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Jessica Schubert

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PRISONERS OF WAR: NAZI-ERA LOOTED ART AND THE NEED FOR REFORM IN THE UNITED STATES

*Jessica Schubert**

I. INTRODUCTION

“I have tried to keep memory alive . . . I have tried to fight those who would forget. Because if we forget, we are guilty, we are accomplices.”—*Elie Wiesel*¹

In late 2013, the revelation of a hidden cache of Nazi-era² looted artwork in a Munich, Germany home caused an immediate sensation as the shocked world learned of the size and relevance of the discovery.³ The collection is believed to be the largest discovery of missing European art since WWII.⁴ The matter continues to re-

* Jessica Schubert is an attorney and author. She obtained her J.D. from Touro Law Center and served on the editorial board of the *Touro Law Review* as an Articles Editor. After working as a government attorney and in private practice for fourteen years, the author now writes and provides counsel to artists and institutions. She has been involved in Holocaust studies relating to art, cultural objects and law since studying them in college and frequently features these issues on her blog, ARTS LAWYER BLOG, available at www.artslawyerblog.com.

¹ Elie Wiesel, Nobel Peace Prize Acceptance Speech (Dec. 10, 1986), available at <http://www.pbs.org/eliewiesel/nobel/>.

² KATJA LUBINA, CONTESTED CULTURAL PROPERTY: THE RETURN OF NAZI SPOILIATED ART AND HUMAN REMAINS FROM PUBLIC COLLECTIONS 41-42 (2009). The phrase “Nazi era” consists of the time period from 1933 through 1945, during Nazi control and the years immediately following. *Id.*

³ Alison Smale, *Report of Nazi-Looted Trove Puts Art World in an Uproar*, N.Y. TIMES (Nov. 4, 2013), <http://www.nytimes.com/2013/11/05/arts/design/trove-of-apparently-nazi-looted-art-found-in-munich-apartment.html?pagewanted=all&r=0>; Andrew Higgins & Katrin Bennhold, *For Son of a Nazi-Era Dealer, a Private Life Amid a Tainted Trove of Art*, N.Y. TIMES (Nov. 17, 2013), <http://www.nytimes.com/2013/11/18/world/europe/a-private-life-amid-a-tainted-trove-of-art.html?pagewanted=all>.

⁴ Patricia Cohen, *Documents Reveal How Looted Nazi Art Was Restored to Dealer*, N.Y. TIMES (Nov. 6, 2013), <http://www.nytimes.com/2013/11/07/arts/design/documents-reveal-how-looted-nazi-art-was-restored-to-dealer.html>; Melissa Eddy et al., *German Officials Provide Details on Looted Art*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/07/arts/design/documents-reveal-how-looted-nazi-art-was-restored-to-dealer.html> (quoting JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY

ceive worldwide attention as unresolved issues of ownership, restitution and applicable Bavarian laws continue to evade consensus, despite prior international efforts and agreements to ensure that this very situation would not occur.⁵ The discovery not only renewed interest in Nazi-looted artwork, but also revealed the fact that, decades after the end of the Holocaust, such artwork continues to stay hidden away from the victims of the Holocaust who may possess claims of ownership. These matters have been eclipsed in modern times by modern problems, and in many ways, forgotten. However, the case reminds the world of the need to refocus attention on the continuing injustice that continues against Holocaust victims, including claims filed in the United States.

The substantial quantity of the artwork discovered in Munich included an excess of 1,400 pieces, including the work of such notable artists such as Chagall, Matisse, Picasso and many others.⁶ According to reported stories, the collection of artwork was inherited by Cornelius Gurlitt from his late father Dr. Hildebrand Gurlitt (hereinafter, “the Dr.”), who was an art expert and curator who worked with the Nazis to loot “degenerate art.”⁷ In 1945, the Dr. was arrested by the American Third Army after the Art Looting Investigation Unit provided information of the Dr.’s illicit activities.⁸ For several years thereafter, the Dr. was investigated as a suspected Nazi art looter but

(2000)).

⁵ BÜRGERLICHES GESETZBUCH [BGB][CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I], as amended, § 202 (Ger.).

⁶ Eddy et al., *supra* note 4; Mary M. Lane et al., *The Strange Tale of Nazis, Mr. Gurlitt and The Lost Masterpieces*, WALL ST. J. (Nov. 8, 2013, 10:40 PM), <http://online.wsj.com/news/articles/SB10001424052702303309504579185861314057386#>.

⁷ *See id.* Degenerate art, known as “Entartete Kunst,” was comprised of several types of art Hitler despised, including modern art, “works [by] Jewish artists, and art [which] represent[ed] Jewish subjects.” MICHAEL J. BAYZLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 202-03 (2003); HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART (1998); Emily J. Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1105 (2002); Cohen, *supra* note 4. The art was originally destroyed, but the Nazis eventually recognized its value. Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 88 (1999).

⁸ ROBERT M. EDSSEL & BRET WITTER, THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY (2010); Felix Bohn et al., *Art Dealer to the Führer: Hildebrandt Gurlitt’s Deep Nazi Ties*, SPIEGEL ONLINE INTERNATIONAL (Dec. 23, 2013, 5:15 PM) (Christopher Sultan trans.), <http://www.spiegel.de/international/germany/hildebrandt-gurlitt-and-his-dubious-dealings-with-nazi-looted-art-a-940625.html>.

over time was able to convince Army investigators that he was simply a Nazi victim who purchased “most of the art” from non-Jewish owners or abroad, to personally “assist them in their severe need.”⁹ Consequently, the Dr. was released.

The Dr. died in a car accident in 1956. His widow subsequently stated that the artwork was destroyed years earlier in the bombing of Dresden.¹⁰ However, the recent uncovering of the artwork in the late Dr.’s son’s apartment suggests that the collection survived not only WWII but also the Dresden bombings; the artwork was preserved for decades by Gurlitt, imprisoned inside the confines of his Munich apartment as the “last of prisoners of World War II.”¹¹

The hidden collection was apparently discovered in 2012 by German authorities who were investigating the late Dr.’s son, Cornelius Gurlitt (hereinafter “Gurlitt”), for tax evasion.¹² The artwork was treated as part of a tax investigation relating to Gurlitt and as such, the discovery and information about the contents in the collection was kept from the public.¹³ The German authorities’ discovery was kept confidential until a German magazine exposed the story in 2013.¹⁴

Following the release of the magazine story, the German authorities’ failure to disclose the discovery has been met with sharp criticism.¹⁵ Moreover, the question has arisen during the pendency of

⁹ Guy Walters, *Revealed: The oddball who hid £1bn of art in his squalid flat . . . and the extraordinary story of how his father, who stole paintings for the Nazis, conned Allied investigators*, DAILY MAIL (Nov. 13, 2013, 12:04 AM), <http://www.dailymail.co.uk/news/article-2504403/Cornelius-Gurlitt-oddball-hid-1bn-Nazi-art-flat.html>; Higgins et al., *supra* note 3.

¹⁰ Higgins et al., *supra* note 3.

¹¹ Kirsten Grieshaber, *Jewish Group Demands Return of All Nazi Looted Art*, ASSOCIATED PRESS (Jan. 30, 2014, 11:31 AM), <http://abcnews.go.com/Entertainment/wireStory/jewish-group-demands-return-nazi-looted-art-22294916> (quoting Ronald Lauder, President of the World Jewish Congress).

¹² Eddy et al., *supra* note 4. In 2010, Gurlitt was traveling on a train from Zurich to Munich with an excessive amount of money, which alerted authorities, who subsequently performed a tax evasion investigation. *Id.* On February 28, 2012, German authorities searched Gurlitt’s Munich apartment and discovered the artwork. *Id.*

¹³ *Id.*

¹⁴ *1500 Werke von Künstlern wie Picasso, Chagall und Matisse Meisterwerke zwischen Müll – Fahnder entdecken in München Nazi-Schatz in Milliardenhöhe*, FOCUS ONLINE (April 11, 2013, 2:19), http://www.focus.de/kultur/kunst/nazi-raubkunst-meisterwerke-zwischen-muell-fahnder-entdecken-kunstschatz-in-milliardenhoehe_aid_1147066.html.

¹⁵ Eddy et al., *supra* note 4; Mary M. Lane & Harriet Torry, *U.S. Pushes Germany for Details of Art Cache*, WALL ST. J. (Nov. 6, 2013), <http://online.wsj.com/news/articles/SB10001424052702304672404579182001498261232>. Criticisms include the failure of the German government to publicize the finding as well as lack of transparency in handling Nazi-

this matter whether the German authorities must return the seized art to Gurlitt, based upon German law, which supports the expiration of a thirty-year statute of limitations on the theft of the artwork.¹⁶ The matter is still pending, but the issue has sparked an outrage about the possibility that the art could potentially be given back to Gurlitt based not upon the merits of each art piece, but based upon procedural grounds; thus, allowing the legal system to continue to advance the injustices of the Nazi regime in carrying out its Final Solution to eradicate the Jewish race by extinguishing its people and culture.¹⁷

The *Gurlitt* issues and the Bavarian effort to quickly amend its statute of limitations law in direct response to the controversy¹⁸ exposes the lack of an appropriate legal framework for the handling of Nazi-looted art cases. Current legislation and case law in numerous countries do not provide clear, predictable outcomes for restitution claims and may impede the public policy favoring restitution to the original property owner; the United States is not an exception.

This Article examines how the United States has addressed Nazi-era looted art cases in recent years and makes proposals designed to provide the fair, just handling of these cases. Section II provides a review of the critical documents that influence how the United States legal system currently handles Nazi-era looted art cases. Section III reviews the duties of public museums and discusses how these duties conflict with U.S. policies and guidelines regarding the restitution of art. Section IV examines notable cases resolved in the U.S. and looks at how the legal process reveals institutional apa-

confiscated artwork.

¹⁶ BÜRGERLICHES GESETZBUCH, *supra* note 5, at §§ 199, 202; *see also* Bruce Zagaris, *Discovery of Nazi-Looted Trove Causes Controversy*, INT'L ENFORCEMENT L. REP. (2014).

¹⁷ Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 J. DEPAUL-LCA J. ART & ENT. L. & POL'Y 27, 30 (1999).

¹⁸ As of the date of publication of this Article, Bavaria has proposed new legislation which aims at elimination of the present thirty-year statute of limitations in the German Civil Code. *See, e.g., Nazi-looted art: Bavaria proposes law to partially lift statute of limitation*, WORLD JEWISH CONGRESS (Jan. 8, 2014), http://www.worldjewishcongress.org/en/news/14322/nazi_looted_art_bavaria_proposes_law_to_partially_lift_statute_of_limitation_wjc_insufficient. The proposed law requires that the individual or group, which possesses the artwork "acted in bad faith." *Id.* Thus, the possessor must have knowledge of the item's origins when he or she acquired the artwork. *Id.* Despite this proposal, the legislation has received criticism that it is not adequate to resolve Nazi-looted art problems. *Id.* World Jewish Congress President Ronald S. Lauder "welcomed the Bavarian initiative as a 'step in the right direction', but 'insufficient to deal with the problem of Nazi-looted art in Germany,'" and highlights the insufficiencies of the existing Nazi-looted art issues in Germany. *Id.*

thy towards Nazi-looted art. Section V proposes legislative reform by enacting a federal statute of limitations law. Finally, Section VI recommends additional reforms to the existing legal framework to not only provide mechanisms for increased fairness to all parties involved in these cases, but also to further the public policy which aims to promote the identification and restitution of Nazi-looted artwork to the original owner.

II. HISTORY OF UNITED STATES POLICY AND GUIDELINES ON NAZI-LOOTED ART

In order to gain a full appreciation of the applicable U.S. legal framework upon which Nazi-era looted art cases are reviewed, it is necessary to understand the underlying history and policy regarding Nazi-era looted art. Consequently, the following discussion provides an overview of these matters.

In the late 1990s, the U.S. developed a revitalized interest in Nazi-era looted artwork included in the collections of its art museums. There were various reasons for this interest,¹⁹ but the success of the recovery of claims against Swiss banks brought by victims of the Holocaust and their heirs was a significantly relevant factor which heightened national interest on the subject.²⁰

Moreover, in the 1990s, the U.S. began to emerge as a “forum of choice for claimants” seeking restitution of Nazi-era looted artwork.²¹ While continental European legislation favors a good faith purchaser by allowing clear title to stolen goods after a certain period of time,²² the U.S. law applicable to the restitution of cultural property was, and remains, favorable to the property owner.²³ Hence, under common law, no one, not even a good faith purchaser, can obtain title to stolen property.²⁴ This law naturally encouraged Nazi-era looted

¹⁹ Demands were being made on Swiss banks for looted bank accounts; Hector Feliciano’s book entitled *THE LOST MUSEUM* was published, as well as Lynn Nicholas’s book entitled *THE RAPE OF EUROPA*. For further discussion, see BAYZLER, *supra* note 7, at 208-09.

²⁰ The first Nazi-era looted art lawsuit, *Goodman, et al. v. Searle*, No. 96-CV-06459, (N.D. Ill. Filed Oct. 3, 1996) (Bloomberg Law, Docket), was settled.

²¹ BAYZLER, *supra* note 7, at 212. In 1998, Congress also passed the Holocaust Victims Redress Act. Pub. L. No. 105-158, Sec 202, 112 Stat. 15, 17-18 (1998).

²² *See, e.g., supra* note 5, at § 935 (explaining that the German Code does not recognize good faith acquisition of title for lost property).

²³ Bert Demarsin, *Let’s Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *BROOK. J. INT’L L.* 117, 177 (2011).

²⁴ Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis*

art claimants to assert their claims in the United States.

During this time, The Holocaust Victims Redress Act (hereinafter “HRA”) was enacted, setting forth the “sense of Congress” regarding Nazi-looted property.²⁵ Specifically, the HRA emphasized that “all governments should undertake good faith efforts to facilitate the return” of looted property.²⁶ Thereafter, the U.S. held Congressional hearings regarding its “sense” and the status of Nazi-looted artwork throughout the country.²⁷

In 1998, following the enactment of the HRA, the Department of State and the U.S. Holocaust Memorial Museum hosted the Washington Conference on Holocaust-Era Assets (hereinafter “Conference”).²⁸ More than forty countries and thirteen international private entities were represented at the five-day-long Conference.²⁹ The aim of the Conference was to confront the issues arising from the confiscation of assets by the Nazis during the Holocaust. Specifically, the goal was to create a consensus of how to manage the issues of recovery and restitution of looted art, religious, cultural and historical objects, communal property, insurance claims, and other related matters.³⁰

The Conference was a collaborative effort by its attendees.³¹ Experts from all over the world discussed how to create policies designed to foster the restoration of artwork to its proper owners.³² Not only did these experts give group presentations in their area of expertise, but also there were “breakout” discussion groups in all areas of the controversy where attendees sat around a table, actively discussing these matters and suggesting how best to handle these issues.³³ Upon the conclusion of the fifth day of the Conference, the “Wash-

and the Legal Rules Governing Restitution of Stolen Art, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 578 (1999) (citing Brian Bengs, Note, *Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 503, 517–18 (1996)).

²⁵ Holocaust Victims Redress Act §§ 201-02.

²⁶ *Id.* at § 202.

²⁷ *Id.* at §§ 201-02.

²⁸ Letter from J.D. Bindenagel, Editor & Director, Washington Conference of Holocaust Era Assets (Feb. 19, 1999) available at <http://fcit.usf.edu/holocaust/resource/assets/heaca.pdf>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Bindenagel, *supra* note 28.

ington Principles” (hereinafter “Principles”) were established.³⁴

The Principles had a majority consensus of the forty-four participant countries.³⁵ Most of the issues were wholly agreed upon, but there was one issue relating to the restitution of communal property where significant debate occurred and a majority consensus was not realized: Central and Eastern Europe post-communist states were particularly wary of committing to aggressively returning confiscated communal property.³⁶

Proposals from the United States which became embodied in the Principles included: commitments to restore “secular as well as religious communal property; ensure that restitution policies adopted at the national level are implemented regionally and locally; make the legal procedures for filing claims clear and straightforward; and above all, to accelerate the process of restitution of communal property.”³⁷

The Principles stated:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not

³⁴ Proceedings, WASHINGTON CONF. ON HOLOCAUST ERA ASSETS, Feb. 19, 1999, at 971-72.

³⁵ *Id.* at 971.

³⁶ Stuart Goldman, *Summary of the Washington Conference on Holocaust Era Assets*, JEWISH VIRTUAL LIBRARY (Nov. 24, 1999), <http://www.jewishvirtuallibrary.org/jsource/Holocaust/crs9.html#one>.

³⁷ *Id.*

subsequently restituted in order to locate its pre-War owners or their heirs.

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

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

8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

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

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

11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.³⁸

Despite the intense scrutiny and debate of issues, the Principles were neither legally binding nor agreed to by formal agreement of the parties attending the Conference. Rather, the Principles were adopted as voluntary commitments “based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions.”³⁹

³⁸ WASHINGTON CONF. ON HOLOCAUST ERA ASSETS, *supra* note 34, at 971-72.

³⁹ *Terezin Declaration*, HOLOCAUST ERA ASSETS (June 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> (follow “TEREZIN DECLARATION FINAL.pdf (78,2 kB)” hyperlink).

During this same time, the Association of Art Museum Directors (hereinafter “AAMD”) drafted guidelines of the Spoliation of Art from 1933-1945,⁴⁰ while the American Alliance of Museums (hereinafter “AAM”) issued guidelines pertaining to the Unlawful Appropriation of Objects.⁴¹ These guidelines serve as the Code of Ethics for Museums when handling claims of ownership regarding artwork in the museums’ collection.⁴² Moreover, these guidelines promote the identification and restitution of Nazi-era looted art. Furthermore, the AAM Guidelines urge museums to the use of non-litigation methods, the use of mediation and the waiver of defenses.

In 2009, a follow-up conference entitled the “Prague Holocaust Era Assets Conference” was held, designed chiefly to examine the progress of the Washington Conference and the other efforts put forth by its participant countries for the restitution of looted property⁴³ and to address other related issues.⁴⁴ The Conference issued the “Terezin Declarations,”⁴⁵ which outlined the commitments of the participant countries with respect to various Nazi-era matters, including Nazi-confiscated and looted art issues.⁴⁶

In addition to renewing the participant countries’ commitment to the Washington Principles as a whole, the Terezin Declarations included a renewed commitment to: the continuation and support of “intensified systematic provenance research, with due regard to legislation, in both public and private archives”; where relevant, making

⁴⁰ *Resolution of Claims for Nazi-Era Cultural Assets*, ASS’N OF ART MUSEUM DIRECTORS, (2014), <https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info>.

⁴¹ *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, AM. ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> (last visited May 2, 2014).

⁴² *Id.*

⁴³ For example, the Vilnius Forum Declaration of 2000, the Stockholm Declaration of 2000, and the Task Force on International Cooperation on Holocaust Education, Remembrance and Research in 2007-2008 were designed to address property restitution. Bureau of European and Eurasian Affairs, Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), <http://www.state.gov/p/eur/rls/or/126162.htm> (Conf. Rep.).

⁴⁴ The issues were described by the Conference sponsors as “important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi-Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites.” *Id.*

⁴⁵ The Conference was held in Terezin, where thousands of Jews were sent to the Theresienstadt concentration camp and work camps. *Id.*

⁴⁶ *Id.*

efforts to publicize the results of provenance research; “establishment of mechanisms to assist claimants and others in their efforts;” the efforts of the participant countries to “ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art;” to “make certain that claims to recover” the art are quickly determined and resolved based upon the facts and merits as well as all documents supplied by all of the parties involved; and for participant countries to “consider all relevant issues when applying various legal provisions that may impede” restitution.⁴⁷ In addition, it was suggested that the U.S. could potentially create a formal body to determine proper ownership.⁴⁸

III. PUBLIC TRUST AND ETHICAL OBLIGATIONS OF PUBLIC MUSEUMS

U.S. public art museums have a duty to hold their collections in the public trust. It follows that the deaccessioning of any artwork owned by a public museum must be made in a manner that is consistent with the museum’s duty.

Deaccessioning in American art museums is largely unregulated. Presently, New York State is the only state which has a codified, comprehensive deaccessioning policy which public museums must adhere to when contemplating removal of artwork.⁴⁹ Pursuant to the New York law, there are only certain reasons why a museum may remove artwork from its collection. Several permissible reasons for deaccessioning include: the artwork will be repatriated or returned to the rightful owner, or the piece is “lost or stolen and has not been recovered.”⁵⁰

Moreover, there is no federal law or policy which legally requires a public museum or other institution to abide by or restrict their actions pursuant to particular deaccessioning regulations; thus, non-New York public museums are not held to any statutory duty. Rather, these museums must make these decisions according to their fiduciary duty in the best interest of the public.

⁴⁷ *Id.*

⁴⁸ Stuart E. Eizenstat, Open Plenary Session Remarks at Prague Holocaust Conference (June 28, 2009), <http://www.state.gov/p/eur/rls/rm/2009/126158.htm> (conf. Rep.).

⁴⁹ N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(c)(7) (2014).

⁵⁰ *Id.*

Generally, a public museum's decisions include those similar to the duties of a trustee of a charitable trust. Thus, these fiduciary duties include:

reasonable steps to take and keep control of the trust property, to use reasonable care and skill to preserve the trust property, to take reasonable steps to realize on claims which are a part of the trust property, [and] to defend [against] actions which may result in a loss to the trust estate, unless it is reasonable not to make such defense.⁵¹

Additionally, deaccessioning activities of public museums are guided by self-regulatory ethical guidelines. These guidelines are set forth by the American Alliance of Museums, the Association of Art Museum Directors and the International Council of Museums.

Pursuant to the 2000 AAM Code of Ethics (hereinafter "AAM Code"), museum governance is governed by public trust⁵² and all museum activities must be in service of the public. Furthermore, the AAM Code indicates that acquisitions, deaccessions and loans of artwork must be performed for the good of the public.⁵³

Furthermore, the AAM's promulgation of standards regarding "Unlawful Appropriation of Objects During the Nazi Era," (hereinafter, "Unlawful Appropriation Guidelines")⁵⁴ underscores the obligation of a museum to act in the public trust. Specifically, museums must act diligently where "Nazi-era provenance is incomplete or uncertain for a proposed acquisition."⁵⁵ The standards further amplified that museums' "stewardship duties and their responsibilities to the public they serve require that any decision to acquire, borrow, or dispose of objects be taken only after the completion of appropriate

⁵¹ RESTATEMENT (SECOND) OF TRUSTS § 379 (1959); *see, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 11-1.1 (McKinney 2011) (describing New York's fiduciary duties); *see generally* Simon J. Frankel, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279 (2013).

⁵² Frankel, *supra* note 51, at 292; *see also* AM. ALLIANCE OF MUSEUMS, *supra* note 41.

⁵³ *See* AM. ALLIANCE OF MUSEUMS, *supra* note 41.

⁵⁴ *Id.*

⁵⁵ *Id.*

steps and careful consideration.”⁵⁶

The Unlawful Appropriation Guidelines also emphasize the need for museums to perform research on the provenance of Nazi-era art in their collections, and if necessary, to attempt to locate the heirs who may potentially possess a claim to the art for the purpose of resolving the issue.⁵⁷ These guidelines indicated that museums publicize the provenance of Nazi-era art by posting the information at their websites.⁵⁸ Moreover, the Unlawful Appropriation Guidelines stated that museums should seek to resolve claims “in an equitable, appropriate and mutually agreeable manner,” utilizing “methods other than litigation.”⁵⁹ Furthermore, these guidelines stated that museums should “consider . . . mediation” as well as the waiver of “certain available defenses” in handling property claims seeking restitution of looted artwork.⁶⁰

Finally, the International Council of Museums (hereinafter, “ICOM”) provides a code of ethics which applies to the professional conduct of museums, including international objectives, such as the illicit trafficking of artwork and cultural objects.⁶¹ The ICOM ethics code emphasizes that museums make deaccessioning decisions only with complete understanding of the artwork’s history and significance as well as considerations involving “any loss of public trust.”⁶² The ICOM has also issued “Recommendations concerning the Return of Works of Art Belonging to Jewish Owners,” which recommends that museums examine their collections in order to identify artwork dating from WWII that has a suspicious provenance.⁶³ The recommendations also provide that museums establish written procedures

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See AM. ALLIANCE OF MUSEUMS, *supra* note 41. A dedicated Internet site was subsequently established which allows museums to voluntarily—but not legally required—list suspicious artwork and related information thereto.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *ICOM in Brief*, INT’L COUNCIL OF MUSEUMS, <http://icom.museum/who-we-are/the-organisation/icom-in-brief.html> (last visited May 2, 2014); *ICOM Missions*, INT’L COUNCIL OF MUSEUMS, <http://icom.museum/the-organisation/icom-missions/> (last visited May 2, 2014).

⁶² *ICOM Code of Ethics*, INT’L COUNCIL OF MUSEUMS, <http://icom.museum/the-vision/code-of-ethics> (last visited May 2, 2014). See also Frankel, *supra* note 51; AM. ALLIANCE OF MUSEUMS, *supra* note 41; *ICOM Missions*, *supra* note 61.

⁶³ *ICOM Recommendations concerning the Return of Works of Art Belonging to Jewish Owners*, COMM’N FOR LOOTED ART IN EUR. (Jan. 14, 1999), <http://www.lootedartcommission.com/OXSHQE36019>.

for handling the publication and restitution of such artwork, as well as “actively address” the restitution of the pieces to the owner.⁶⁴

The aforementioned public art museum’s fiduciary duty to the public trust and ethical obligations to further the identification and restitution of Nazi-era looted artwork creates a tension of competing interests: the interest to act in the best interest of the public when deaccessioning artwork versus the interest to act in furtherance of the identification and restitution of artwork to its owners. According to the ethical obligations for restitution, the museum is urged to determine claims expeditiously, using non-litigious methods, waiving defenses and resorting to alternatives such as mediation.

However, when public museums seek to remove a piece of artwork from its collection, including those pieces which are the subject of a looted art claim, the museum must also adhere to its fiduciary duties and make the public trust its primary priority. This fiduciary duty to act in the best interests of the public cannot simply be set aside in favor of ethical obligations relating to Nazi-era looted art. Therefore, the guidelines’ statement that museums should consider waiving defenses and determining claims based upon merits puts a museum in a precarious position; a museum cannot function in a fiduciary manner while also adhering to the ethical guidelines pertaining to Nazi-era looted art claims. Consequently, the precise manner in which a public museum should conduct itself in cases of looted Nazi-era art claims is unclear.

The public museum is neither directed by the codes of ethics to disregard litigation nor to ignore available defenses, yet the proactive actions to institute declaratory judgment actions or assertion of procedural defenses do not coincide with the stated goals of the Washington Principles and the ethical obligations of the museums. For example, museums are urged by the AAM guidelines to resolve looted art claims “openly, seriously, responsively and with respect for the dignity of all parties.”⁶⁵ The ethical guidelines also indicate that looted art claims should be determined upon the merits of a case, not procedural issues. Additionally, the Unlawful Appropriation Guidelines promote a resolution of these claims by non-litigious methods and with a waiver of possible defenses.⁶⁶ Consequently, if a museum proactively seeks a declaratory judgment or asserts a time-barred de-

⁶⁴ *Id.*

⁶⁵ AM. ALLIANCE OF MUSEUMS, *supra* note 41.

⁶⁶ *Id.*

fense, the museum is not acting in accordance with these codes of ethics regarding Nazi-era looted art claims.

This complex situation is intensified because courts do not provide a clear direction for museums that encounter this tension. Rather, the courts demonstrate “institutional apathy”⁶⁷ towards the U.S. policy favoring restitution of Nazi-era looted art. For example, in a First Circuit case involving Nazi-era looted artwork, the Court revealed its treatment of the Washington Principles and Terezin Declaration when it stated that the documents were phrased in “general terms evincing no particular hostility” toward statute of limitations defenses.⁶⁸ Therefore, the statute of limitations defense was permitted.

Similarly, in *Grosz v. Museum of Modern Art*,⁶⁹ the Court of Appeals for the Second Circuit upheld the lower court’s determination dismissing the claimant’s challenge to the museum’s ownership of three paintings based upon the statute of limitations.⁷⁰ The museum and the claimants had previously engaged in negotiations which did not result in a settlement. Thereafter, the case was filed and subsequently the claimant’s claims were unsuccessful.⁷¹

Significantly, the museum was found to have engaged in extensive negotiations for the purpose of elongating the time frame for limitation purposes.⁷² The lower court did not protest this conduct, as the court inferred an implicit demand and refusal from the parties’ correspondence.⁷³ This fact further heightens the “institutional apathy within the United States” regarding the “changes it zealously sought internationally.”⁷⁴

⁶⁷ Demarsin, *supra* note 23, at 165.

⁶⁸ *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 12 (1st Cir. 2010).

⁶⁹ 403 F. App’x 575 (2d Cir. 2010).

⁷⁰ *Id.* at 576-78.

⁷¹ *Id.* at 577-78.

⁷² Demarsin, *supra* note 23, at 165 (citing Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 665-71 (2011)).

⁷³ *Id.* (citing *Grosz*, 772 F. Supp. 2d 473, 483-88 (S.D.N.Y. 2010), and Demarsin, *Has the Time (of Laches) Come?*, *supra* note 72, at 665-71).

⁷⁴ *Id.*

IV. DISMISSAL OF NAZI-LOOTED ART CASES ON PROCEDURAL GROUNDS

Beginning in 2005, the instances of public museums' disregard of the ethical guidelines in favor of technical defenses to resolve Holocaust restitution claims increased. It follows that the cases to resolve artwork ownership disputes are increasingly commenced by museums which seek declaratory judgment that the museum is the clear title holder of the artwork. This trend signifies a disregard of the Principles and its progeny when a public museum is confronted with Nazi-era artwork ownership issues. In addition, the merits of the case are typically never reviewed; the majority of Nazi-era looted art cases to date have been settled outside of the courthouse, so there is no relevant examination of the substantive facts and circumstances of a claim in which to provide a clear precedent for the artwork's original owner or heirs.

When considering the proactive cases initiated by public museums, the federal courts demonstrate a disfavoring of victims of Nazi-era looted art by strictly applying the doctrine of constructive notice based upon the time of the discovery and dismissing cases based upon expiration of the statute of limitations. For example, in the case entitled *Toledo Museum of Art v. Ullin*,⁷⁵ the U.S. District Court for the Northern District of Ohio dismissed claims of the defendants, heirs of a Nazi persecutee, based upon a four-year statute of limitations.⁷⁶ In this action to quiet title, the defendants asserted that the subject painting was sold under duress during the Holocaust.⁷⁷ The heirs further argued that the painting was sold for less than market value.⁷⁸ Additionally, the defendant-heirs claimed to have no knowledge whatsoever of the painting or its history, let alone the museum's possession of the piece.⁷⁹

Despite recognizing the dispute over the sale and knowledge of the artwork and its history, the District Court nevertheless dismissed the case on the basis that the defendant had constructive notice of the existence of the painting.⁸⁰ In making this determination,

⁷⁵ 477 F. Supp. 2d 802 (N.D. Ohio 2006).

⁷⁶ *Id.* at 806, 809.

⁷⁷ *Id.* at 804-05.

⁷⁸ *Id.* at 805.

⁷⁹ *Id.* at 808.

⁸⁰ *Ullin*, 477 F. Supp. 2d at 808.

the court emphasized that the museum's possession of the artwork was "easily discoverable"⁸¹ as the museum included the piece on its website. Moreover, the court stressed that since the original owner or the estate failed to file a claim, particularly in light of the heightened public awareness of Nazi-looted art at the time of the owner's death, the heirs should have asserted the claim prior to the filing of the action. Consequently, constructive notice was imputed to the defendants, which barred the claim based upon the statute of limitations.⁸²

Similarly, in *Detroit Institute of Arts v. Ullin*,⁸³ the U.S. District Court for the Eastern District of Michigan failed to consider the merits of a case made by the heirs of Nazi-looted artwork. In the case, the court applied the applicable three-year Michigan statute of limitations and held that the claims were time-barred.⁸⁴ In *Ullin*, the alleged forced Nazi-era sale occurred in 1938; the court opined that the three-year statute of limitations had commenced in 1938 and therefore the passage of time barred the assertion of any claims.⁸⁵ Moreover, the court noted that the estate had previously made wartime loss claims in 1973 and therefore, should have discovered the claim at that time.⁸⁶ However, since the three-year statute of limitations expired on that claim, too, the claim would be time barred.⁸⁷

Common to both cases was the fact that each instance involved prior knowledge of the transactions to the claimants' families, but the families failed to assert these claims. In addition, both cases included the families' filing prior wartime loss claims. These facts and the courts' decisions are important because they demonstrate that the courts will not reset the time limitations on filing the case; rather, the consecutive generations will be denied the opportunity to assert a case because the previous generation has the responsibility to obtain evidence and assert the claim. Moreover, the cases demonstrate the failure to review the case on its merits and instead resolve the matter on procedure-based reasoning.

⁸¹ *Id.*

⁸² *Id.* at 807.

⁸³ No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).

⁸⁴ *Id.* at *3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

V. PROPOSAL TO ENACT A STATUTE OF LIMITATIONS MODELED ON NEW YORK STATE LAW

The State of New York favors the rights of dispossessed former owners of stolen property. In actions for replevin, the State applies a “demand and refusal rule,” which states that the statute of limitations does not commence until the date that the owner or heir has located their stolen property and demanded its return from the possessor.⁸⁸

Additionally, under New York law, a defendant may assert an affirmative defense of laches in replevin actions to recover stolen art.⁸⁹ However, a defense of laches is “not binding on [the] court[.]”⁹⁰ In assessing a laches argument, the court must review all facts and circumstances to determine if the key components of the defense⁹¹ are fulfilled; thereafter, the court must balance the equities.⁹²

Laches allows a bona fide purchaser to have the opportunity to defend title to property. The defense also allows the purchaser the chance to put forth ownership arguments despite the quantity of evidence.⁹³ Consequently, this defense can offer a museum a chance to obtain a declaration that they are the proper owner where the provenance of an artwork has proven questionable or unclear.

It has been argued by some that the laches defense should not be available.⁹⁴ However, if the New York “demand and refusal”

⁸⁸ See, e.g., *Golden Budha Corp. v. Canadian Land Co. of Am.*, 931 F.2d 196, 201 (2d Cir. 1991); *Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966). See also *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 427 (N.Y. 1991) (holding that the timing of the original owner’s demand and the refusal of the possessor to return the piece are the “only relevant factors in assessing the merits of the Statute of Limitations defense.”).

⁸⁹ *Lubell*, 569 N.E.2d at 429 (emphasizing that a defendant may invoke the equitable defense of laches to prove that the claimant’s delay in pursuing recovery prejudiced the defendant).

⁹⁰ Emily Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 486 (2010) (citing 51 AM. JUR. 2D *Limitation of Actions* § 8 (2014)).

⁹¹ The key components to sustain a laches defense include: 1) opposing party had knowledge of their claim; 2) the opposing party “inexcusably delayed in taking action”; and 3) the possessor of the property sustained prejudice due to the delay. See, e.g., *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 303 (S.D.N.Y. 2011) (citing *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998) (involving private parties but stating the elements for laches)).

⁹² Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2446 (1994).

⁹³ 51 AM. JUR. 2D *Limitation of Actions* § 8 (2014).

⁹⁴ See Raymond J. Dowd, *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops*, 14 RUTGERS J. L. & RELIGION 529, 529, 547 (2013). Such arguments stem from the premise that a “good faith purchaser of stolen artwork” cannot obtain clear title and,

model applied to all Nazi-era looted art cases, along with the right of a museum to assert a defense of laches, fairness to both the museum and the alleged owner or heir to Nazi-looted art would be extended. A demand and refusal statute of limitations would provide for a more equitable result because the court can look at the merits of a case, not just procedures, and render a decision.

Assuming *arguendo* that courts allowed a “demand and refusal” statute of limitations while simultaneously denying the defense of laches, a possessor would have limited to no grounds to defend oneself; a piece of artwork could easily be inherited or passed down from generation to generation without any knowledge of its history. Moreover, every time the piece passed, the courts would likely have to restart the timeline for statute of limitations purposes, which is an unlikely result. While it is true that a good faith purchaser cannot acquire title to stolen property, it nevertheless does not automatically follow that the possessor was not prejudiced when a claimant delays in submitting a claim.

The Washington Principles urged the tenets of fairness and equity as well as consideration of the merits of a case when determining Nazi-looted art claims; the enactment of a federal “demand and refusal” statute applicable to all of these cases would help streamline the manner in which museums may act. Moreover, the federal statute would fairly and reasonably recognize that victims of the Nazis were not capable of asserting a claim during, immediately following and long after the Holocaust occurred. Therefore, present day claimants would have the ability to discover an artwork’s provenance and make a timely claim thereafter. Moreover, the possessor would have an equal opportunity to demonstrate prejudice in the event that the claimants had knowledge of the claim but failed to make the claim. This balance of the equities would lead to a more just results based upon the merits of the case, not just procedural issues.

VI. PROPOSALS FOR CHANGE IN HANDLING OF NAZI-ERA LOOTED ART BY THE UNITED STATES

The existing legal framework for the restitution and review of Nazi-looted art cases in the U.S. does not effectively adhere to the Washington Principles. Rather, the existing framework fails to provide a consistent, predictable and equitable result. Consequently, the

therefore, cannot be prejudiced. *Id.* at 547.

U.S. legislature should reform the legal constraints which impede restitution to victims of looted artwork by creating mechanisms for the identification and restitution of Nazi-era looted art. The following proposals, which should be considered as separate and compact ideas unless otherwise indicated, seek to achieve this result.

Initially, a neutral third party should be created to oversee and resolve restitution claims of Nazi-looted art. This entity should be composed of individuals with expertise in art, history, cultural property and the related areas of law. Moreover, this neutral body should be given exclusive jurisdiction over the resolution of Nazi-looted art claims. The body should review each party's documentation and evidence of ownership and make a determination based solely on the merits; no procedural issues should be considered whatsoever, such as those based upon statute of limitations or laches. At the conclusion of the matter, the third party's determination should be binding on the parties.

Next, in accordance with the Washington Principles which encourage "every effort . . . to publicize," the use of social media to foster such publication and transparency regarding the acquisition of art work with questionable provenance should be mandated. Every public U.S. museum contemplating an acquisition with an unclear history should be required, as a matter of law, to routinely post the art work and any historical information in its possession (except for information that could violate personal privacy) by using social media. The postings should be made available to all relevant countries; therefore the publication should be available in the appropriate languages. Additionally, the museum should be legally obligated to distribute the information via social media for a specific time period as a prerequisite to acquiring the suspicious artwork.

Furthermore, a centralized registry should be established whereby individuals seeking Nazi-era looted art can elect to receive direct notice of any suspicious art in the possession of a U.S. museum. If an individual chooses to be on this list and receives notice, this not only fosters disclosure of the artwork, but also potentially could provide a fair basis for notice for a public museum's statute of limitations defense, assuming the existing or similar legal framework remained in effect. The notice should be made available both electronically and in hard copy upon request. Importantly, any individual subscribing to the list would be required to provide receipt of the list. Additionally, the list should be updated annually. A failure by a mu-

seum to adhere to reporting regulations to provide the information every year would result in a monetary penalty. This solution would encourage the museum's identification and disclosure of looted artwork to the original owners or heirs, allow legitimate seekers of lost art to have direct access of the artwork, and also foster a fair and equitable process to both parties.

In addition, there should be the creation of a federal statutory requirement that a claimant exhaust certain remedies prior to the commencement of legal action. This would assume the existence of a neutral third party as proposed earlier in this Article, which would have jurisdiction to preside over the case. In instances where a claimant seeks restitution against a museum, a hearing should occur whereby the parties attempt to resolve the dispute. As an alternative to a hearing, a set of formal conferences could instead be required by a claimant prior to formal legal action where the claimant and museum reveal their respective information and discuss the potential of a settlement. In either instance, if the hearing or conferences could not resolve the matter, then the parties could proceed in court. The requirement to exhaust remedies would serve as a mechanism to promote quicker determination of claims and eliminating legal provisions that could impede restitution by offering a non-litigious process.

Finally, public museums seeking to acquire an artwork from the Nazi-era should have an affirmative legal obligation to demonstrate their due diligence in researching the provenance of the works in order to seek declaratory action. The sufficiency of this research should be held to a clearly defined standard subject to peer review. In the event that a museum fails to attain the standard of evidence of the artwork's provenance, the museum should be barred from asserting a declaratory judgment that the museum is the rightful owner of the art. Rather, in such an instance, the museum should have the right to proceed in acquiring the piece, but without the right to file a declaratory action. This proposal would encourage museums to perform sufficiently appropriate provenance research. Furthermore, this requirement would prevent museums from resorting to filing declaratory actions in instances where clear title is not established.

VII. CONCLUSION

The *Gurlitt* case has sparked a renewed interest in the han-

dling of Nazi-looted art claims. The discovery of the cache of artwork demonstrates the lack of clear guidelines and mechanisms for how the matter will proceed and on what basis will the property ownership issues be determined; how Bavaria handles the matter remains to be seen.

Nevertheless, the *Gurlitt* case reminds the nation of the continuation of the terrible injustices committed by the Nazis, in the exacting of the Final Solution by attempting to extinguish an entire race by eradicating its culture and people.⁹⁵

Existing legal framework throughout the U.S. has failed victims of the Nazi regime by continuing to allow victims' looted art to find its way into U.S. museums instead of the hands of the proper owners or their heirs. These issues highlight the necessity to reform the current U.S. legal framework in order to more effectively promote the commitments the U.S. made when executing the Washington Principles and its progeny. Hopefully, the *Gurlitt* case will spur the U.S. legislature to reexamine the Washington Principle commitments, to take appropriate measures to ensure that Nazi looted artwork is finally identified and restored to the original owners or heirs, and to create a framework based upon the principles of equity and fairness. If the U.S. continues to allow its existing legislative framework to perpetuate injustices against the victims of the Holocaust, then, in the words of Elie Weisel, "we are guilty, we are accomplices."⁹⁶

⁹⁵ See, e.g., Eric Gibson, *Taste—de Gustibus: The Delicate Art of Deciding Whose Art It Is*, WALL ST. J., July 16, 1999, at W11.

⁹⁶ Elie Wiesel, *supra* note 1.