ginder, *supra* note 12.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

nature of the work.[36] More negative slogans were placed on the walls and one room was restricted to Jewish artists.[37] Furthermore, two of the recurrent themes were "genetic inferiority" and "society's moral decline."[38] The overall theme of the exhibit was to promote the idea that modern art was a conspiracy led by the Jewish-Bolshevik artists and supporters who were trying to undermine German "decency."[39] Ironically, only six of the approximately 120 artists who participated in the First Exhibition were Jewish.[40]

Despite all of the Nazi-induced complications, over 1,000,000 people attended the first six weeks of the Degenerate Art Exhibit and the final attendance figure was 2,009,899, or approximately 20,000 visitors per day.[41] The officially sanctioned Exhibition attracted only half that number and was reputedly panned by the international art community.[42] Furthermore, the degenerate version was subsequently shown in Berlin, Leipzig, Dusseldorf, Frankfurt, Weimar, Halle, and other German cities, and in Salzburg and Vienna, Austria, adding another 1,000,000 viewers to the total.[43] Ironically, the concept of a "degenerate art show" has long outlived the destruction of the barbaric Third Reich, with a number of successful successor shows in leading American museums, mostly in the 1990s, including the well-publicized show at New York's Modern Museum and the Los Angeles County Museum's forensic reproduction of the Exhibit as late as 1991.[44]

Recognizing their concept of discrediting Jewish and modern art by organizing shows in uncomfortable settings, the Nazi authorities intensified their other actions, continuing to loot, collect, sell

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36 *Id.*

37 *See* Ginder, *supra* note 12.

38 *Id.*

39 *Id.*

40 *Id.* ("Although there were only five Jewish artists represented among the 101 artists, the defamation of Jews as degenerate profiteers of Germany's cultural decline was present throughout the exhibition in banners across paintings and graffiti on the walls.").

41 *Id.*

42 *Id*.

43 *See* Ginder, *supra* note 12.

44 William D. Cohan, *MoMA's Problematic Provenances*, ART NEWS (Nov. 17, 2011), http://www.artnews.com/2011/11/17/momas-problematic-provenances/ [https://perma.cc/P4WY-M5E5].

through favored agents, and/or destroy, often by outright burning,[45] thousands of priceless works. In one sense, the Degenerate Art Exhibit was actually productive for the Nazis, as it increased the desire of prospective European purchasers to bid for works which might otherwise be removed from the market or destroyed.[46]

Although the Nazi lootings began concurrently with the initial seizure of power by the Nazis in the early 1930s, it was not until 1941, in conjunction with the blitzkrieg through Europe, that the Nazis "turned their art-looting operation into a smooth-running machine" in the occupied countries with the assistance of the "Einsatzstab Reichsleiter Rosenberg," often referred to as the "ERR," whose fully translated name was "The Reichsleiter Rosenberg Institute for the Occupied Territories."[47] The ERR was controlled by Hermann Goring and, in late 1940, became the primary processing group for looted art in occupied countries, particularly France and the Netherlands, but also including Russia and parts of Eastern Europe.[48] Having been directed to "seize" and collect Jewish art collections and other culture-related objects, the

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45 *See* Ginder, *supra* note 12. While not as well-publicized or as organized as the infamous German "book-burnings" of the 1930s, many looted art works were destroyed in a similar manner, in some instances simply for the enjoyment of the individuals or small groups gathered to observe the spectacle. *Id.* Almost 5,000 works, consisting of 1,004 paintings and sculptures and 3,825 watercolors, drawings and prints were reputedly burnt in one day on March 20, 1939, ironically in the courtyard of the Berlin Fire Department. *Id.*

46 *See id.*

47 *See* RIDING, *supra* note 24, at 163. The ERR maintained a central depository in the Jeu de Paumes. *Id.* Although it became the most well-known official collection agency, in part because the French heroine Rose Valland worked there, the ERR was by no means the only Nazi organization seeking to catalogue and control seized art as the Nazis stole art and other cultural properties from their own German Jews and from the citizens of every occupied country. *Id.* As early as 1933, prior to the conquest of France and subsequent founding of the ERR, the politically victorious Nazis had set up a very broad German-based organization called the Reichskinlturkamnes ("RKK") run by the notorious Joseph Goebbels and designed to regulate all forms of cultural life including art, film, and the press. *Id.* Later, as their forces overran Western Europe, the Nazis set up other looting groups, such as the "Dienststelle Muhlmann," covering the Netherlands and Belgium and the Sonderauftrag Linz, which concentrated on the looting of art for the Fuhrermuseum. *Id.* In an analogous manner, certain members of the Nazi forces were formed as the "Von Ribbentrop Battalion" and charged with raiding libraries in the occupied countries and looting a wide variety of items. *Id.* Finally, an organization run by an art historian was given the honor of collecting valuable works for the above-referenced Fuhrermuseum. *Id.*

48 *Id.*

ERR collected these works through its Paris headquarters located in a former Jewish library in the Pigalle area of Paris.[49] A number of these works were in turn inventoried at the Museum Jeu de Paume and at other locations in central Paris, and were ultimately transferred to prominent Nazis, both civilian and military personnel, or traded in Paris or elsewhere, using friendly middlemen, galleries, and well-connected individuals in the art world.[50] Many of these traders were located in France and, to some extent, other entities and individuals in neutral Switzerland and Spain, were even somewhat more surreptitiously using friendly galleries located in the United States—a venue that deserves an entire book, or at minimum, a separate article on the intrigue and shady circumstances surrounding these sales.[51] Wherever the works were found, from the outset, Goering apparently insisted that the most valuable works be divided among Hitler and himself, a directive that Hitler reputedly amended so that all of the looted art would first be reviewed by him to see which pieces he wanted for his private or Fuhrermuseum collections.[52] Despite having to choose after Hitler, Goering allegedly ended up collecting more than 300 valuable works, over half of which were confiscated works.[53]

To put this heinous property crime in historical perspective, reliable government sources have estimated that Nazi soldiers and their agents during the Nazi era of art looting, generally recognized as the period between 1933 and 1945, seized or forced the sale of at least approximately *one-fifth* of all Western European art then in existence.[54] Other commentators suggest the figure may be as high as one-fourth (or even one-third) of such art.[55] If other types of seized cultural artifacts are included in the totals, the aggregate value of stolen property approaches many millions of dollars.[56] One commentator estimated that the aggregate value of all of the looted artwork as of 1945 may have been as much as $2.5 billion, or

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49 *See id.* at 163–64.

50 *Id.*

51 *See id.*

52 Rothfeld, *supra* note 20.

53 *Id.*

54 Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT'L L. 297, 298 (2001).

55 *Id.*

56 *Id.* at 299.

approximately $20.5 billion using current values.[57] This estimate does not include the value attributed to the 2013 discovery of a massive number of art works (reputedly as many as 1400 pieces) located in the Munich, Germany apartment of Mr. Gurlitt; some commentators estimated upon this discovery that the aggregate may be as much as an additional $1.4 billion, using current values.[58] The enormity of the looting becomes clear when considering that the works seized in Cornelius Gurlitt's modest apartment represent only a portion of the works handled by his father, Hitler's favorite art thief.[59]

III. The Monuments Men and the Post-World War II Legal Perspective on Looted Art

Returning to the central theme of American jurisprudence as applied to the looted-art cases, many of these artworks ended up in American private collections or museums, at least in some instances as the result of the work of the "Monuments Men,"[60] soldiers from thirteen nations and the subjects of George Clooney's film of the same name. Unfortunately, the potential repatriation of these returned works to their rightful owners (if alive), or more likely to their family survivors, if any, was immediately, after the end of World War II, generally left to the goodwill of the United States and other European post-war governments.[61] As a result, thousands of

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57 *Id.*

58 Michael Shields, *New Haul Found in Austria Home of Munich Art Hoarder*, REUTERS (Feb. 11, 2014), https://www.reuters.com/article/us-germany-art-austria/new-haul-found-in-austria-home-of-munich-art-hoarder-idUSBREA1A15620140211 [https://perma.cc/LC8N-4P3C].

59 *See* Sophie Gilbert, *The Persistent Crime of Nazi-Looted Art*, THE ATLANTIC (Mar. 11, 2018), https://www.theatlantic.com/entertainment/archive/2018/03/cornelius-gurlitt-nazi-looted-art/554936/ [https://perma.cc/W4VN-C4B2].

60 ROBERT M. EDSEL & BRET WITTER, THE MONUMENTS MEN (Central Street 2009) [hereinafter EDSEL & WITTER]. An original group of fifteen men was created; their official American name was "The Monuments, Fine Art and Archives Section." *Id.* at 64–65. In November of 1944, the United States, led by William J. Donovan, the head of the Organization of Strategic Services (the "OSS") set up a related organization, the Art Looting Investigation Unit ("ALIU"), as a branch of the OSS and charged it with responsibility for collecting any available information on looting by the Germans and its wartime allies, and interviewing knowledgeable individuals at a centralized facility in Bad Aussee, Austria. *Id.*

61 For example, a recent article describes efforts by the German government to locate more than 400 works of art that are still missing after extensive Nazi looting in 1945. Catherine Hickley, *Hitler Looted the Art, Then They Looted Hitler*, N.Y. TIMES (July 19,

works either never were returned to the victims or their heirs, or simply did not have a full and accurate provenance. Moreover, for other reasons, such as the psychological scars left on the victims who were attempting to start new lives, relatively few claims, let alone successful claims, were historically made, and even less favorably resolved in the United States or elsewhere in the immediate post-war era. In addition, many valuable works, rather than being repatriated by the Monuments Men,[62] were retaken by local civilians or ordinary American and other Allied soldiers, including Russian soldiers and officials, and intentionally or inadvertently kept on residential or business walls in their home countries or stored away in places far from their original locales.[63] Still other valuable works ended up being destroyed by the retreating Nazi forces.[64]

To be sure, the Monuments Men performed heroically and laudably in their limited role of preserving, protecting, and collecting significant cultural landmarks and items for the purpose of returning them to the "countries of origin" in connection with the defined repatriation process. Their actions were certainly heroic, and have inspired similar efforts by other protectors of cultural patrimony and artifacts in more recent conflict zones, like Iraq in the early Twentieth Century.[65] It is estimated that the Monuments

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2019), https://www.nytimes.com/2019/07/19/arts/design/hitler-looted-the-art-then-they-looted-hitler.html [https://perma.cc/5Z59-DT8F]. Similarly, Austria was the repository of many works and enacted an "Art Restitution Law" creating the Art Restitution Advisory Board, which issued approximately 220 recommendations between 1998 and 2008, leading to the restitution of approximately 10,000 items. Comm'n for Art Recovery, Inc., *The Austrian Art Restitution Law*, http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf [https://perma.cc/ZB7Q-V857].

62 EDSEL & WITTER, *supra* note 60 (stating that the responsibility of the Monuments Men was to protect against the destruction or looting, to the maximum extent possible, but in the final analysis to simply return the stolen works to their "country of origin," which clearly is not an instruction to seek out the families of the prior owners of the work).

63 Tom Mashberg, *Returning the Spoils of World War II, Taken by Americans*, N.Y. TIMES (May 5, 2015), https://www.nytimes.com/2015/05/06/arts/design/returning-the-spoils-of-world-war-ii-taken-by-our-side.html [https://perma.cc/XU33-WMG4].

64 Jonathan Jones, *Dazzling Demons*, THE GUARDIAN (May 7, 2008), https://www.theguardian.com/artanddesign/2008/may/07/art [https://perma.cc/R65E-XF8D].

65 *See generally, e.g.*, MATTHEW BOGDANOS, THIEVES OF BAGHDAD (Bloomsbury 2005) (detailing Marine Colonel Mathew Bogdanos's efforts to recover more than 5,000 looted objects stolen during the fall of Saddam Hussein's regime in Iraq, including the

Men returned more than five million stolen cultural objects.[66] Their quest was, however, specifically directed to the return of the works to the "countries of origin," so that those countries could, in theory, return those works to their true owners,[67] i.e. the victims of the looting or their surviving closest relatives who had not perished in the Holocaust. As we have observed, this vague directive is a good example of the lawyer cliché that "the devil is in the details," since a significant portion of the post-war Holocaust art litigation in the modern era involves litigation battles between the claimants and the so-called "countries of origin," whose governmental representatives on many occurrences proved to be very unhelpful and, in some cases, rigidly intractable, with regard to denying claims.[68] Moreover, in Europe, as opposed to the United States, many of the large central museums are owned by the central government or a quasi-governmental agency,[69] thus adding another procedural layer to any work that had been transferred or otherwise repatriated and ended up in the possession of the particular museum.

In addition to the "psychological scars" mentioned above, for many other understandable reasons, the early years of art restoration through the end of World War II did not see a great deal of legal developments in this area. One problem was the enormity of the theft. Currently, the general consensus among commentators is that the Nazis seized hundreds of thousands of valuable art works and related cultural objects, and that not only had many disappeared by the end of the war, but that many are still missing in 2019.[70] To be

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"Treasure of Nimrud" gold artifacts).

66 Sophie Hardach, *Art Theft: The Last Unsolved Nazi Crime*, THE ATLANTIC (Nov. 18, 2013), https://www.theatlantic.com/international/archive/2013/11/art-theft-the-last-unsolved-nazi-crime/281566/ [https://perma.cc/W9QL-4XKF].

67 *The Monuments Men*, MONUMENTS MEN FOUNDATION FOR THE PRESERVATION OF ART, http://www.monumentsmenfoundation.org/the-heroes/the-monuments-men [https://perma.cc/ZXK2-QS5A].

68 William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html [https://perma.cc/7HLT-AS33].

69 *See* SHANNON S. LOANE, CONG. RES. SERV., R45674, NATIONAL MUSEUMS: IN BRIEF 1 (2019) (describing "national" museums in the United States); Geraldine Fabrikant, *European Museums Adapt to the American Way of Giving*, N.Y. TIMES (Mar. 15, 2016), https://www.nytimes.com/2016/03/17/arts/design/european-museums-are-shifting-to-american-way-of-giving.html [https://perma.cc/VE4V-H5KD].

70 I generally leave it to experienced research analysts such as my co-panelist and

sure, the information shared by groups such as the Art Looting Investigation Unit (ALIU),[71] the Monuments Men themselves, and even on a relatively small number of occasions by the Communist-developed Commission established in 1942,[72] was helpful to potential claimants, but only in a limited sense.[73] Moreover, even those Holocaust survivors who otherwise had the desire and ability to move forward were generally far more concerned with building their new lives, and in some sad instances even rebuilding from scratch their entire family structure.[74]

For those persons who attempted to enforce their rights, either in court or through the various administrative entities in the now independent countries, many obstacles loomed. For one thing, a number of countries in Eastern Europe had been taken over by the Communists and were virtually impenetrable.[75] For another, the

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good friend Marc Masurovsky of the United States Holocaust Museum in Washington, D.C., and Professor Jonathan Petropoulos of Claremont McKenna College, to provide us with first their best estimates of the total number of paintings plundered by the Nazis; and second, their most-current estimates of the amount of plundered art works still unaccounted for. While the estimates for the total amount taken among commentators vary widely, they currently, as a generalization and as an estimate, range in the aggregate from at least 40,000 to 100,000 works of art. *See* Gilbert, *supra* note 59 (estimating that the total amount of art plundered ranges from 40,000 to 100,000 works of art).

71 MICHAEL HUSSEY ET AL., U.S. OFFICE OF STRATEGIC SERVICES ART LOOTING INTELLIGENCE UNIT, OSS ART LOOTING INVESTIGATION UNIT REPORTS, 1945-46, https://www.archives.gov/files/research/microfilm/m1782.pdf [https://perma.cc/U9YE-CRUF].

72 The Commission was formally known by the long-winded official name of "The Soviet State Extraordinary Commission for Ascertaining and Investigating the Crimes Committed by the German-Fascist Invaders and their Accomplices." *See generally* Kiril Feferman, *Soviet Investigation of Nazi Crimes in the USSR: Documenting the Holocaust*, 5 J. GENOCIDE RES. 587 (2003) (describing the investigations undertaken by the Commission into the crimes committed during the German occupation of Soviet areas).

73 Telegram from the Ambassador in the Soviet Union (Harriman), to the Secretary of State, U.S. Office of the Historian (Dec. 10, 1943), https://history.state.gov/historicaldocuments/frus1943v03/d698 [https://perma.cc/WJ76-4EHP].

74 FRANÇOISE S. OUZAN, HOW YOUNG HOLOCAUST SURVIVORS REBUILT THEIR LIVES: FRANCE, THE UNITED STATES, AND ISRAEL 38–72 (2018).

75 After the Iron Curtain disappeared, the Russian Federation formed a new "State Commission for the Restitution of Cultural Variables," which began the gargantuan task of identifying and cataloguing the enormous number of looted pieces taken from Russian museums by the Nazis. *See Online Catalogue of Lost Artworks*, FED. AGENCY OF CULTURE & CINEMATOGRAPHY OF THE RUSSIAN FEDERATION, http://www.lostart.ru/lost/ [https://perma.cc/64HJ-7HF3]. In 2008, the Commission issued an interim report which identified 1,148,908 lost artworks from fourteen museums, libraries, and State archives.

judicial climate in the American courts or early administrative bodies (mostly military or quasi-military), or their European counterparts, while philosophically decent, were not by any means universally favorable to the survivors or their families who sought some form of restitution.[76]

What was historically "on the books," but not yet well-understood or well-developed, was the later well-recognized premise that *cultural property wrongfully taken from its rightful owners should be returned to those owners*.[77] This recognition and the fundamental premise that, in its simplest pronouncement, under Anglo-American law a thief can never obtain or pass good title to stolen personal property, which may be reclaimed at any time (whatever may have been the number of intervening owners and whether or not anyone in the chain was a "bona fide purchaser"), were the guiding principles at the heart of the development of a comparatively favorable body of law in the United States generally recognized as having run from the 1838 New York case of *Hoffman v. Carow*.[78] This basic doctrine was, unfortunately, not as well-recognized in American looted art-law until the Washington Conference and our own seminal *Republic of Austria v. Altmann*[79] case, which occupied us for many years, and which was the only Nazi-looted case in the post-war era to successfully proceed through the entire federal court system, at least on a procedural basis.

Superimposed on this historic perspective was the early post-war recognition that the laws of Nazi Germany in this context are invalid *per se* and not true "acts of state."[80] The London Declaration

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See id.

76 *See* E.B., *How is Nazi-Looted Art Returned?*, THE ECONOMIST (Jan. 12, 2014), http://www.economist.com/blogs/economist-explains/2014/01/economist-explains [https://perma.cc/7UUU-4JFT].

77 Lawrence M. Kaye, *Recovery of Art Looted During the Holocaust*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 351–52 (James A.R. Nafziger & Ann M. Nicgorski eds., 2009).

78 Hoffman v. Carow, 20 Wend. 21, 22 (N.Y. Sup. Ct. 1838).

79 Republic of Austria v. Altmann, 541 U.S. 677 (2004).

80 *See, e.g.*, Weiss v. Lustig, 58 N.Y.S. 2d 547 (1945). Courts also could, in theory, point to the text of the wartime London Declaration of 1943, cited in many treatises. *See Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, COMM'N FOR LOOTED ART IN EUROPE (Jan. 5, 1943), https://www.lootedartcommission.com/inter-allied-declaration [https://perma.cc/CX3A-4SZ4] [hereinafter Inter-Allied Declaration].

was directed in the following excerpt to all forms of Treaties and included actions referred to as so-called "sham transfers." In the words of the draftsmen:

> Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interest of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) residents in such territories. *This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected*.[81]

In the aftermath of World War II, there were resolute individuals like Maria Altmann who, without setting aside their continuing re-entry goals, attempted to retrieve their family's valuable art properties. Their efforts, at best, led to minimal successes and, at worst, proved to be threatening experiences for the refugees, with such horrendous examples as the expulsions or even shootings of individuals seeking to reclaim their homes and/or thefts of their valuables.[82] Maria Altmann, whose uncle died in Switzerland in 1946,[83] actually retained an Austrian lawyer at one point after the war ended. The lawyer sought to take advantage of a 1946 Austrian statute which provided that all dealings which involved some form of Nazi ideology were null and void, subject to fair payment to any current bona fide possessors, and limited by an outright ban on exporting any valuable art that was considered part of Austria's historical heritage.[84] After substantial advance negotiations, Maria's lawyer was forced to give up the more valuable Klimt-

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81 Inter-Allied Declaration, *supra* note 80.

82 OUZAN, *supra* note 74.

83 Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES (Sept. 16, 2006), https://www.nytimes.com/2006/09/19/arts/design/19kimm.html [https://perma.cc/RD85-R6KX].

84 Republic of Austria v. Altmann, 541 U.S. 677, 683 (2004). In more recent times, all of the Nazi-occupied countries other than Poland have reportedly enacted similar legislation, but none proved to be self-executing for the unfortunate claimants. *See* William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html [https://perma.cc/7HLT-AS33].

related claims in return for export licenses with respect to far less valuable works.[85] Other claimants were simply not as resolute in the first instance and, even if they were, often gave up their claims after the inevitable rejection by the post-war European governments and in the face of a patchwork of uneven national and international statutory perspective.

IV. The Subsequently Developed Legal Protections

In the postwar period, several individuals did attempt to recover their looted art, to varying degrees of success. However, the general situation described in the prior section of this article continued for over fifty years, only beginning to change in the final decade of the 20th Century. This section provides an overview of the 1998 Washington Conference, some of the legal developments which arose between that conference and our *Altmann* case, how the law developed after *Altmann* was decided, and the impact of the 2016 HEAR Act.

A. The Washington Conference and its Aftermath

The general situation described in the prior section of this article continued for over fifty years, until the 1998 Washington Conference was convened at the behest of a number of governmental leaders, international judges and lawyers, and victims' organizations.[86] In 1997, the London Conference on Nazi Gold "addressed questions of how much gold was stolen, where it went, and what should be done about it" and established a fund for Holocaust survivors and their heirs.[87] A year later, in 1998, the Association of Art Museum Directors drafted guidelines on how member institutions should handle art looted by the Nazis, which formed the basis of the Washington Conference.[88] In the end, representatives from forty-four countries attended the Washington

85 *Altmann*, 541 U.S. at 705.

86 MARILYN J. HARRAN & JOHN ROTH, THE HOLOCAUST CHRONICLE 691 (2000).

87 *Holocaust Restitution: Overview of the London Gold Conference*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/london-gold-conference [https://perma.cc/48Y6-GAJT].

88 *Resolutions of Claims for Nazi-Era Cultural Assets*, ASS'N OF ART MUSEUM DIRECTORS, https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info [https://perma.cc/N4K4-A543].

Conference.[89] While the participants discussed many art-related subjects, the Conference has become most famous for developing the "Washington Principles."

In fact, the modern development of the legal principles governing the disposition of looted art can be traced to this Conference and the development by experts in attendance of the so-called "Washington Conference Principles."[90] These experts reviewed the continuing and increasing discovery of Nazi-looted assets, including artworks, and promulgated eleven basic principles concerning Nazi confiscated art, including two basic Principles that have come to be referred to as the "Washington Conference Principles": (1) that pre-war owners and their heirs and assigns should be encouraged to come forward to make their claims known; and (2) that reasonable steps should be undertaken on an expeditious basis to develop "fair and just claims procedures," with both principles to be accompanied by liberal rules of evidence so that the looted art could be returned to its rightful owners.[91] Mr. Eizenstat, an outstanding lawyer and a real hero in this field, has spent years in and out of American governmental positions, passionately devoted to the quest for Nazi-looted art.[92]

Following the Washington Conference, the movement to improve the systems for retrieving looted art was assisted by another source, the Association of Art Museum Directors, who promulgated guidelines for reviewing provenance, with an emphasis on the provenance relating to alleged Nazi-looted art. In 2009, more than ten years after the Washington Conference, the Czech Republic convened the Holocaust Era Assets Conference, often referred to as the "Terezin Conference," which resulted in forty-six countries signing a "Proclamation" or "Declaration"[93] consistent with the Washington Principles.[94] In the years since the 1998 Washington Conference and the Terezin Conference, a number of American and

89 *Id.*

90 *Id.*

91 *See generally* STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003) (describing the inner workings of the Conference).

92 Cohan, *supra* note 84.

93 U.S. DEP'T OF STATE, PRAGUE HOLOCAUST ERA ASSETS CONFERENCE: TEREZIN DECLARATION (June 30, 2009), https://2009-2017.state.gov/p/eur/rls/or/126162.htm [https://perma.cc/J6Y8-VHLU].

94 *Id.*

foreign governmental authorities have taken a much closer look at art with questionable provenance, and many auction houses, museums, and collectors have simply avoided dealing with art with any serious gaps in reported provenance between 1933 and 1945.[95] Similarly, a report found that two-thirds of the nations that have endorsed agreements regarding research, publicity, and claims for Nazi-era looted art have done nothing to implement those pacts.[96] Unfortunately, neither the Washington Principles nor the Declaration are self-executing and/or the legal equivalent of a treaty, so over the course of time, the signatory countries have at most given lip service or, whether intentionally or unintentionally, bypassed in too many instances.[97]

As recently as November of 2018, yet another international conference was organized, this time by the German Lost Art Foundation in cooperation with the Prussian Cultural Heritage Foundation and the Cultural Foundation of the German Federal States.[98] Well-attended by many experts, legendary spokespersons such as Ronald Lauder and Stewart Eizenstat, and governmental representatives, the Conference's overriding goal was "the question of how to impart and hand on to following generations the concerns of the Washington Principles, with the goal of permanently and continuously integrating the Principles into a culture of responsibility and remembrance."[99] There will undoubtedly be other conferences, but whether considered individually, or on a

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95 Victoria Reed, *Due Diligence, Provenance Research, and the Acquisition Process at the Museum of Fine Arts, Boston*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 363, 366–67 (2013).

96 *See* Wesley A. Fisher & Ruth Weinberger, Conf. on Jewish Material Claims Against Germany & World Jewish Restitution Org., Holocaust-Era Looted Art: A Current World-Wide Overview 4 (Sept. 2014), http://art.claimscon.org/wp-content/uploads/2014/09/Worldwide-Overview.pdf [https://perma.cc/7ZNF-RV2E].

97 Randy Kennedy, *Museums' Research on Looting Seen to Lag*, N.Y. TIMES (July 25, 2009), https://www.nytimes.com/2006/07/25/arts/design/25clai.html [https://perma.cc/3YYL-GK9B].

98 *See Conference: "20 Years Washington Principles: Roadmap for the Future" (26-28 November 2018),* GERMAN LOST ART FOUNDATION (Feb. 6, 2018), https://www.kulturgutverluste.de/Content/02_Aktuelles/EN/News/2018/February/18-02-06_Save-the-Date-Washington-Konferenz.html [https://perma.cc/3T8B-VBBF].

99 *20 Years of the Washington Principles: Roadmap to the Future, Conference, Berlin, 26-28 November 2018*, THE CENTRAL REGISTRY OF INFORMATION ON LOOTED CULTURAL PROPERTY 1933-45 (Aug. 6, 2018), https://www.lootedart.com/T1I90B291111 [https://perma.cc/S3LF-A75N].

collective basis with the Washington Conference and its progeny, these conferences of well-meaning individuals will ultimately not achieve even a portion of their normally lofty goals.[100]

B. The General Development of the Law (Pre- and Post-Altmann)

As discussed above, neither the Washington Conference nor any of its successor conferences, or any of the less formal meetings, resulted in a widespread change of governmental or art museum policies in the countries involved and among the original collector and gallery representatives.[101] Thus, it was left to the lawyers here and abroad to develop through negotiations, litigation, and arbitration the basic (and not necessarily consistent) principles that were designed to govern an individual looted art recovery case. Randy and I are proud that *Altmann*[102] served as a watershed case where the U.S. Supreme Court dealt with an Austrian looted art case brought against an entire nation and its state-owned museum.[103] There have been a series of other developments and cases, both before and after *Altmann*, which have served as part of the backdrop to our more recent work. Since most of these pre-2016 cases have been extensively discussed in one or both of my prior articles, I will try to simply summarize their holdings in this section, as opposed to providing the reader with a more detailed and perhaps duplicative analysis here.

The legal picture changed in the mid to late 1990's, (coincidently at the beginning of Mrs. Altmann's lengthy legal quest) as a number of factors led heirs, museums, collectors, and even some governmental authorities, to authenticate and reexamine the history of the artworks that had been looted by the Nazis but never returned to the families of the original owners.[104] First, the

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100 *Unlawful Appropriation of Objects During the Nazi Era*, AM. ALLIANCE OF MUSEUMS (Apr. 2001), https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/ [https://perma.cc/SGC8-JBTF] (publishing a set of guidelines concerning the unlawful appropriation of objects during the Nazi era).

101 Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 643–45 (2010).

102 Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).

103 *Id.*

104 Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann,*

end of the Cold War led to previously classified archives in communist countries to become publicly available.[105] Second, the development of the internet effected a substantial change in the ability to research this area, and more scholars turned their attention to researching and writing books about Nazi looting.[106] Furthermore, *The Rape of Europa,* a pioneering study by Lynn Nicholas, which formed the basis for a later full-length documentary film, was completed in 1994 and served as an example for other books and documentaries.[107] The following year, the Bard Graduate Center for Studies in the Decorative Arts in New York City held a symposium entitled *The Spoils of War*, at which scholars presented many papers—including one paper by my close friend and New York colleague, Larry Kaye—examining issues related to looted art.[108] Also in 1995, two very respected researchers, Konstantin Akinsha and Grigori Koslov, working with Sylvia Hochfeld of *Art News*, published *Beautiful Loot*: *The Soviet Plunder of Europe's Art Treasures*.[109] Two years later, Hector Feliciano published his classic work, *The Lost Museum*: *The Nazi Conspiracy to Steal the World's Greatest Works of Art*, emphasizing a slightly different aspect of the looting.[110] And in August of 1997, the National Jewish Museum established the Holocaust Art Restitution Project.[111] Shortly thereafter, the Washington Conference fixed the world's attention, at least temporarily, on the subject of looted art.[112] It would be difficult, if not impossible, to apportion on any precise

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Bennigson, Portrait of Wally, Von Saher and Their Progeny, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 406 (2016) [hereinafter Burris*, Tragedy to Triumph*].

105 *Id*.

106 *Id.*

107 *Id.*

108 Lawrence M. Kaye, *Laws in Force at the Dawn of World War II: International Conventions and National Laws*, *in* THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 100 (Elizabeth Simpson ed., 1997).

109 Burris, *Tragedy to Triumph*, *supra* note 104, at 406–07.

110 *See generally* HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (Tim Bent & Hector Feliciano trans., 1997) (detailing the systematic confiscation of artwork by Nazis and the problematic treatment of looted art works by museums post-war).

111 Greg Bradsher, *Documenting Nazi Plunder of European Art*, NAT'L ARCHIVES (Nov. 1997), https://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html [https://perma.cc/Z6CY-7EC9].

112 Burris, *Tragedy to Triumph*, *supra* note 104, at 406.

basis the growing reexamination of the potentially looted Nazi art among these and other important developments culminating with *Altmann*.

C. The Significance of Altmann, Bennigson, Von Saher, and Other Selected Pre-HEAR Act Proceedings

A few years after the convening of the Washington Conference, my friends and fellow restitution counsel Howard Spiegler and Larry Kaye at Herrick Feinstein, LLP became involved in what proved to be a very lengthy dispute over a well-known Egon Schiele painting called "Portrait of Wally," which the artist had painted in 1912.[113] The painting was seized by the Nazi authorities in Austria in the late 1930's, recovered after the War and restituted to a Jewish victim other than the firm's client, who claimed to be the rightful owner of the work.[114] The case turned out to be the longest-running Nazi looted art case of its time, involving over ten years of litigation and ultimately ended with a $19 million dollar settlement in favor of the rightful owner, the Estate of Lea Bondy.[115]

Turning to the specific defenses, one leading defense with self-evident implications for our cases was the potential international application of the time-honored sovereign immunity defense, which dates back to England in the 1600's,[116] and was extensively dealt with by the Supreme Court in the *Altmann* case.[117] It was also one of the defenses raised in the Ninth Circuit in *Cassirer v. Kingdom of Spain*,[118] involving a classic Camille Pissarro painting, with which we had an initial and tangential involvement.[119] The claimant was a Californian who was the grandson of a Jewish art collector forced to "sell" the priceless painting ("Rue Saint Honore, Apres-midi, Effet de Pluie"), painted by perhaps the leading Jewish artist of his era, for about $360, in order to be allowed to flee Germany

113 United States v. Portrait of Wally, 663 F.Supp.2d 232, 237 (S.D.N.Y. 2009).

114 *Id.* at 238.

115 *Row Over Egon Schiele Work Costs Austrian Museum $19M*, BBC NEWS (July 21, 2010), https://www.bbc.com/news/entertainment-arts-10709321 [https://perma.cc/5633-JBFG].

116 For a comprehensive and well-written analysis of the history of this doctrine, see George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 485 (Mar. 1953).

117 *See* Republic of Austria v. Altmann, 541 U.S. 677, 689–92 (2004).

118 Cassirer v. Kingdom of Spain (*Cassirer II*), 616 F.3d 1019, 1022 (9th Cir. 2010).

119 *Id.*

by virtue of exit visas for herself, her husband, and her grandson.[120] Ironically, although the exit visas were issued and honored, the ever-malevolent Nazis reportedly retained the $360.[121]

At first, the Pissarro masterpiece was believed to be lost and the post-war German Government paid the heirs approximately $13,000 in reparations for its theft and apparent destruction.[122] However, after the claimant learned that the painting was part of a collection purchased by the Spanish government and ultimately transferred to a museum foundation, his counsel brought an action against both Spain and the Spain-based Foundation,[123] which had acquired the work for $275,000 in 1976 from a New York gallery.[124] In the course of this action, the federal courts in California had to deal with a wide range of international issues, including, among others, personal jurisdiction, standing, justiciability, sovereign immunity, and the potential liability of a country or entity which was not "involved' in the actual looting.[125] Some of these issues had been directly, or at least indirectly, dealt with in the *Altmann* proceedings, with the obvious exception being the last issue, although the Austrian authorities in our case took a stab at arguing that Austria, despite its acquiescence in the Anschluss, was a "victimized" nation.[126]

There were multiple rulings in the *Cassirer* case. The earliest Ninth Circuit decision in the *Cassirer* proceedings rejected, among other defenses, the claim of immunity under the Foreign Sovereign Immunities Act (FSIA).[127] In the later opinion of the appellate tribunal, a second panel (with Judge Wardlaw replacing Judge Alexander, who had in the interim passed away) ruled that the district court judge had this time wrongfully dismissed the action as the plaintiff's claims were *not* in conflict with federal policy regarding so-called "internal restitution" and represented the

120 *Id.* at 1023.

121 *See id.*

122 Colleen Shalby, *Nazi-Looted Painting Won't Be Returned to California Family, Judge Says*, L.A. TIMES (May 1, 2019), https://www.latimes.com/local/lanow/la-me-judge-ruling-nazi-stolen-art-20190501-story.html [https://perma.cc/9365-LASE].

123 *Cassirer II*, 616 F.3d at 1023.

124 *Id.*

125 *Id.* at 1022.

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

127 Cassirer v. Kingdom of Spain (*Cassirer I*), 580 F. 3d 1048, 1057 (9th Cir. 2009).

equivalent of private claims.[128]

In mid-July of 2017, the Ninth Circuit court issued a third, at the time very helpful, ruling decision in *Cassirer v. Thyssen-Bormemisza Collection Foundation*[129] after David Boies had substituted into the case as the claimant's co-counsel. The court ruled in essence that the museum's representatives had failed to establish as a matter of law that they did not know that the painting was stolen when it was acquired from Baron Hans-Heinrich Thyssen-Bornemisza, a prominent industrialist, art collector and scion of Germany's Thysson Steel empire, who had purchased it for $275,000 from a New York gallery owner in 1976.[130] In ruling in this manner, the court thus seemingly recognized that the six-year limitations period under the newly enacted Holocaust Expropriated Art Recovery (HEAR) Act of 2016[131] superseded the patchwork of prior state statutes.[132] The court reversed the summary judgment that had been granted to the Museum's attorneys and remanded the case for further proceedings revolving around the factual issues surrounding the relevant transactions.[133]

Unfortunately, the *Cassirer* case did not have a happy conclusion for the claimants.[134] After what had become his third appellate reversal, the case returned to Judge Walter and was set for a non-jury trial in April of 2018. After proceedings, which were quite limited at the direction of Judge Walter, he ruled in favor of the defendants, concluding that there was no evidence that they knowingly purchased a piece of looted art when it was acquired in 1992.[135] Judge Walter ruled in essence, on a thin record, that the museum had no reason to believe that it was purchasing a Nazi-looted work in 1992 and that the court could not force the defendant-

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128 Von Saher v. Norton Simon Museum of Art (*Von Saher V*), 754 F.3d 712, 714 (9th Cir. 2014).

129 *See* Cassirer v. Thyssen-Bormemisza Collection Foundation (*Cassirer IV*), 862 F.3d 951, 955 (9th Cir. 2017).

130 *Id.* at 975–76.

131 *See* discussion *infra*, Part IV, sec. D; *see also* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §5(a), 130 Stat. 1524, 1526 (2016) [hereinafter HEAR Act].

132 *Cassirer IV*, 862 F.3d at 960.

133 *Id.* at 981.

134 *See* Civil Minutes–General at 20, Cassirer v. Thyssen-Bormemisza Collection Foundation, No. CV-05-3459-JFW (C.D. Cal. Apr. 30, 2019), ECF No. 621.

135 *Id.*

museum to comply with its moral "commitments."[136]

A related problem for claimants has been the modern policy of many museums' attempts to use a jurisdiction's statute of limitations as a type of sword to avoid having claims decided on the merits rather than as simply a defensive shield.[137] As the noted art commentator, Erik Olson, wrote in his blog in 2013, three years prior to the enactment of the HEAR Act:

> In some of the cases, museums like the Detroit Institute of Arts, the Toledo Museum of Art in Ohio, the Museum of Fine Arts in Boston and the Solomon R. Guggenheim Museum have tried to deter claimants from filing suit by beating them to the courthouse and asking judges to declare the museums the rightful owners.[138]

Between the *Altmann* decision in 2004 and the 2016 passage of the HEAR Act, two significant cases handled by other counsel in the First Circuit resulted in somewhat important but complicated opinions from two different panels of the circuit.[139] In *Vineberg v. Bissonette*,[140] one panel granted summary judgment to the successors in interest of the original owner, Dr. Max Stern, of a valuable painting also by the impressionist master Camille Pissarro, which was in the possession of Baroness Marie-Louise Bissonette.[141] The painting had been looted from a Jewish gallery owner (who subsequently fled Germany) by means of a clearly forced sale and sold for a drastically low price by the Lempitz Auction House for the benefit of the Nazi authorities.[142] The case presented, among other things, a significant choice of law issue, and the court decided this issue in favor of the claimant, ruling that the trial court had properly determined that the defendant had not met its burden with regard to establishing a laches defense.[143] The panel signed off with a ringing recognition of the need to counter the

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136 *Id.* at 33–34.

137 *See* Burris, *Tragedy to Triumph*, *supra* note 104, at 413.

138 Patricia Cohen, *Museums Faulted on Restitution of Nazi-Looted Art*, N.Y. TIMES (June 30, 2013), https://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html [https://perma.cc/D5K7-B2KZ].

139 *See* Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008); *see also* Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010).

140 *Vineberg*, 548 F.3d at 50.

141 *Id.* at 53.

142 *Id.*

143 *Id.* at 58.

Nazi's "notorious exercise of man's inhumanity to man."[144]

The second and slightly more recent First Circuit case was *The Museum of Fine Arts (Boston) v. Seger-Thomschitz*.[145] This case involved as complicated a factual scenario as any of the other cases that I have come across in this area. The First Circuit panel in this case ruled against the claimant, a family nurse designated as the "universal successor" in the will of the former owner of the painting at issue in the case.[146] The owner had "transferred for sale" the painting to a Parisian gallery in 1939 along with several other paintings he was allegedly forced to sell by the Austrian Nazis, who had taken over Austria as the result of the Anschluss, and required Jewish owners to list on a required form "declaration" all valuable property, including art works, as a prelude to their seizure.[147]

The significance of this case is not only its outcome, but also the fact that the American museum, acting as a defendant, aggressively pursued (albeit in the pre-HEAR Act era) a modern museum procedural remedy, i.e. a declaratory judgment action based on the traditional Massachusetts three-year statute of limitations, without being required in the first instance to rebut the factual allegations allegedly supporting the plaintiff's position.[148] Many of our small group of claimant lawyers have suggested that this type of tactic has some negative moral overtones, particularly where the museum may be accused of using a so-called "technical defense," such as the state statutes and case law regarding limitation periods and laches to thwart an otherwise legitimate ownership claim.[149]

A third oft-cited case decided during this era was the Second Circuit's ruling in *Bakalar v. Vavra*.[150] Along with the later *Cassirer* case, this case represents one of the few Nazi-looted art cases to actually go to trial on the merits in the United States.[151] It ended up with a court trial with the basic issue being the question of the proper title to an Egon Schiele drawing entitled "Seated Woman

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144 *Id.* at 59.

145 Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d 1, 2 (1st Cir. 2010).

146 *See id.* at 3.

147 *Id.* at 3–4.

148 *Id.* at 3.

149 Burris, *Tragedy to Triumph*, *supra* note 104, at 413.

150 Bakalar v. Vavra (*Bakalar III*), 619 F.3d 136 (2d Cir. 2010).

151 *See* Bakalar v. Vavra (*Bakalar II*), No. 05 Civ. 3037, 2008 WL 4067335 (S.D.N.Y. 2008).

with Bent Left Leg" that had been part of a collection of nearly 450 artworks owned by Franz Friedrich Grunbaum.[152] Much of this collection was subject to a Nazi forced sale in order to pay taxes and penalties imposed on Jews.[153] Although neither Grunbaum nor his wife survived the war, his wife's sister did, and she sold the drawing, which had remained in their possession, in 1956 to a Swiss gallery.[154] The drawing was then transferred to another gallery in New York.[155]

The District Court initially held that, under New York conflicts of law rules, the jurisdiction in which title was purportedly transferred determined which law applied.[156] Since the initial transfer occurred in Switzerland, the court held that Swiss law applied and that the Swiss gallery therefore obtained good title to the drawing.[157] On appeal to the Second Circuit, the court vacated the decision and remanded the case on the ground that New York law should govern.[158] In so ruling, the Circuit Court panel rejected the District Court's application of the traditional conflicts of laws "situs" rule in favor of an "interest" analysis, and in the process held that the compelling interest of New York-based courts in ensuring that the state did not become a haven for stolen property overrode any interests Switzerland might have had in connection with a transaction where the purchased property left the country almost immediately.[159] The *Bakalar* case is also significant in that a similar transaction in connection with the Gruenbaum collection became the subject of a potentially important post-HEAR Act case entitled *Reif v. Nagy*.[160]

Before turning to the passage and implications of the HEAR Act, I should briefly add to the passing reference I made at the beginning of this section to the lengthy *Portrait of Wally* proceedings.[161] The case arose in the District of Columbia and was

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152 *Id.* at *1.

153 *Id.* at *3–5.

154 *Id.* at *6.

155 *Id.*

156 Bakalar v. Vavra (*Bakalar I*), 550 F. Supp. 2d 548, 550 (S.D.N.Y. 2008).

157 *Bakalar II*, 2008 WL 4067335, at *6–8.

158 *Bakalar III*, 619 F.3d 136, 147 (2d Cir. 2010).

159 *Id.* at 143–44.

160 *See infra* notes 204–15 and accompanying text.

161 *See supra* notes 113–115 and accompanying text.

litigated by Howard Speigler and his partner, Larry Kaye, co-chairmen of the New York Herrick Feinstein firm's Art Recovery Department.[162] The *Portrait of Wally* case involves a 1912 Egon Schiele portrait of Walburga "Wally" Neuzil, who was 17 years old when he met her.[163] She became his model and lover and ended up being depicted in a number of Schiele's works until they split in 1915, when he announced his intention to marry another woman and Wally moved out.[164] In 1917, she passed away from scarlet fever while working as a nurse in the Dalmatia region of Croatia.[165]

In 1954, Rudolf Leopold bought the painting and it became part of his collection at the Leopold Museum, which was specifically established by the Austrian Government with 5,000 of Leopold's art pieces.[166] In the late 1990's, the Museum of Modern Art in New York put together an exhibit that included the paintings, and an article about the provenance was published in the New York Times.[167] Based on this article, the heirs of Lea Bondi Jaray, a Jewish Austrian art dealer who had owned the work before the outbreak of World War II, asked Robert M. Morgenthau, the illustrious New York District Attorney, for his assistance in restituting the painting to the heirs.[168]

According to certain incontrovertible facts, Ms. Jaray was clearly under some duress and accordingly had to give up the painting to a notorious Nazi dealer, Friedrich Weisz, in 1939 in connection with the Anshcluss and the Aryanization program in post-1938 Austria.[169] Ironically, Ms. Jaray had previously transferred all of her public collection and Mr. Weisz had seen the painting at her home as part of her so-called "private" collection.[170]

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162 United States v. Portrait of Wally, 663 F.Supp.2d 232, 236 (S.D.N.Y. 2009).

163 PETER RUSSELL, THE HISTORY OF ART IN 50 PAINTINGS 487 (2017) (ebook); s*ee Portrait of Wally*, 663 F. Supp. 2d at 236.

164 RUSSELL, *supra* note 163, at 488.

165 *Id*.

166 *Id*.

167 *Id*.

168 *Id*.

169 *See* United States v. Portrait of Wally, 663 F. Supp. 2d 232, 238 (S.D.N.Y. 2009) ("She resisted, explaining that the Painting was part of her private collection and had never been part of the gallery. However, she ultimately relented at the behest of her husband, who reminded her that they intended to flee Austria and that Welz could prevent their escape. Welz did not compensate her for the Painting.") (internal citations omitted).

170 *Id*.

In any event, the valuable work was transferred to the Austrian National Gallery and ultimately to Ms. Jaray's supposed friend, Rudolph Leopold, a shady character who made it the cornerstone of his Leopold Museum collection.[171]

The more recent legalistic part of the story began in 1997 with the opening of a New York Museum of Modern Art exhibit on "the Leopold Collection." After hearing about the exhibition, Ms. Bondi's nephew Henry asked District Attorney Robert Morgenthau to file a recovery claim.[172] Although his seizure attempt was ultimately unsuccessful, it led to a $19 million settlement—after years of protracted litigation in the New York federal court, and as the case was about to finally go to trial on one remaining issue, i.e., whether the Leopold Museum could establish that Mr. Leopold was unaware that the painting was stolen property at the time of importation—which, according to the commentators, was not completely well-accepted by the claimants or the museum representatives.[173]

There is a consensus among the commentators that the *Wally* proceedings focused all of the parties on the potential implications of American museums arranging to loan European paintings of questionable provenance.[174] If any reader may be interested in the details of the Estate of Wally proceedings, there are a number of articles, media interviews, and even a 2012 documentary which serve to provide a great deal of detailed information.[175] The documentary is called "Portrait of Wally" and was prepared by Andrew Shea.

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171 *See generally id.* (recounting the transfer of the painting and mentioning some actions taken by Mr. Leopold that could be considered unscrupulous).

172 PORTRAIT OF WALLY (P.O.W. Productions 2012).

173 *See id*. (explaining that, after a long battle over the painting, the museum agreed to pay a $19 million settlement, a large portion of which went towards attorneys' fees).

174 *See id.*

175 *See id.*; *see also* Nicholas Rapold, *The Multidimensional Fate of a 1912 Schiele Portrait*, N.Y. TIMES (May 10, 2012), https://www.nytimes.com/2012/05/11/movies/portrait-of-wally-documentary-on-schiele-painting.html [https://perma.cc/Z6Z4-N9ZC]; Thomas R. Kline, *Portrait of Notoriety*, WALL ST. J. (July 27, 2010), https://www.wsj.com/articles/SB10001424052748703294904575385543744550822 [https://perma.cc/UJG4-HFPZ]; Stefan Cassella, *Recovering Stolen Art & Antiquities Under the Forfeiture Laws: Who Is Entitled to the Property When There Are Conflicting Claims*, 45 N.C. J. INT'L L. 393, 423–24 (2020).

D. The HEAR Act and its Progeny to Date

Three years after Mr. Olson's commentary,[176] Congress in 2016 enacted the so-called "HEAR Act," actually voting on a remarkably bi-partisan basis[177] to approve the Act, formally referred to as "The Holocaust Expropriated Art Recovery Act of 2016."[178] As reflected in its legislative history, it represented an attempt by the U.S. Congress to deal with a significant problem for survivors by providing for some uniformity among the states in connection with the statute of limitations defense and by attempting to provide additional guidance to, in effect, implement one of the Washington Conference goals, i.e., to attempt to have disputes over looted art be adjudicated on the merits.[179]

In the first instance, in response to the concern of claimants and their counsel to the differing state statutes of limitations,[180] on a procedural and substantive basis, under the Act, subject to a few exceptions, cases for the recovery of looted "artwork or other property" (including paintings, sculptures, engravings, graphic arts, artistic assemblages and montages, books and various forms of media) brought prior to December 16, 2026, are subject to the six-year statutory period, with the "accrual date" considered to be the date when the claimant first has actual knowledge (or sufficient knowledge so as to amount to "actual" knowledge) of either the work's identity and location or of the claimant's possessory interest.[181] The HEAR Act, while still quite young, has spawned a number of rulings. I discuss, although in somewhat summary fashion, two of the potentially important rulings below.[182]

The HEAR Act brought this philosophical issue regarding so-called "technical defenses" into a sharper focus, which in the post-2016 era remains very current, with no small debate over whether the statutory defense should be considered to be "substantive" and

176 *See* Cohen, *supra* note 138.

177 *See* Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593, 634 (2018) ("The Holocaust Expropriated Art Recovery Act of 2016 passed with overwhelming bipartisan support.").

178 *Id.* at 610.

179 *Id.* at 610–11.

180 *Id.* at 595.

181 *Id.* at 617–20.

182 *See infra* notes 194 and 204 and accompanying text.

interposed by defense counsel, as they suggest, as part of the "merits" of the case, or simply considered to be a procedural roadblock, based on technical arguments which have little, if anything, to do with the particular facts of a case.[183]

There are also incompletely-answered questions as to the reach and implications of the 2016 HEAR Act.[184] It would take a separate article to fully analyze even the comparatively limited number of cases in which the Act was involved in some manner.[185] As far as the HEAR Act is concerned, the essence of its basic reach is Article 5, which provides in pertinent part that any civil action

> against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than six (6) years after the *actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property*.[186]

The statute's concept of the "discovery date" is in turn the effective date of the statute, i.e., December 16, 2016.[187] Finally, as Mr. O'Donnell's treatise articulately points out, the HEAR Act "puts to rest" the defendants' somewhat continuous arguments, made in cases such as *Altmann* on a historical basis and in the *Von*

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183 *See* Barnes, *supra* note 177 ("Many scholars in this area have raised concerns over the invocation of time-based procedural defenses by [good-faith] purchasers to defeat restitution claims for Holocaust expropriated art. But others have defended the use of such time-based procedural defenses as a means of separating meritorious claims from unmeritorious claims, without which false or unmeritorious claims may receive settlements from good faith purchasers who want to simply avoid costs of litigation or public shaming.").

184 *See* Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157, 158 (2019) ("The HEAR Act's language is unclear, ambiguous, or raises difficult issues about the application or scope of the statute."). *See also generally* Simon J. Frankel, *The HEAR Act & Laches After Three Years*, 45 N.C. J. INT'L L. 441 (2020) (discussing conflicting court interpretations of the HEAR Act and the equitable doctrine of latches).

185 *See* Frankel & Sharoni, *Navigating the Ambiguities*, *supra* note 184, at 158 ("Litigants are already espousing conflicting interpretations of the Act's language on some of the points discussed below, and courts have already reached holdings at odds with the statute's language or legislative history (and sometimes both).").

186 HEAR Act, Pub. L. No. 114-308, §5(a) (2016).

187 *See id.* § 5(c).

Saher,[188] *Cassirer*,[189] and *de Csepel*[190] cases, that such private claims intrude on the power of the Executive Branch of our government to conduct foreign affairs.[191] Instead, subsection 2 (8) encourages "alternative dispute resolution," and at the same time confirms that litigation is an option available to claimants.[192]

In the three years of its existence, the HEAR Act has already spawned some significant rulings in this area as the Act began to be cited in a wide range of cases where the Holocaust victims attempted to use the Act to avoid the interjection of the so-called "technical defenses" into otherwise meritorious looted art cases.[193] One of the most publicized post-HEAR Act proceedings was the so-called "Guelph Treasure" case, which was decided by the D.C. Circuit Court of Appeals in 2018.[194] This case was originally brought to the German indigenous Limbach Commission and was filed against the Prussian Cultural Foundation (or "SPK"), the entity which under German law serves as the operator of the Museum of Fine Art in Berlin, and against the German government.[195] The claimants were the descendants and heirs of the original co-owners who owned, as a consortium, the extremely well-known and valuable "Wolfenscharz" (Guelph Treasure), a collection of several dozen medieval and religious objects (some in the original collection had been sold off after the consortium had purchased the collection in 1929).[196] The claimants alleged that their ancestors were forced to sell a number of extremely valuable objects to the

188 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher III*), 592 F.3d 954, 957 (9th Cir. 2010).

189 Cassirer v. Thyssen-Bornemisza Collection Foundation (*Cassirer III*), 737 F.3d 613, 618–19 (9th Cir. 2013).

190 De Csepel v. Republic of Hungary (*De Csepel IV*), 859 F.3d 1094, 1097 (D.C. Cir. 2017).

191 *See* O'DONNELL, *supra* note 23, at 349–51.

192 *Id*. at 350.

193 *See* Barnes, *supra* note 177 ("Regardless of whether the HEAR Act will ultimately prove beneficial, it has already proven consequential. Because of the outsized role that statutes of limitations play in litigation for the return of art lost in the Holocaust era, the HEAR Act has in the short-time since its passage already been regularly invoked in restitution litigations in the United States.").

194 Philipp v. Federal Republic of Germany (*Philipp I*), 894 F.3d 406 (D.C. Cir. 2018).

195 *Id*. at 409.

196 *Id.*

Prussian state entity, acting for Herman Goering.[197] The Commission, one of the more active of several such European administrative bodies described in my earlier article for the John Marshall School of Law, denied the claim on the theory that the low price for the ultimate sale in 1934 or 1935 was in large part the result of the German (and global) economic crisis rather than a true Nazi "forced sale."[198]

Based on the questionable nature of the Limbach Commission's actions and procedures, the Guelph Treasure claimants brought the case back to the United States. In 2018, the D.C. Circuit ruled that sovereign immunity did not bar the claims of the art dealers who had sold the Guelph under self-evident duress and that they were therefore entitled to a trial on the merits of their claims in the American federal courts against the Prussian Cultural Foundation.[199] In this regard, the court alluded to the potential illegality of the seizure and the fact that the claimants should have their proverbial day in court.[200] After the court denied a request for *en banc* consideration, the case was remanded back to the district court.[201]

The jurisprudential significance of this HEAR Act case is that it represented the first instance in which an American court clearly stated that such claimants had the right to sue Germany in an American court.[202] In this respect, the court built upon the earlier cases that alluded to the inherent illegality of Nazi looting, such as *Menzel v. List*.[203]

While the Guelph Treasure case was working its way through

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197 *Id.*

198 *See* Burris, *supra* note 104, at 424–29.

199 *Philipp I*, 894 F.3d. at 408.

200 *Id.*

201 *See* Philipp v. Federal Republic of Germany (*Philipp II*), 925 F.3d 1349 (D.C. Cir. 2019).

202 *See generally* Brief in Opposition for Writ of Certiorari, *Philipp II*, 925 F.3d 1349 (D.C. Cir. 2019) (No. 19-351) (explaining relevant precedent).

203 Menzel v. List, 267 N.Y.S.2d 804, 811 (N. Y. Sup. Ct. 1966) (stating that Nazi party could not convey good title to art taken during World War II because the seizure of art during wartime constituted ["pillage"] or plunder . . . [which is the] taking of private property not necessary for [the] immediate prosecution of the war effort, and is unlawful."). *See also* Weiss v. Lustig, 58 N.Y.S. 2d 547, 549 (N.Y. Sup. Ct. 1945) ("This court may take judicial notice of the fact that we are not dealing with the laws of a sovereign state but with a country overrun by bandits, who were issuing their own decrees. To recognize these decrees as the laws of a sovereign state would do violence to every fundamental principle of human justice.").

the federal courts, the Commercial Division of the New York State Supreme Court, in *Reif v. Nagy*,[204] granted the claimants, the descendants, and statutory heirs of the prominent cabaret performer and art collector, Fritz Grunbaum, the right to reclaim two valuable drawings by Egon Schiele, drawings which had been looted as part of a "duress sale" from Mr. Grunbaum's extensive collection.[205]

Although this matter was filed in the state court, the factual background is essentially the same as the facts in the separate federal court proceeding referenced as *Bakalar v. Vara*.[206] In the *Reif* case, the common facts include that Mr. Grunbaum was arrested and sent to a concentration camp and, after his extensive collection (said to include 450 pieces, 80 of which were Schiele works) was inventoried and catalogued, he was forced to execute a power of attorney giving his wife control over all of his assets, including all of the art works in the collection.[207] He died penniless in 1941 in Dachau, where he somehow performed musicals and plays for his fellow prisoners, and within two years, his wife suffered a similar fate.

The known historical and legal scenario continues as of 1956, when Grunbaum's sister-in-law somehow obtained possession of the collection and turned around and sold off the paintings to a Berne, Switzerland gallery (the Kornfeld Gallery).[208] After the works were sold and re-sold several times, the defendant, Richard Nagy, purchased the two identified drawings with only a half-interest in "Woman in a Black Pinafore."[209] After Nagy publicly exhibited the drawings in a New York art show, the plaintiffs, consisting of certain remote relatives and statutory heirs to the

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204 Reif v. Nagy, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

205 *Id.* at 7. The Schiele drawings were entitled "Woman Hiding her Face" (1912) and "Woman in a Black Pinafore" (1911), respectively.

206 Bakalar v. Vavra (*Bakalar IV*), 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

207 *Reif v. Nagy*, 106 N.Y.S.3d at 7–9.

208 *Id*. at 12.

209 *See id*. at 13 ("Defendant Richard Nagy, who has been an independent art dealer since 1980, first obtained a 50% share in "Woman in a Black Pinafore" from Thomas Gibson Fine Art on or around February 24, 2005, the day after its unsuccessful auction at Sotheby's. In October 2011, he "voided" his interest, given the ambiguity and problems with the provenance. However, he reacquired his interest in the piece on or around December 9, 2013, soon after the Second Circuit affirmed the dismissal of the plaintiffs' claims in *Bakalar*.").

Grunbaum Estate, filed suit in New York against Nagy, basing their claims on the standard torts alleged in my own firm's looted art cases such as conversion and replevin, and adding a cause of action under New York's General Business Law.[210]

The parties in the *Reif* case each moved for summary judgment.[211] Essentially, the plaintiffs' position was that Grunbaum undisputedly owned the works before the War, and that as a matter of law the defendants could not establish that the initial transfer was voluntary, thus in effect "poisoning" all of the subsequent transfers.[212] By contrast, the defendants' position on summary judgment was that the claimants had not met their burden of proof with regard to the available evidence in proving Grunbaum's ownership interest since "[t]he most reasonable inference to draw from these facts is that the [works] remained in the Grunbaum family and were never appropriated by the Nazis."[213] On April 7, 2018, New York State Supreme Court Justice Ramos adopted the plaintiffs' position and held that the defendants had not established that there was sufficient evidence to suggest that Grunbaum had voluntarily transferred the works during his lifetime.[214] Defendants' further contention that the claims were barred by laches because of the alleged failure of Grunbaum and his descendants to diligently pursue their claims was also summarily rejected as Justice Ramos held that:

> Although defendants argue that the HEAR Act is inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue. Since plaintiffs discovered the Artworks in November of 2015, their action is timely under the HEAR Act.[215]

As is generally true and expected in this specialized field of law, not all of the cases in the post-HEAR Act era have consistently been

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210 *Id.*

211 *Id.* at 14.

212 *See id*. at 15 ("Here, we find that plaintiffs have made a prima facie showing of superior title to the Artworks based on evidence that establishes the following: (1) Grunbaum owned the Artworks prior to World War II; and (2) Grunbaum never voluntarily relinquished the Artworks.").

213 Bakalar v. Vara (*Bakalar IV*), 819 F. Supp. 2d 293, 298–99 (S.D.N.Y. 2011).

214 Reif v. Nagy, 80 N.Y.S.3d 629, 634 (N.Y. Sup. Ct. 2018), *aff'd*, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019).

215 *Id*. at 635.

decided in favor of the claimants.[216] As one very recent example, the Second Circuit in *Zuckerman v. Metropolitan Museum of Art*[217] dismissed a claim made by the family of an individual who was allegedly forced to sell a valuable Picasso painting in order to escape Nazi persecution.[218]

In *Zuckerman*, which was handled by the Herrick Feinstein firm based in part on a referral from me, which sadly involved a Paris-based friend, the claimant sought recovery of a Picasso "masterwork" called "the "Actor" that had been owned by her great-uncle and great-aunt, Paul and Alice Leffmann, wealthy German Jews who sold it in 1938 to a dealer, and were forced to sell other valuable property in order to obtain the money to flee Italy and relocate in Brazil after they had already escaped from Germany.[219] The District Court denied her claim based on its conclusion that she had not made a case for "duress" under New York law.[220] The Second Circuit affirmed on a different ground, namely that because the final version of the HEAR Act did not bar a defense based on laches, the defense was available to the museum and was in fact applicable to this case.[221] As the court stated:

> Here, despite the fact that the painting was a significant work by a celebrated artist, that it was sold for a substantial sum to a well-known French art dealer, and that it has been in the Met's collection since 1952, neither the Leffmans nor their heirs made any demand for the painting until 2010. Such a delay is unreasonable, and the prejudice to the Met is evident on the face of Zuckerman's complaint. We further conclude that the HEAR Act does not preempt the Met's laches defense. Accordingly, we AFFIRM the judgment of the district court.[222]

In another section of its opinion, the court surprisingly held that:

> While the HEAR Act revives claims that would otherwise be untimely under state-based statutes of limitations, it allows defendants to assert equitable defenses like laches[] . . . because

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216 *See* Zuckerman v. Metropolitan Museum of Art, 928 F.3d 186 (2d Cir. 2019) (stating plaintiff's claim dismissed based on the doctrines of laches).

217 *Id.*

218 *Id.* at 190.

219 *Id.* at 190–91.

220 *Id.* at 192.

221 *Id.* at 197.

222 Zuckerman v. Metropolitan Museum of Art, 928 F.3d 186, 190 (2d Cir. 2019).

> Congress in removing "laches" from the draft text of the statute intended to keep the defense available to "good faith" defendants.[223]

In one additional twist, the *Zuckerman* court added, in a direct admonition to other future museum-defendants who might otherwise have been over-confident with regard to the Court's ruling, "[w]e emphasize that each case must be assessed on its own facts: while the laches defense succeeds here, in other cases it will fail and not impede recovery for claims brought pursuant to the HEAR Act."[224]

E. Reflections and Discussion of Various Pre- and Post-HEAR Act Cases in Context

Before moving on to my conclusory remarks I thought that it would be helpful to provide some personal insights with regard to the two seminal California cases which changed the legal lives of both Randy and me and to place them in a broader perspective with regard to the development of modern looted art law.[225] I also discuss the marathon *Norton Simon Museum*[226] proceedings, in which I served as one of the local counsel and the Herrick Feinstein firm served as chief counsel. In the final portion, I examine the significance of two other pre-HEAR Act proceedings, the *Schoeps*[227] and *de Csespel*[228] cases, the latter of which actually ran into the post-1916 period.[229]

It is difficult to adequately discuss the leading looted art cases with which I have been involved in one section of an article, to provide the reader of this article with an adequate overview of our cases, and to predict with a reasonable degree of accuracy, and hopefully objectivity, the future course for this constantly evolving area of American, and to some extent foreign, jurisdiction. Given

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223 *Id*. at 196–97.

224 *Id*. at 197.

225 *See* Republic of Austria v. Altmann, 541 U.S. 677 (2004); *see also* Bennigson v. Alsdorf, No. B168200, 2004 WL 803616, at *1 (Cal. Ct. App. Apr. 15, 2004).

226 Von Saher v. Norton Simon Museum (*Von Saher VI*), 754 F.3d 712 (9th Cir. 2014).

227 Schoeps v. Museum of Modern Art (*Schoeps II*), 594 F. Supp. 2d 461 (S.D.N.Y. 2009).

228 De Csepel v. Republic of Hungary (*De Csepel III*), 714 F.3d 591 (D.C. Cir. 2013).

229 *Id*. at 594.

these limitations, I will try to do as much as I can to provide some reasonable insight into the current legal framework for our work representing claimants seeking the restitution of Nazi-looted art.

Although I am admitted in several other jurisdictions and have appeared on a *pro hac vice* basis in others, the bulk of our work has involved California-oriented cases. By coincidence the plaintiffs in both *Altmann*[230] and *Bennigson*,[231] which each ended up with good results and ended up touching upon other jurisdictions, and even other nations, were California-based.

The highlight of our work and the most well-known of our cases was obviously the return and re-sale of the five paintings by Gustav Klimt involved in our seminal *Republic of Austria v. Maria Altmann* litigation.[232] As has been well-publicized, the five Klimt paintings awarded to Maria were re-sold for the benefit of Maria's family: one in a private sale to Ronald Lauder at a then-record price and four in a collective and well-publicized auction at the Christie's auction house in New York City.[233] In *Altmann*,[234] we formally litigated at each level of the American federal courts up to and including the United States Supreme Court. As the well-known saga goes, after succeeding at the procedural level in the Supreme Court by a 6-3 vote, Maria chose to present her case to a specially-selected arbitration panel in Austria who unanimously ruled that she had the legal right to the return of the works.

Bennigson, involving a once "lost" Picasso painting entitled "Femme en Blanc," presented a different set of issues because we did not have complete diversity: the co-defendant gallery owner was a resident of Beverly Hills, but Mrs. Alsdorf was an Illinois citizen.[235] When we were shut out at the first two levels of the state courts,[236] we felt almost like "ping-pong balls" being directed back

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230 *Altmann*, 541 U.S. at 681.

231 Bennigson v. Alsdorf, No. B168200, 2004 WL 803616, at *1 (Cal. Ct. App. Apr. 15, 2004).

232 *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

233 Except for one purchaser (and as it turns out re-seller), the purchasers remain unidentified. The exception is Oprah Winfrey, who bought one of the paintings for $87.9 million and sold it in 2017 to a Cines for $150 million dollars.

234 541 U.S. 677 (2004).

235 Burris, *Tragedy to Triumph*, *supra* note 104, at 407–09.

236 *See Bennigson*, 2004 WL 803616, at *1, *reh'g denied*, (May 11, 2004), *rev. granted*, Bennigson v. Alsdorf, S124828 (Cal. July 28, 2004); *see also* Alsdorf v. Bennigson, No. 04 C 5953, 2004 WL 2806301, at *1 (N.D. Ill. Dec. 3, 2004).

and forth between the state and federal tribunals in both states. Ultimately, while we were awaiting the California Supreme Court to place our matter on its docket, we entered into a "win-win" settlement whereby Mrs. Alsdorf paid in excess of $6 million to our client, the grandson of the former owner of the classic Picasso work, to retain the rights to the painting.[237] Several years later, she re-sold the painting for a not-insignificant profit.[238]

The third prong of what I would refer to as our trilogy of cases is the *Von Saher v. Norton Simon Museum*[239] case, which spawned multiple hearings at both the federal trial and appellate levels, and which was decided after the publication. We served for many years as local counsel while my dear friends and colleagues, Larry Kaye and Howard Speigler, fought valiantly through lengthy and multiple appearances to restore the rights of the survivor to the epic "Adam and Eve" work by Lucas Cranach the Elder. Ultimately, and after the California legislature enacted a helpful statutory amendment to the state statute of limitation in art recovery cases,[240] the case was decided by Judge Walter on summary judgment against our client.[241]

Marei von Saher, like Maria Altmann, another indomitable and courageous client, filed a restitution claim in the Netherlands[242] not long after the start of the *Wally* case discussed above, and became another Herrick Feinstein client that turned into yet another legal marathon in which I personally served as local counsel for some years. The claimant, Marei von Saher ("Marei"), the sole heir of the very respected pre-war Dutch dealer, Jacques Goudstikker, sought to recover more than 200 Old Master works that had been looted by the highest Nazis[243] but ended up in the hands of the Dutch Government in accordance with the admonition to the Monuments Men.[244]

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237 Burris, *Tragedy to Triumph*, *supra* note 104, at 408.

238 *Id.*

239 Von Saher v. Norton Simon Museum (*Von Saher VI*), 754 F.3d 712 (9th Cir. 2014).

240 *Id.* at 718–19.

241 Burris, *Tragedy to Triumph*, *supra* note 104, at 418.

242 *Id.* at 414.

243 *Id.*

244 Joseph P. Fishman, *Locating the International Interest in International Cultural Property Disputes*, 35 YALE J. INT'L L. 327, 358 (2010)*; see also* Inter-Allied Declaration, *supra* note 80; Forced Transfers of Property in Enemy-Controlled Territory, 1943, *in* 3 DEP'T OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED

Before World War II, Jacques Goudstikker ("Jacques") was one of the foremost art dealers in Europe, with access to an extraordinary collection in Amsterdam, including approximately 1,400 works of art, mostly Dutch, Flemish, and Italian Old Master paintings.[245] A few days after the Nazi invasion of Holland commenced, Herman Goering, Hitler's second-in-command, personally visited Jacques' gallery, and soon thereafter arranged a "forced sale" to him of approximately 800 of the best artworks from the gallery's collection.[246] Jacques, who had fled the Netherlands with his wife, Desi, and their young son, Edo, managed to escape just ahead of the invasion, and took with him a small black leather notebook (the "Blackbook,") that contained an inventory of much of his collection.[247] Although Jacques's flight from the Nazis was short-lived—he tragically fell to his death aboard the ship carrying him and his family to safety—his widow was able to retrieve the Blackbook from his pocket.[248] Fortunately, this book would ultimately prove to be the key document used to establish the family's claims to the looted artworks.[249]

In 1945, in the course of liberating Germany, the Allied forces recovered more than two hundred Goudstikker works looted by Goering and sent them to the Central Collecting Point in Munich for cataloging.[250] These, and other stolen works from the Netherlands were then returned to the Dutch government pursuant to established Allied policy, emanating from the 1943 London Declaration, which mandated that "acts of Nazi dispossession would be undone," and that the government was to hold the artworks in trust for their lawful owners.[251] Unfortunately, Jacques' widow, who managed to survive the war and to return in 1946 to attempt to recover Jacques' property, was met with great hostility by the postwar Dutch government.[252] She, like other survivors, confronted a "restitution" regime that did what it could to make it difficult for Jewish citizens

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STATES OF AMERICA 1776–1949, 754 (C. Bevans Comp., 1969).

245 Burris, *Tragedy to Triumph*, *supra* note 104, at 414–15.

246 *Id.*; *see also Von Saher VI*, 754 F.3d 712, 715 (9th Cir. 2014).

247 *See Von Saher VI*, 754 F.3d at 715.

248 *See id.*

249 Burris, *Tragedy to Triumph*, *supra* note 104, at 415.

250 *Id.*

251 *Id.*

252 *See id.*

to actually recover their property.[253] In the end, the Dutch government collected and retained the works in the National Collection, but never obtained legal title to them.[254]

The situation in the Netherlands remained unchanged until the mid-1990s when, as described above and in my other articles, following the above-referenced Washington Conference, several European governments created new restitution commissions charged with the task of re-examining claims by victims' families to recover looted artworks and attempting to determine these claims on the merits.[255] In 1997, before the Conference began, the Dutch announced a new policy that allowed claims to be made for the restitution of artworks that had been returned following the war but had never been restituted to their rightful owners.[256]

In the mid-1990s, shortly after the deaths of both Desi and Edo, Pieter den Hollander, a Dutch journalist, informed Marei, Edo's widow, and Jacques' and Desi's daughter-in-law that many of the treasures from the collection were still being held by the Dutch Government.[257] Based on this information, Marei filed a claim in 1998 under the new restitution program.[258] Unfortunately, the State Secretary in charge of Cultural Affairs denied her application, and court proceedings failed to overturn that decision.[259] In 2002, however, the Dutch Government adopted additional restitution guidelines more in line with the Washington Principles, and these guidelines provided renewed hope to claimants like Marei.[260] A new Restitutions Committee, an independent body charged with investigating artwork claims, was formed and was asked to make recommendations to the Ministry of Education, Culture and Science as to how those claims should be resolved.[261]

In 2004, Marei filed yet another application under the revised guidelines and spent two more years pursuing the case in the

253 *Id.*; *see also Von Saher VI*, 754 F.3d 712, 716–17 (9th Cir. 2014).

254 Burris, *Tragedy to Triumph*, *supra* note 104, at 415.

255 *Id.*

256 *See Von Saher VI*, 754 F.3d at 717.

257 *Id.*; *see also* Burris, *Tragedy to Triumph*, *supra* note 104, at 415.

258 Burris, *Tragedy to Triumph*, *supra* note 104, at 415.

259 *Id. See also Von Saher VI*, 754 F.3d 712, 717 (9th Cir. 2014).

260 Burris, *Tragedy to Triumph*, *supra* note 104, at 415.

261 *Id.*

Netherlands.[262] This effort culminated in a hearing before the Restitutions Committee, which issued its "advice" in December 2005, substantially in Marei's favor.[263] That advice, however, was kept confidential pending a final decision by the State Secretary. On February 6, 2006, the State Secretary formally announced that the Dutch government would restitute 200 Goudstikker paintings to Marei, including, among others, magnificent works by Solomon van Ruysdael, Claude Lorrain, and Jan van Goyen, finding that the works had been involuntarily taken from Jacques by reason of Goering's "forced sale."[264] Following the restitution, Marei organized a traveling exhibition of about forty of the restituted works and they were displayed at several key venues throughout the United States, including the Christie's auction house gallery in New York, which recreated a 1930's era European gallery as a creative and professional backdrop to the works and hosted a 1930's style gala in the reconstructed gallery,[265] which I was privileged to attend.

For a number of reasons, the Dutch restitution did not end the Goudstikker tale. Many of the looted works were never located by the Allies after the war and remain missing.[266] Because the Blackbook described above is not illustrated, the family retained a team or art researchers to, in effect, "visualize" the book and to identify and locate the missing works.[267] To date, most of the works have been identified, a substantial number of the aggregate works

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262 *Id.*

263 *Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection*, RESTITUTIECOMISSIE (Dec. 19, 2005), https://www.restitutiecommissie.nl/en/recommendations/recommendation_115.html [https://perma.cc/53KU-AY8V].

264 Alan Riding, *Dutch to Return Art Seized by Nazis*, N.Y. TIMES (Feb. 7, 2006), https://www.nytimes.com/2006/02/07/arts/design/dutch-to-return-art-seized-by-nazis.html [https://perma.cc/8U47-EU8N].

265 Carol Vogel, *Recovered Artworks Heading to Auction*, N.Y. TIMES (Feb. 22, 2007), https://www.nytimes.com/2007/02/22/arts/design/22heir.html [https://perma.cc/7WY5-UTTQ].

266 Scott Eyman, *Jacques Goudstikker's Story a Fascinating Tale of Art, War and Theft*, PALM BEACH POST (Feb. 25, 2010), https://www.palmbeachpost.com/article/20100225/ENTERTAINMENT/812017594 [https://perma.cc/7784-YG6J].

267 Alan Riding, *Göring, Rembrandt and the Little Black Book*, N.Y. TIMES (Mar. 26, 2006), https://www.nytimes.com/2006/03/26/arts/design/goring-rembrandt-and-the-little-black-book.html [https://perma.cc/AXD2-8R8Q].

have been located, and there have been many restitutions, including works by Jan De Cock, Edgar Degas, Donatello, and Rachel Ruysch.[268] Surprisingly, most of the restitutions have come from collections and institutions outside of the United States.[269] This is consistent with my experience, that North American museums and collectors have, as a rule, traditionally been somewhat less cooperative than their Western European counterparts, as was the case with regard to the proverbial brick wall erected with Marei's claim against the Norton Simon Museum, a major local Pasadena museum, for the return of what are perhaps the most valuable works looted by the Nazis from Jacques—two historic monumental images of "Adam and Eve" by Cranach the Elder that were acquired by Jacques in May of 1931.[270] The Adam and Eve paintings were among Jacques' most valued works. In the early 1970s, the paintings came into the possession of the museum.[271] Marei discovered them there in November of 2000 and demanded their return.[272]

After years of unsuccessful settlement negotiations, in 2007, Marei commenced a formal restitution action in the Los Angeles Federal District Court.[273] Judge Walter dismissed the claim, holding unconstitutional a unanimously enacted California statute that had extended the statute of limitations applicable to actions against museums and galleries for the recovery of Nazi-looted art, on the ground that the state statute infringed on the federal power to make and resolve war.[274] Marei appealed to the Ninth Circuit and her appeal was supported by the California Attorney General and several other important amici.[275] The Court of Appeals affirmed in

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268 *See id.*

269 *See id.*

270 Maura Dolan, *Norton Simon Museum wins fight to keep two masterpieces looted by Nazis*, L.A. TIMES (July 30, 2018), https://www.latimes.com/local/lanow/la-me-ln-paintings-court-20180730-story.html [https://perma.cc/C44G-Z8CM].

271 *Timeline: The Legal Battle over Cranach's Adam and Eve*, THE ART NEWSPAPER (July 31, 2018), https://www.theartnewspaper.com/analysis/cranach-s-adam-and-eve-timeline-of-a-decade-long-legal-battle [https://perma.cc/MT9W-ELHB].

272 *Id.*

273 *Id.*

274 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher I*), No. CV 07-2866-JFW, 2007 WL 4302726, at *3 (C.D. Cal. Oct. 18, 2007).

275 *E.g.* Brief of Amicus Curiae State of California in Support of Appellant Marei Von Saher, Von Saher v. Norton Simon Museum (*Von Saher VI*), 754 F.3d 712 (9th Cir. 2014)

part and reversed in part, reinstating the case, holding that Marei could proceed under the general California statute of limitations provision for stolen cultural property,[276] but affirming the disappointing ruling on the important constitutional issue involving the new statute.[277] The Ninth Circuit held that California had no "traditional state interest" in enacting the statute and that the statute in any event violated the foreign affairs preemption doctrine recognized by the Supreme Court in its *Zschernig v. Miller*[278] ruling because the Federal Government had preempted the field.[279] There was a strong dissent written by the late Judge Pregerson, who was generally favorable to Marei's position throughout the proceedings, and was among the more consistent supporters of Holocaust claims during his long judicial tenure.[280]

Marei's subsequent Petition for Rehearing was denied,[281] and the Ninth Circuit agreed to stay the issuance of its mandate pending a petition by Marei for a writ of certiorari to the Supreme Court.[282] Marei then filed her petition, and on October 4, 2010, the Court issued an order inviting the Acting Solicitor General to file a brief setting forth the views of the United States Government on the question of whether California had the power to pass the statute.[283] Unfortunately, the Solicitor General's brief was not as helpful as we had hoped and the request for certiorari was ultimately denied.[284]

The Ninth Circuit had also heard the case of *Movsesian v. Victoria Versicherung AG*, a sister case which presented similar statute of limitations issues in the context of Armenian genocide claims.[285] In *Movsesian,* the court considered the constitutionality of a California statute that extended the statute of limitations for

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(No. 12-55733), 2012 WL 4895007.

276 CAL. CIV. PROC. CODE § 338 (West 2019) (amended 2010).

277 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher II*), 578 F.3d 1016, 1029 (9th Cir. 2009).

278 Zschernig v. Miller, 389 U.S. 429, 432 (1968).

279 *Von Saher II*, 578 F.3d at 1029.

280 *See, e.g.*, *id.* at 1031–32 (Pregerson, J., dissenting).

281 *See* Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher III*), 592 F.3d 954 (9th Cir. 2010).

282 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher IV*), 564 U.S. 1037, 131 S. Ct. 3055 (2011).

283 *Id.*

284 *Id.*

285 Movsesian v. Victoria Versicherung AG, 578 F.3d 1052 (9th Cir. 2009).

victims and their heirs to recover on insurance claims in connection with the Armenian Genocide.[286] Decisions in the two cases were handed down nearly simultaneously, both penned by the late Senior Circuit Judge Thompson, with a dissent in each by Judge Pregerson.[287] The two statutes were again found unconstitutional because they conflicted with the Federal Government's foreign policy, to which the Ninth Circuit gave preemptive weight.[288] The plaintiffs in *Movsesian* and *Von Saher* filed petitions for rehearing and the *Von Saher* petition was denied.[289] Then, on December 10, 2010, after Marei had filed her petition for certiorari, the court granted the *Movsesian* petition, with Judge Pregerson, who had originally dissented in both cases, now writing the majority opinion in favor of the plaintiffs, and Judge Thompson, who had written the majority decision in both cases, now dissenting![290] In this decision, the new majority (Judge Nelson had switched sides), relying on *Alperin v. Vatican Bank*,[291] found that the statute fell within a traditional area of state interest and would have only an incidental effect on foreign affairs because it involved "garden variety property claims," ironically the precise argument that had been made by Marei, which was summarily rejected by the Ninth Circuit a year earlier.[292] We immediately filed a supplemental brief with the Supreme Court to bring this surprising development to the Court's attention.[293] Subsequently, Judge Thompson passed away and was replaced on the panel by Judge Wardlaw.

In the interim, on September 30, 2010, then-Governor Schwarzenegger signed into law (effective January 1, 2011) a bill amending California's Code of Civil Procedure § 338.[294] This legislation extended the statute of limitations from three years to six

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286 *Id.* at 1054–55.

287 *Id.* at 1052.

288 *Id.* at 1063.

289 *See* Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher III*), 592 F.3d 954 (9th Cir. 2010).

290 Movsesian v. Victoria Versicherung AG, 629 F.3d 901 (9th Cir. 2010).

291 Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005).

292 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher II*), 578 F.3d 1016, 1025 (9th Cir. 2009).

293 Supplemental Brief in Support of Petition for a Writ of Certiorari, Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher IV*), 564 U.S. 1037, 131 S. Ct. 3055 (2011) (No. 09-1254), 2010 WL 5195762.

294 A.B. 2765, 2010 Leg. (Ca. 2010).

years for claims brought for the recovery of a "work of fine art" unlawfully taken or stolen—including "by means of fraud or duress"—against "a museum, gallery, auctioneer, or dealer."[295] The bill also changed the accrual date for these claims, so that the statute of limitations would not begin to run until six years from the "*actual discovery* by the claimant" of the identity and whereabouts of the work and the "[i]nformation or facts . . . sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art."[296] Under the prior law, a "discovery rule" applied, meaning that the statute of limitations began to run when the claimant either discovered or *reasonably could have discovered* her claim to the artwork.[297] This legislation was designed to present a fairer approach to all looted art claims.[298]

Marei filed a First Amended Complaint which was assigned to Judge Walter, the same judge who had initially dismissed the case and who later dismissed the *Cassier* case.[299] Norton Simon's counsel in turn filed a new motion to dismiss. Judge Walter again cancelled the hearing and granted the motion to dismiss, rejecting Marei's arguments as to the new statute.[300] This time, however, the Ninth Circuit, with the composition of the panel altered by Judge Alexander's death and his replacement by Judge Wardlaw, decided an important procedural issue in our favor. The Court found that under the new statute, Marei's claims were not inconsistent with the federal government's internal restitution policy and remanded the case to determine if the litigation would implicate the so-called "act of state doctrine."[301]

Consistent with the normal practice in the Central District, the remanded case was again assigned to Judge Walter.[302] The Museum scheduled extensive discovery and filed a motion for a pre-trial

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295 *Id.* § 2.

296 *Id.*

297 CAL. CIV. PROC. CODE § 338 (West 2007) (amended 2010).

298 *See* A.B. 2765, 2010 Leg. § 1 (Ca. 2010).

299 First Amended Complaint, Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher V*), 862 F. Supp. 2d (C.D. Cal. 2012) (No. CV 07-02866-JFW), 2011 WL 12544171.

300 *Von Saher V*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

301 Von Saher v. Norton Simon Museum (*Von Saher VI*), 754 F.3d 712 (9th Cir. 2014) (No. 12-55733), 2012 WL 4895007.

302 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher VII*), CV 07-2866-JFW, 2015 WL 12910626 (C.D. Cal. Apr. 2, 2015).

dismissal based on grounds analogous to their earlier position. For the first time in the case, Judge Walter issued a ruling favorable to Marei denying the motion to dismiss.[303]

Marei's victory was short-lived. On August 9, 2016 there was yet another Judge Walter ruling.[304] Faced with comprehensive cross-motions for summary judgment, he granted the Museum's motion and denied Marei's cross-motion.[305] Several amici with an interest in the area joined in the appeal to the Ninth Circuit and the appeal was argued before another three-judge panel of the Ninth Circuit.[306] Unfortunately, Marei's long quest ended there.

It is self-evident from just these three firm cases that, based on the course of the case law and the varying judicial attitudes, the only certainty in this area is "uncertainty."

In the next section, I reference a few representative opinions in other cases in order to provide as comprehensive a picture as possible on the development of the applicable legal principles in the wake of the enunciation of the Washington Conference Principles.

The leading representational cases such as the lengthy *Portrait of Wally*,[307] *Altmann*,[308] and *Von Saher*[309] cases, together with others such as the Stern Estate case, *Vineberg v. Bissonnette*,[310] have (at least in theory) re-confirmed the continuous rule that in America, Nazi forced sales are treated in the first instance the same as outright theft and do not, under the London Declaration or otherwise, convey good title.[311] American courts have thus generally acknowledged what should have been obvious from the outset, i.e. looted art seizures and sales by Jewish owners during the period between 1933 and 1945 that would not have been made but for the persecution of the European Jews during the Holocaust may both be invalidated

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303 *Id.* at *10.

304 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher VIII*), CV 07-2866-JFW, 2016 WL 7626153 (C.D. Cal. Aug. 9, 2016).

305 *Id.* at *14.

306 Von Saher v. Norton Simon Museum of Art at Pasadena (*Von Saher IX*), 897 F.3d 1141 (9th Cir. 2018), *cert. den.* 139 S. Ct. 2616 (2019).

307 United States v. Portrait of Wally, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

308 Republic of Austria v. Altmann, 541 U.S. 677 (2004).

309 *See* Von Saher v. Norton Simon Museum (*Von Saher VI*), 754 F.3d 712 (9th Cir. 2014) (No. 12-55733), 2012 WL 4895007.

310 Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008).

311 Burris, *Tragedy to Triumph*, *supra* note 104, at 418.

upon proper proof, subject to the various procedural defenses that may be raised in a particular proceeding.[312]

Another representative pre-HEAR Act case on point is *Schoeps v. The Museum of Modern Art and the Solomon R. Guggenheim Foundation*,[313] which centered on two important Picasso paintings that were in the possession of the Museum of Modern Art (MOMA) and the Solomon R. Guggenheim Foundation, respectively.[314] The claimants were the heirs of Paul von Mendelssohn-Bartholdy who, according to documents executed in 1935, gave the paintings to his wife, Elsa, as a wedding gift in 1927—but this transfer was purportedly a pretext to protect the works from Nazi seizure in the face of anti-Jewish laws in Germany.[315] The paintings were then sold to Justin K. Thannhauser, a leading Berlin art dealer, who sold "Boy Leading a Horse" to William S. Paley in 1936 through a gallery in Switzerland.[316] Paley donated the painting to the MOMA in New York in 1964.[317] Thannhauser kept the second painting, "Le Moulin de la Galette," as part of his personal collection until 1978, at which point he bequeathed and transferred the painting to the Guggenheim Museum.[318] In 2007, Julius Schoeps, the great-nephew of Bartholdy, sent letters to both the MOMA and the Guggenheim, claiming that the sale of the paintings to Thannhauser was a product of Nazi duress, and that the Bartholdy heirs were thus the rightful owners of the works.[319]

Judge Rakoff, applying an interest analysis choice of law test, held that German law applied to the issue as to whether the transfer of the paintings in 1935 was a product of duress.[320] He further held that issues of fact existed as to whether Bartholdy would have transferred the pictures had it not been for his fear of persecution by the Nazis, and found that even though the record regarding the

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312 *Id.*

313 Schoeps v. Museum of Modern Art (*Schoeps II*), 594 F. Supp. 2d 461 (S.D.N.Y. 2009).

314 *Id.* at 463.

315 *Id.* at 464.

316 *Id.* at 463.

317 Museum of Modern Art v. Schoeps (*Schoeps I*), 549 F. Supp. 2d 543, 545 (S.D.N.Y. 2008).

318 Burris, *Tragedy to Triumph*, *supra* note 104, at 419.

319 *Schoeps I,* 549 F. Supp. 2d at 545.

320 *Id.* at 465.

transfer was "meagre," "it [was] informed by the historical circumstances of Nazi economic pressures brought to bear on 'Jewish' persons and property, or so a jury might reasonably infer," and that therefore, the claimants had "adduced competent evidence sufficient to create triable issues of fact as to whether they ha[d] satisfied the elements of a claim under [the German duress provisions]."[321] Summary judgment was thereby denied, leaving a New York jury to decide whether the original owner, as a persecuted Jew, was under "duress" pursuant to the German Civil Code when the artworks were transferred.[322] Most analysts would agree that this was a very favorable ruling for the claimants.[323]

The appellate panel next determined that New York law, and *not* Swiss law, should govern the validity of the 1936 sale from Thannhauser to Paley.[324] Under the common law rule, followed by New York and every other American jurisdiction, a good faith purchaser cannot obtain title to a stolen object.[325] Here, the court equated the alleged duress sale with theft for the purpose of determining whether Paley, as a good faith purchaser, acquired title to the artwork.[326]

Finally, the court discussed the museum's laches defense.[327] In earlier rulings, the New York courts often decided the laches defenses on preliminary motions.[328] In *Schoeps*, however, the court determined that since laches is a fact-intensive question, the court would decide the issue only after a trial on the merits of the case.[329] In so ruling, Judge Rakoff underscored the impropriety of summary judgment because, if the museums had reason to know that the paintings were misappropriated, they would be barred by the "unclean hands" doctrine from arguing laches[330]—yet another significant ruling in the case that could have lasting repercussions.

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321 *Id.* at 466.

322 *Id.* at 468. *See also* Burris, *Tragedy to Triumph*, *supra* note 104, at 419.

323 Burris, *Tragedy to Triumph*, *supra* note 104, at 419.

324 Schoeps v. Museum of Modern Art (*Schoeps II*), 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009).

325 *Id.* at 467.

326 *See id.*

327 *Id.* at 468.

328 *Id. See* Burris, *Tragedy to Triumph*, *supra* note 104, at 419.

329 *Schoeps II*, 594 F. Supp. 2d at 468.

330 *Id.*

The *Schoeps* trial was scheduled to start shortly after this decision, but on the proverbial courthouse steps, the case was settled by means of a confidential settlement.[331] About two months after the settlement, Judge Rakoff issued an unusual six-page opinion expressing the court's dissatisfaction with the parties' decision to keep the terms secret in light of the significance of the case to the public and to other victims of Nazi looting.[332] In his words, it "baffles the mind and troubles the conscience" that Schoeps and his relatives would want to keep the settlement private.[333]

Another major full-scale Holocaust recovery case was filed in the District of Columbia federal courts pitting the heirs of Baron Mór Lipót Herzog, a Budapest collector of fine art who assembled one of the greatest pre-war art collections in Europe, against the Republic of Hungary, three Hungarian museums, and a Hungarian university.[334] In this case, which is commonly referred to as "the Baron Herzog case," the heirs sought to recover many paintings and other works taken in the early 1940s that either remained in, or came into the possession of, Hungarian government museums.[335] The list included major paintings of the highest quality, by artists such as El Greco, Lucas Cranach the Elder, Zurbarán, and Gustave Courbet.[336] It also included Renaissance paintings and sculptures and some ancient works of art.[337] Baron Herzog died in 1934 and left the collection to his children.[338]

When World War II began, Baron Herzog's family hid their vast collection in a Budapest factory basement.[339] During the later stages of the war, the Nazis brought Hungary under the wing of the Axis powers and sent the notorious Adolf Eichmann to oversee mass deportations of Jews and the full-scale seizure of their art works.[340]

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331 Schoeps v. Museum of Modern Art (*Schoeps III*), 603 F. Supp. 2d 673, 674 (S.D.N.Y. 2009).

332 *See id.* at 675. *See also* Burris, *Tragedy to Triumph*, *supra* note 104, at 419–20.

333 *Schoeps III*, 603 F. Supp. 2d at 676.

334 De Csepel v. Republic of Hungary (*De Csepel III*), 714 F.3d 591, 596 (D.C. Cir. 2013).

335 *See id. See also* Burris, *Tragedy to Triumph*, *supra* note 104, at 420.

336 *De Csepel III*, 714 F.3d at 594.

337 Burris, *Tragedy to Triumph*, *supra* note 104, at 420.

338 *De Csepel III*, 714 F.3d at 594.

339 *Id.* at 595.

340 *Id*. at 594–95.

When he discovered the Herzog collection, Eichmann seized the paintings, sent some to Germany, and gave the remainder to the Hungarian Museum of Fine Arts.[341]

The family initially tried negotiating with the Hungarian government after the Soviet bloc's dissolution, but after eight fruitless years, they were compelled to file suit in Hungary.[342] After eight years of litigation, the appellate tribunal issued a judgment against the heirs based on legal defenses that arguably were never intended to apply to their claims.[343]

The heirs then brought suit in 2010 in the United States District Court for the District of Columbia against Hungary, three Hungarian art museums, and one Hungarian university for breach of an implied bailment agreement to remedy the alleged injustice of the decades of Hungarian intransigence and wrongful decision-making.[344] Counsel for Hungary and the defendant-museums moved to dismiss the action, asserting that, among other defenses, the Herzog heirs and the district court lacked jurisdiction over the defendants under the United States Foreign Sovereign Immunities Act (FSIA),[345] and that even if such jurisdiction existed, the claim should be barred by the applicable statute of limitations and/or because the prior claims had already been heard by the Foreign Claims Settlement Commission.[346] On September 1, 2011, District Judge Huvelle, in a wide-ranging decision, confirmed Hungary's right to retain certain designated paintings, but generally denied the defendants' motion to dismiss.[347] Two weeks later, the court stayed all further proceedings pending the further ruling of the Court of Appeals.[348]

On appeal, the D.C. Circuit ruled that "without ruling on the availability of the expropriation exception," the claims of the heirs

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341 *Id*. at 595.

342 De Csepel v. Republic of Hungary (*De Csepel I*), 808 F. Supp. 2d 113, 125 (D.D.C. 2011).

343 *Id.* at 125–26.

344 *De Csepel III*, 714 F.3d 591, 596 (D.C. Cir. 2013).

345 28 U.S.C. § 1605(a)(3) (2012); *see De Csepel III*, 714 F.3d at 596.

346 Burris, *Tragedy to Triumph*, *supra* note 104, at 420; *see De Csepel I*, 808 F. Supp. 2d at 134.

347 *De Csepel I*, 808 F. Supp. 2d at 113.

348 De Csepel v. Republic of Hungary (*De Csepel II*), 2011 WL 13244741, *2 (D.D.C. Nov. 30, 2011).

were comfortably within a separate exception (the "commercial activity" exception) to FSIA.[349] This ruling led to a four-year judicial battle.[350] After some discovery, Hungary again filed a motion to dismiss based on the lack of subject matter jurisdiction, and the court held that while the separate exception to FSIA did not apply, jurisdiction could be predicated on the "expropriation exception."[351]

The case returned to the D.C. Circuit.[352] The court, in a complicated opinion authored by Judge Tatel, ruled that: (1) the heirs were permitted to sue the Hungarian entities possessing the artworks but not the Hungarian government, and (2) that the claims, as in *Altmann*, fit the exception to the FSIA based on a commercial activity taking which violated international law and the fact that the works were possessed by instrumentalities (or agents) of a foreign state which was engaged in U.S. commerce.[353]

Thus, *de Csepel* represents a case where the Holocaust-injured plaintiffs had not been deprived of their proverbial "day in court" and received a disposition on the merits, as opposed to one based on procedural defenses.[354] The opinion makes it clear that the expropriation exception to FSIA allows American courts to hear claims by genocide victims against their own governments for property losses arising from genocide, which as a policy or practice represents a "violation of international law."[355] In the process, the ruling continued the doctrine discussed above: that even Nazi "governmental" actions of this nature are unlawful *per se* and are not necessarily entitled to judicial respect.[356] Finally, because the appellate opinion was handed down after the HEAR Act was enacted, Judge Tatel explicitly authorized the plaintiffs to amend

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349 *De Csepel III*, 714 F.3d at 598.

350 De Csepel v. Republic of Hungary (*De Csepel IV*), 859 F.3d 1094 (D.C. Cir. 2017).

351 *See id.* at 1110.

352 *Id.*

353 See *id.* at 1094. In order to satisfy the exception a claimant must meet two requirements: (i) show that "rights in property taken in violation of international law are in issue;" and (ii) further show that either the property "is present in the United States" for commercial purposes; or the property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

354 *See De Cespel IV,* 859 F.3d at 1110.

355 *Id.* at 1103.

356 *See id.* at 1110.

their complaint "in light of the Holocaust Expropriated Art Recovery Act."[357]

V. Conclusion—Are We Dealing with the Past as Prologue, or Simply an Uncertain Future, in this Area of the Law?

What seems to be clear from my historical experience in this field is that simply labeling the artwork at issue as "Nazi looted art" and setting forth the basic causes of action as forms of tortious undertakings or withholdings does not ensure that a trier of fact, whether a federal or state tribunal, will quickly, or even ultimately, agree with the claimant's legal position. Instead, this very untraditional area of law, as a generalization, tends to evolve based on the different facts and presentation of each case.

The only certain prediction that I can share after twenty-five years of working in this area is that the outcome of future post-HEAR Act cases, as well as the entire issue of the future directions of looted art cases, is surrounded by uncertainty. Our small group of claimant looted-art lawyers has, however, learned one basic fact, and it has been taught to us by Maria Altmann, Marei von Saher, and the other courageous claimants and family members in the cases I have discussed. This fact is that the key ingredient to presenting a potentially successful claim is not just the need for careful and sensitive lawyering, but is also a client's perseverance in the face of longstanding hardship and too often some temporary defeat. What we would, in the final analysis, like to hear is a statement similar to the closing statement by the court in the *Vineberg v. Bissonnette*[358] case. As Judge Selya put it in his majority opinion:

> A de facto confiscation of a work of art that arose out of a notorious exercise of man's inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles. The mills of justice grind slowly, but they grind exceedingly fine.[359]

In closing, as the legendary Stewart Eizenstat put it in speaking at the recent Berlin Conference, designed to discuss further actions to implement the principles of the Washington Conference:[360]

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357 *Id.*

358 Vineberg v. Bissonnette, 548 F.3d 50, 58–59 (1st Cir. 2008).

359 *Id.*

360 *See* David Rising, *Germany Marks 20th Anniversary of Nazi Looted Art Agreement*, AP NEWS (Nov. 26, 2018),

"There is simply no excuse in the 21st century for coveting Nazi looted art, and it does not speak well for the countries that do so."[361]

https://apnews.com/b85d932dffbe4344b4557d9717f62c19 [https://perma.cc/CSG2-TNLP].

361 *Id.*