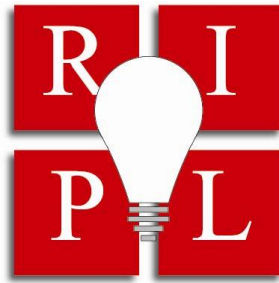


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



FROM TRAGEDY TO TRIUMPH IN THE PURSUIT OF LOOTED ART: ALTMANN,  
BENNINGSON, PORTRAIT OF WALLY, VON SAHER AND THEIR PROGENY

DONALD S. BURRIS

## ABSTRACT

Professor Burris is a well-known and respected international litigator and lecturer based in Los Angeles and servicing clients in many states and several foreign countries. In this article, he has provided a broad and approachable overview of American law regarding the potential repatriation of Nazi-looted art—an area which he and his now-retired partner, Randy Schoenberg, helped develop from the ground up starting with the development of the *Altmann* case, decided by the U.S. Supreme Court in 2004, and continuing on through a number of fascinating looted-art cases of a more recent vintage. Parts of the article read as much like a detective story as a summary of cases and Mr. Burris has been kind enough to share both his approach to these cases and his prognosis for the future development of American, international and administrative law principles applicable to this fascinating subject.

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DONALD S. BURRIS\*

I. INTRODUCTION

This article was conceived by me<sup>1</sup> in part as a follow-up to an earlier article that I co-authored in 2005 with the helpful assistance of my “celebrity” law partner Randy Schoenberg for the Vanderbilt Journal of Transnational Law entitled *Reflections on Litigating Holocaust Stolen Art Cases*.<sup>2</sup> The earlier article was based on our firm’s then-current work as “looted art attorneys” attempting to repatriate Nazi-stolen works, or in a more usual and practical sense, to obtain their value, on behalf of Holocaust victims and their families who had valuable family art treasures seized from them by the Nazis, the most malevolent art thieves in recorded history.

In this subsequent article, I have attempted, with the very capable assistance of my Chicago-based research associate Ms. Monalee Shah, and with some additional input from Mr. Schoenberg, who is currently helping administer the Los Angeles-based Museum of the Holocaust, in order to summarize the continued development of so-called “looted art law” in the eleven years since the final resolution of our seminal case involving the courageous Maria Altmann in *Republic of Austria v. Altmann*.<sup>3</sup> In this context I have provided a bit more detail on the other major California case, highlighted in my earlier article, *Benningson v. Alsdorf*,<sup>4</sup> which

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\* © Donald S. Burris 2016. Donald S. Burris is a leading expert in the pursuit of art stolen by the Nazis. He is an honors graduate of the Georgetown Law Center, served as the Editor-in-Chief of the Georgetown Law Journal and further served as a special counsel to the Senate Watergate Committee. He has spent much of his forty-five year career as an international lawyer and litigator based in California. In recent years, Mr. Burris has devoted a considerable amount of time to the pursuit of looted art stolen by the Nazis before and during World War II. These efforts culminated with the Supreme Court Case of *Altmann v. Republic of Austria*, at the conclusion of which the Austrian government was ordered to, and did, return a number of priceless historic paintings by Gustav Klimt. He has authored an article for the VANDERBILT JOURNAL OF TRANSNATIONAL LAW entitled *Reflections on Litigating Holocaust Stolen Art Cases*. He is currently involved as lead or local counsel in a number of cases in the state and federal courts dealing with the restitution of Nazi-looted art.

<sup>1</sup> Much of the credit for the genesis and initial development of this article should be shared with Lawrence Kaye, a fellow looted-art attorney and close friend, and his law partner Howard Spiegler, also my close friend. Mr. Kaye, a pioneer in this field, along with Mr. Spiegler, helped me organize a major and comprehensive seminar conducted in 2009 by the Loyola of Los Angeles Law School in which a number of the ideas expressed in this article were developed. In addition, various case analyses in the text of the article, with particular reference to major segments of the discussions of the *Schoeps*, *Von Saher*, and *Herzog* cases, were initially suggested by Mr. Kaye in connection with the Loyola program. In the end I built upon our 2009 ideas and combined them with my thoughts arising out of my presentation at the 2015 John Marshall Law School Symposium.

<sup>2</sup> Donald S. Burris and E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Case*, 38 VAND. J. TRANSNAT’L L. 1041 (Oct. 2005).

<sup>3</sup> *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

<sup>4</sup> 2004 Cal. LEXIS 6903 (Cal. July 28, 2004); 2004 WL 803616 (Cal. App. 2d Sit. Apr. 15, 2004); 2004 WL 2806301 (N.D. Ill. Dec. 3, 2004).

involved the California state and federal courts and to some extent the Illinois federal courts. In the process, I have reviewed and analyzed significant cases such as the very lengthy *United States v. Portrait of Wally*<sup>5</sup> proceedings and the currently well-publicized California-based federal court case, *Von Saher v. Norton Simon Museum*,<sup>6</sup> both having been brought in the first instance by the special art recovery division of the New York-based law firm Herrick & Feinstein.<sup>7</sup> Finally, I end up attempting to analyze a number of representative cases which have been litigated or settled either in American courtrooms, before European administrative tribunals, or sometimes, as in *Altmann*, involving multiple forums.

Although it is in effect a subject area that re-examines events which occurred at least seventy years ago, the timeliness of looted art recovery (which comprises so much of my current work) is evidenced by, among other things, the media attention given to Hollywood productions such as *THE MONUMENTS MEN*<sup>8</sup> and *WOMAN IN GOLD*,<sup>9</sup> the issuance of the January 2016 alleged “final” report on the “Gurlitt Collection,”<sup>10</sup> and weekly articles in the press and on the Internet about the discovery of and/or the continuous search for Nazi-looted art. Also, an Internet article posted on February 23, 2016, *the very same day* that the first draft of this article was completed, referred to the University of Oklahoma’s agreement to finally return a classic Camille Pissarro 1886 work entitled “Shepherdess Bringing in Sheep” to Leone Meyer, a French Holocaust survivor whose deceased father was the pre-Holocaust owner of the painting. From a preliminary review of the article it appears that the university’s lawyers ironically opposed the lawsuit on the procedural grounds of sovereign immunity of the state university.<sup>11</sup> The settlement required that the painting, valued at \$1.5 million, be sent to a designated museum in France for five years and then rotated between certain museums in Oklahoma and France.<sup>12</sup>

If these examples are not enough to support the premise that the subject is a timely one, perhaps the most significant support is provided by the unavoidable conclusion that no auction house, collector, dealer, or museum can safely avoid investigating any gaps in a painting’s provenance between 1933 and 1945 if the painting was ever located in Germany, Italy, or any other European nation under Nazi control during this period. Because of a number of cases, including the *Portrait of Wally* case that is discussed in this article, the same form of due diligence is required where the current owner, whether an individual or a museum, is planning to loan the work(s) to an institution in another jurisdiction.

In addition to crediting the important and creative efforts of my fellow attorneys practicing in this admittedly highly specialized area of the law, significant credit should also be allocated to the tireless and enthusiastic efforts of our support teams: a small cadre of dedicated professors, researchers, and looted art recovery organizations here, in Europe, and the Middle East, all of whom are very much

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<sup>5</sup> *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

<sup>6</sup> *Von Saher v. Norton Simon Museum*, 754 F.3d 712 (9th Cir. 2014).

<sup>7</sup> See discussion, *supra* note 1.

<sup>8</sup> *THE MONUMENTS MEN*, Columbia Pictures and Babelsberg Studio (2014).

<sup>9</sup> *WOMAN IN GOLD*, BBC Films and Origin Pictures (2015).

<sup>10</sup> See discussion *infra* Section VI.C.

<sup>11</sup> Daniel Houston, *University of Oklahoma Agrees to Return Nazi Stolen Painting*, Associated Press (Feb. 23, 2016).

<sup>12</sup> *Id.*

concerned with the continuing uncertainties related to the thousands of confiscated Jewish-owned properties. In fact, in my opinion and that of my colleagues, the current flurry of legal activity in this area appears to be rekindling to some extent an intensified quest for the recovery of not only valuable art pieces, but also the value of real estate, easily identifiable personal property (to the extent it exists), and businesses taken from a group of millions of innocent citizens whose only “crime” was their birth religion.

As I worked on the finishing touches to this article, I continued to be humbled by the thought of how courageous and resourceful many of our clients and their deceased ancestors had to be to endure and to attempt to survive the Nazi era, to put so much energy and resources into rebuilding their lives, and to still be willing to be fully supportive to us in protracted and emotionally draining legal battles seeking restitution and some emotional compensation for their families. The most notable current examples are Maria herself and, more recently, the indomitable Marei Von Saher and her family. As a practical matter, most of my lengthy career dealing with these disputes has involved matters stretching for lengthy periods of time which average somewhere between three and six years to ultimately be resolved, whether formally or informally.

Although far from the first such seizures in recorded history,<sup>13</sup> the sheer brutality and enormous scope of Nazi looting is overwhelming, and unfortunately, the Nazi seizures were not the last in the chain. More modern examples include the virtually complete takeover of American businesses by Castro’s revolution in 1959,<sup>14</sup> the ransacking of the Iraqi National Museum,<sup>15</sup> the theft of many Afghan historical treasures during the recent Middle Eastern wars, and the horrendous seizures and

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<sup>13</sup> See, e.g., the reports of the earlier plundering by the British authorities in Asia, Africa, Afghanistan, and India; the continuous looting of priceless Italian art and the transfer of many items to the Louvre by Napoleon; the plundering of Latin and South America by the Spanish Empire; the sacking of Constantinople by the Crusaders; the massive looting by the Swedes of the treasures in the Prague Castle during the bloody Thirty Years’ War; the wide-spread historical looting of Polish treasures by the Russians and Prussians; and the looting of many conquered countries by controversial historical figures such as Genghis Khan and Alexander the Great.

Even the United States, whose current motives and actions are generally laudable, during the Civil War set up institutional structures which justified and legalized the looting of works held by military opponents and nations. There was even an 1863 presidential edict known as the “Lieber Code” and enacted as general orders number 100 on April 24, 1963, that specifically authorized the Union Army to plunder and loot the enemy. As the Code in Article 36 states “if such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the enduring treaty of peace.” General Orders No. 100: The Lieber Code (Apr. 24, 1863), [http://avalon.law.yale.edu/19th\\_century/lieber.asp#sec2](http://avalon.law.yale.edu/19th_century/lieber.asp#sec2).

<sup>14</sup> There is an excellent analysis of this issue in an article entitled *Restituting Looted Cuban Art* by Mr. Kaye’s and Mr. Spiegler’s partner, Mari-Claudia Jimenez, Esq in the ASCE journal. The author suggests that the current aggregate value of Cuban looted assets may well be in excess of \$50 billion. See also Alistair Bell, *Despite Détente, Search of Looted Art in Cuba Could Take Years*, REUTERS, (January 8, 2015), <http://in.reuters.com/article/cuba-usa-art-idINKBN0KG0EH20150107>.

<sup>15</sup> Many reports at the time suggest that virtually all of the Iraqi National Museum’s most valuable artifacts, about 501,000 pieces, had been removed by looters during the first U.S.-Iraqi War.

destruction of cultural works and edifices by the modern-day ISIS terrorists.<sup>16</sup> The Nazi program for the confiscation of valuable art from the vast number of conquered territories—the European Jewish populace in particular—has accurately been characterized as the greatest displacement of art, if not the most audacious property crime in human history.

Placing it in proper perspective, Nazi looting represented far more than the typical plundering of a losing party's artifacts by the victor in an armed conflict. By definition "the war on the Jews"<sup>17</sup> was in no way a "typical" armed conflict, but instead was marked by the subjugation, disenfranchisement, pauperization, and the mass murder of millions of mostly unarmed and innocent people. Indeed, the aggregate number of works stolen by the Nazis during World War II from museums and private collections throughout Europe, with a particular emphasis on looting Jewish-owned art, is astounding.<sup>18</sup> It should be noted that this wholesale pillaging was carried out as an official and systematic Nazi policy, and not as an accidental byproduct of war and the subsequent looting of defeated peoples. The mostly Jewish victims<sup>19</sup> had their property seized during this period through state confiscations, dispossessions, foreclosures, and Jewish "tax sales" in addition to allegedly legitimate, but in reality sham, auctions or sales designed to give the owners a minimal amount of funds to temporarily survive on or be used to emigrate to a safe haven.

Much of the finest looted art was intended for the massive Führermuseum that Adolf Hitler, whose dreams of an art career had been stalled by his teachers at a critical stage, was planning to build in his hometown of Linz, Austria. Other valuable works were seized by the most evil Nazis such as Herman Goering, who made many trips to the Musée Jeu de Paume ("Jeu De Paume") in Paris to select art to stock the massive private collection located at his Carinhall estate in Germany, and on occasion went so far as to have multiple freight cars loaded for his return trips.

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<sup>16</sup> The further suggestion has been made that there is some, albeit limited, potential "light at the end of the looted-art tunnel," even in conflict areas in the Middle East. As described in the World Policy Blog authored by Professor Mark Vlasic, a leading human rights scholar, and his associate Helga Turku, the combined efforts of the United States Departments of Justice, State and Homeland Security succeeded in securing the return to the people of Iraq the ancient carving of Assyrian King Sagan (itself worth between \$1-2 million on the black market) and sixty-four other looted antiquities. See Mark V. Vlasic and Helga Turku, *Countering IS's Theft and Destruction of Mesopotamia*, WORLD POLICY BLOG, (July 7, 2015, 8:55 AM), <http://www.worldpolicy.org/blog/2015/07/07/countering-is%E2%80%99s-theft-and-destruction-mesopotamia>. At the same time, the authors suggest, ISIS has intensified its looting of treasure to "finance their reign of terror in Syria and Iraq." The organization in effect "licenses" approved middle-men to deal with the looted artifacts! *Id.*

<sup>17</sup> See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945* (Bantam 1988).

<sup>18</sup> Towards the end of the occupation, Robert Schultz drew up an inventory of the 21,903 works of art seized through the ERR, run by Hitler's crony Alfred Rosenberg, a total of which was estimated by at least one respected commentator to be incomplete by as much as one-third. See DAVID PRYCE JONES, *PARIS IN THE THIRD REICH* 92 (William Collins Sons 1981). As Robert Edsel put it in *RESCUING DAVINCI*, Nazi looting was "the most thorough and extensive looting operation in history."

<sup>19</sup> Some State museums that held looted art were also periodically ransacked.

As one commentator recently put it in her well-written biography of Cornelius Gurlitt, the so-called “Munich collector” whose apartment was found to contain in excess of 1,200 mostly valuable works:

It is a gross misapprehension to believe that looted art is somehow a lesser crime of the Nazi era. Art is intended to unite people of disparate backgrounds in a combined cultural heritage that transcends national boundaries . . . The wholesale theft of art from museums, private individuals, libraries and archives was highly calculated and well organized by the criminal regime of the Third Reich.<sup>20</sup>

In addition to being motivated by the vast potential profit, another underlying purpose of the widespread Nazi looting and the isolation of degenerate art was “to use [the] so-called ‘degenerate’ art works as bargaining pieces to trade for art deemed worthy of possession.”<sup>21</sup> The term “degenerative art” was apparently derived from the German term “entartete Kunst,” and was used indiscriminately by the Nazis to apply to all discredited “modern art,” including valuable works by illustrious masters like Van Gogh, Chagall, Gauguin, Kandinsky, Matisse, and Picasso as well as many of other time-honored and treasured works from painters of Jewish origins.<sup>22</sup>

The term degenerate art became well-known in Germany because of the 1937 Munich exhibition which featured over six-hundred and fifty banned and seized paintings, sculptures, prints, and books which ultimately travelled to eleven other major German cities. Shortly after the Munich exhibition opened, Hitler’s cultural minister, Joseph Goebbels, ordered a more comprehensive seizure and exhibition of the so-called modern art. This resulted in a substantial number of lootings reputedly consisting of an additional 16,558 works, and an alternative exhibition of artists favored by the Nazis such as Dutch and Flemish old masters or works by acceptable German artists. Some of these were personal favorites of Hitler who favored pastoral scenes by the Dutch masters or simple paintings focusing on animals or obvious, at least to the Nazis, Aryan-featured and physically strong men and blonde pastoral women. Ironically, the degenerate art exhibitions, which were designed by the Nazis to cause revulsion among the German art community and the general populace, ended up drawing in excess of three times the number of visitors who attended the official exhibition of the government approved-artists. Put in a modern context, in 1991 the Los Angeles County Museum of Art organized a well-received comprehensive program featuring a large amount of the degenerate art of this period. Other popular exhibitions were more recently put on by the Neue Gallerie, the current home of “The Lady in Gold,” and the Jewish Museum, both located in New York City.

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<sup>20</sup> SUSAN RONALD, *HITLER’S ART THIEF* 15 (St. Martin’s Press 2015); *see also* MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* (N.Y.C. Press 2003). Professor Bazylar, a good friend and an important historical figure in this area, characterized the confiscations in this as “the greatest displacement of art in human history.”

<sup>21</sup> *See* Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473 (2010).

<sup>22</sup> *Id.*

Sadly, many priceless works were simply destroyed as a result of the Nazis enforcing their horrendous ideology. For example, the staff of the ERR,<sup>23</sup> the designated German government vehicle for dealing with looted art, was careful to differentiate Jewish family portraits and Jewish-themed works. The ERR kept the Jewish works hidden away in, among other places, three separate rooms in the Louvre while avariciously regularly selling off many works by non-Jewish artists. There, as reported by the heroic French curator Rose Valland,<sup>24</sup> an Assistant Curator for the Jeu de Paume, the staff would periodically slash a number of these paintings to ribbons as if in a strange ritual.<sup>25</sup> In fact, on May 27, 1943 a group of other paintings considered unfit for sale were trucked to the general Jeu de Paume storage facility, where the Nazi authorities lit a bonfire in the garden and destroyed between five and six hundred masterpieces in the process. The list of artists whose paintings were destroyed reads like a historical “Who’s Who” and includes Miro, Klee, Ernst, Picasso, Leger, and Kisling.<sup>26</sup> This list presumably would be expanded if more details were known about the ultimate fate of the thousands of unaccounted-for looted works, some of which were likely privately destroyed.

Although the lootings commenced concurrently with the initial seizure of power by the Nazis in the early 1930’s, as the Nazi leadership began to steal Jewish artistic and cultural treasures and to build up a bureaucracy to accumulate, evaluate, and relocate the works; it was not until 1941 that the Nazis, with the assistance of the ERR, “turned their art-looting operation into a smooth-running machine,” in conjunction with the Blitzkrieg which ultimately ran through occupied Russia.<sup>27</sup> Other similar departments were set up by the Nazis throughout Europe. A significant number of the seized works were in turn inventoried at the Jeu de Paume and other reputable museums and galleries. Often, as noted above, they were traded for cash or other works by using galleries and individuals in France and other European entities and individuals in neutral Switzerland, Spain, or Portugal.<sup>28</sup> As one commentator focusing on the Paris-based looting succinctly put it: “For some there were profits to be made on the side, for others there was ideology to enforce.”<sup>29</sup>

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<sup>23</sup> The ERR was technically known as the Einsatzstab Reichsleiter Rosenberg für die Besetzten Gebiete and also known as the Reichsleiter Rosenberg Institute for the Occupied Territories.

<sup>24</sup> Ms. Valland, the so-called heroine of French cultural preservation during World War II and an Assistant Curator at the Jeu de Paume, is featured in many books and in the films *MONUMENTS MEN* and *THE TRAIN* (with Burt Lancaster). She deserves at least an entire article to describe the full scope of her accomplishments. See, e.g., PATRICK BUNKER, *THE INSPIRATIONAL ADVENTURES OF THE MONUMENTS MEN* (Amazon Digital Services 2014); ROBERT M. EDSEL, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES AND THE GREATEST TREASURE HUNT IN HISTORY* (Little, Brown and Company 2013).

Jacques Jaujard, the Director of the French National Museums and Ms. Valland’s overall supervisor, was also a great hero in this process. He personally supervised the transportation of the Louvre’s valuable contents and a total of 3,690 paintings, including the “Mona Lisa” and the “Venus de Milo.” These paintings were transported to safer, often multiple, locations before the Nazi looting of Paris began. Mr. Jaujard was honored by the post-war government for his work.

<sup>25</sup> See DAVID PRYCE JONES, *PARIS IN THE THIRD REICH* 93 (William Collins Sons 1981).

<sup>26</sup> *Id.*

<sup>27</sup> See ALAN RYDING, *AND THE SHOW WENT ON* 163 (Knopf 2010).

<sup>28</sup> See MELISSA MULLER AND MONIKA TATZKOW, *LOST LIVES, LOST ART* 232-234 (The Vendome Press 2010).

<sup>29</sup> JONES, *supra* note 25, at 93.



To put this large-scale and systematic pillaging of valuable art works in its proper perspective, reliable sources have estimated that Nazi authorities had accessed the assets of just German and Austrian Jews at the staggering aggregate value of approximately eight billion Reichsmarks as early as 1938. Looked at from a broader perspective, between 1933 and 1945 Nazi soldiers and their agents are estimated to have seized or forced the sale of at least approximately *one-fifth* of all Western Europe's finest art, involving at least 650,000 works.<sup>30</sup> If other types of cultural artifacts such as statues, jewelry, and silverware are included in the totals, the value of stolen property runs into many millions of dollars. In fact, the aggregate value of the Nazi-looted art has been said to exceed the total value of all of the artwork held in the United States in 1945, with its aggregate value estimated to have been \$2.5 billion at the time *or approximately \$20.5 billion using current values!*<sup>31</sup> Furthermore, this estimate preceded the massive amount of art works located in the Munich apartment owned by Cornelius Gurlitt and identified in 2013, which had been preliminarily estimated by some commentators to be worth as much as an additional \$1 billion in current value.<sup>32</sup>

It has been suggested by art historians that a large number of artistic, cultural, and ritual objects looted by the Nazis (perhaps as many as 100,000) have not been located, let alone properly catalogued. Marc Masurovsky, a leading Holocaust historian as well as a good friend and non-lawyer colleague of mine, is in the process of periodically updating an ongoing and detailed database of looted properties, including properties recovered and those still missing. Marc has already compiled a partial list of European-based, mostly French, items containing details regarding in excess of 30,000 items, a significant portion of which remain missing. Marc's list and other helpful inventory lists are regularly refreshed as the Internet and the press continue to report on looted art finds and/or cases on a regular basis.<sup>33</sup>

Many of the looted artworks which survived the Nazi era ended up in American private collections or museums, in some instances as a result of the work of the Monuments Men, who were the subjects of the Hollywood film<sup>34</sup> featuring George Clooney, Matt Damon, and other celebrity actors, and based on Robert M. Edsel's book, *THE MONUMENTS MEN*.<sup>35</sup> As an aside, while some of the Monuments Men had an artistic and even curator-type background, many were simply ordinary soldiers who believed in their cause and risked their lives trying to undo at least some of the looting or felt that it was preferable to the dangers of serving as ordinary foot soldiers despite the very real dangers of wartime activities. Together they embarked on a program to reverse the Nazi looting and destruction. Indeed, one commentator has

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<sup>30</sup> See Kelly Ann Falconer, *When Honor will not Suffice: The Need for Legally Binding Informational Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT'L ECON. L. 383, 383-384 (2000).

<sup>31</sup> See BAZYLER, *supra* note 20, 202.

<sup>32</sup> See RONALD, *supra* note 20, 4. See also Jimenez, *supra* note 14, 140.

<sup>33</sup> Another very informative and helpful database is The Central Registry of Information of Looted Cultural Property 1933-1945 maintained by the London-based Commission on Looted Art in Europe which contains approximately 25,000 looted artworks covering twelve European countries. THE CENTRAL REGISTRY OF INFORMATION, <http://www.lootedart.com/>.

<sup>34</sup> *MONUMENTS MEN*, Columbia Pictures and Babelsberg Studio (2014).

<sup>35</sup> ROBERT M. EDSSEL AND BRETT WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY* (Little, Brown and Company 2013).

suggested that the approximately 350 Monuments Men and Women embarked on the most important “treasure hunt in history.”<sup>36</sup>

The Monuments Men approved the foundation of the “American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas,” widely known as the Roberts Commission, and formally referred to as the “Monuments, Fine Arts and Archives Section” (“MFAA”) of the Allied Army. The group was first approved by President Roosevelt on or about June 23, 1943. Their original task was to accompany the troops as a type of specialized advance guard. This mission later evolved into their role of repatriating looted art to their countries of origin. Despite some scenes from the film, they were generally not involved in following up on the search for the actual institutional or individual pre-Holocaust owners. Nonetheless, much of the group remained in Europe for up to six years following the end of the war overseeing the restitution process and helping to rebuild cultural life in what was left of the Jewish and other captive communities in Germany and occupied Europe. The Monuments Men returned in excess of five million artistic and cultural items looted by the Nazis.<sup>37</sup> Their cultural contributions did not end there. Many Monuments Men had prominent post-war roles in connection with important cultural and educational institutions in the United States. In fact, the New York City Ballet, the National Endowment for the Arts, and the National Endowment for the Humanities were all developed by Monuments Men.

I had the unique pleasure of recently sharing the podium at a lecture with ninety-year-old Monuments Man Heinz (Harry) Ettliger, who describes himself as the healthiest survivor of the group. Harry easily had the most unique background. Born in 1926 to a middle-class German-Jewish family, he fled with his family after the Anschluss (and just after his bar mitzvah) to Switzerland by train, and then to New York by boat, arriving on October 9, 1938. Not only was his the last sanctioned bar mitzvah in his area, but upon coming of age in America, Harry began his service in the United States Army and was subsequently sworn in as an American citizen on August 1, 1944. On January 28, 1945, Harry was separately assigned, along with two others, to a small unit. Then in early May of 1945 he was assigned to the Monuments Men group, personally serving under Monuments Men Captain James J. Rorimer.<sup>38</sup> After the war, Harry worked in the sewing machine and defense industries, ending up as a deputy program director for the submarine-launched Trident missile.<sup>39</sup>

Unfortunately, while the actual Monuments Men performed yeoman service in connection with the return of many looted works to the countries of origin, the ultimate repatriation to their rightful owners or their descendants was, for a number of reasons, generally beyond the scope of the activities of the Monuments Men and left to the discretion of the post-war European governments and/or their state-run museums. Moreover, a number of Allied and Russian soldiers simply took home

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<sup>36</sup> *Id.*

<sup>37</sup> *The Monuments Men*, Monuments Foundation for the Preservation Of Art, <http://www.monumentsmenfoundation.org/the-heroes/the-monuments-men> (last visited Apr. 25, 2016).

<sup>38</sup> Harry and Captain Rorimer visited the famous Walt Disney-like Neuschwanstein Castle, the repository of an overwhelming amount of looted art.

<sup>39</sup> See EDSEL, *supra* note 35, 424; Interview with Heinz Ettliger, Monuments Men, Wuersch & Gering, LLP in New York City, NY (March 10, 2016).

valuable pieces of allegedly abandoned European art as souvenirs for their families. Other pieces were inadvertently ruined or destroyed; with the individual causing the destruction not necessarily intending to do so.

For many reasons, some of which are discussed in this article, only a very small number of successful claims were historically and successfully made and resolved in the United States or Europe in the immediate post-war era. For one thing—while a number of works were accessible in areas such as large salt mines, Nazi mansions, Nazi staging areas, plush offices, prominent castles, churches, and museum vaults—many valuable works were retaken by local civilians, ordinary Americans, and other Allied soldiers and stored away in places far from their original homelands. Furthermore, at the end of the war the Jewish refugee population as a whole was generally and understandably preoccupied with their assimilation into normal American or European life as opposed to seeking the return of family valuables. Finally, the historic process of reclaiming looted artwork was accurately characterized and portrayed in a leading English commentary as “often opaque, ad-hoc, expensive and uncertain.”<sup>40</sup>

Since this earlier period of understandable indifference and inattention, many commentators have observed a growing interest by the dwindling number of victims and, more commonly, their descendants, to see if the American legal system, independently or to some extent in conjunction with the post-War European legal systems, has the tools to establish the true owners of the works, order their return, and to, at least symbolically, reverse one important and cruel Nazi goal, like in the *Altmann* case.<sup>41</sup> As we have observed, American jurisprudence, while not perfect and self-evidently subject to improvement, has nonetheless responded in some positive ways to this renewed interest in looted art.

## II. THE HISTORIC LEGAL PRINCIPLES GOVERNING THE POTENTIAL REPATRIATION OF LOOTED ART

The relatively small group of American lawyers who, like myself, have been working in this area have, on behalf of the families of our Holocaust victims, been doing all we can to locate the current possessors of these works as the search for the provenance of and the quest for repatriation of such looted art continues to become more sophisticated and more accurate. Over the many years that I have practiced in this area, I have observed a growing (but unfortunately not universal) recognition in the international art law world among the members of the international art community, and even shared by a number of museums and their in-house representatives, that *cultural property wrongfully taken from its rightful owners should be returned to those owners*. This recognition and the fundamental premise that since the 1830's under Anglo-American law a thief can *never* obtain or pass good title to stolen American 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 an otherwise “bona fide purchaser”) has been the guiding

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<sup>40</sup> See *The Economist Explains How is Nazi-looted art returned?*, THE ECONOMIST, (January 12, 2014, 23:50 PM), <http://www.economist.com/blogs/economist-explains/2014/01/economist-explains>.

<sup>41</sup> i.e., the eradication of European Jewish culture.

principles at the heart of the development of a comparatively favorable historical body of law in the United States. It was the underpinning of *Republic of Austria v. Altmann* that occupied our firm's time and interest for many years and culminated in the very important and successful Supreme Court procedural ruling on sovereign immunity in 2004. This case was discussed at length in our prior article and I would refer the reader to that article for any further details.<sup>42</sup>

While there have been—and presumably will continue to be—battles among the claimed heirs and competing families, it seems that there will also continue to be potential procedural defenses raised by at least some museums<sup>43</sup> and family lawyers to the otherwise absolute admonition. The bottom line and starting point for any discussion of looted art in the United States is that the rightful historic owner of looted property need only establish two elements in order to prove a prima facie claim, regardless of the number of intervening transfers or thefts. These elements are: (i) ownership through the introduction of the property's provenance and (ii) the original theft. The historic starting point for this doctrine is the 1839 New York Court of Appeals ruling in *Hoffman v. Carow*.<sup>44</sup> A sister American doctrine was developed by the American courts at the end of World War II and provides that the laws and execution of Nazi Germany are invalid *per se* and should never be recognized as “acts of state” because Germany under Nazi rule should as a matter of law not be respected as a “sovereign state.”<sup>45</sup>

In theory all governments are subject to the London Declaration of 1943,<sup>46</sup> which invalidated any Nazi property transactions. However, the actual laws in various European jurisdictions appear to American looted art lawyers to be inconsistent and somewhat less transparent, with some countries like Austria adopting the American rule, and others like Switzerland authorizing a good faith purchaser of stolen property to acquire title superior to the rightful owner(s) and presumes that a purchaser of any type of property, whether stolen or not, is presumed to have acted in good faith. In Europe, there is the added factor that at least six countries have set up state-mandated advisory committees or commissions designed to provide a mechanism for victims to obtain evidence and assistance for seeking restoration of their cultural property.<sup>47</sup> The respective jurisdictions, procedural processes, and enforcement powers, if any, of these mostly advisory entities obviously vary, although they share the common goal of fairly determining the legitimacy of Holocaust-related claims. A related, albeit separate, factor is the existence of art restitution statutes,

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<sup>42</sup> Burris and Schoenberg, *supra* note 2.

<sup>43</sup> The museums' at least occasional reliance on the general “technical” defenses to attempt to defeat otherwise meritorious claims has been criticized as being inconsistent with the spirit of the Washington Principles. See, e.g., Patricia Cohen, *Museums Faulted on Restitution on Nazi-Looted Art*, NEW YORK TIMES, (June 30, 2013); see also discussion, *infra* note 50.

<sup>44</sup> *Hoffman v. Carow*, 1839 N.Y. Lexis 21.

<sup>45</sup> See *Weiss v. Lustig*, 58 N.Y.S.2d 547 (1945).

<sup>46</sup> The Declaration is technically referred to as “The Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, January 5, 1943.”

<sup>47</sup> The six countries are: (i) Germany (German Lost Art Foundation); (ii) Austria (“Beirat”); (iii) The Czech Republic (Rychetsky Commission); (iv) France (Commission for the Compensation of Victims of Spoliation Resulting From the anti-Semitic Legislation enforced During the Occupation (“CIVS”)); (v) The Netherlands (Restitution Committee); and (vi) the United Kingdom (Spoliation Advisory Panel (“SAP”). Some commentators do not equate the Czech Commission with others, leading them to identify only five commissions but I have included it in the interest of completeness.

which vary in effectiveness in almost all of the countries that came within the Nazi orbit.<sup>48</sup>

In fact, some American jurisdictions have developed their own procedural ramifications. One of the most significant is the New York rule that an original owner may seek to reclaim looted property for a period of three years from the time that he or she demands its return and the demand has been refused.<sup>49</sup> By contrast, in other jurisdictions as close to New York as New Jersey, the statute may run from the time that the work was taken or from the time that the plaintiff had discovered or should have discovered the misappropriation.<sup>50</sup>

I wish that I could report to you equivalent success, or at least fair settlements, in all of our other American cases, whether brought in California or elsewhere, but that would not be an entirely accurate claim. Moreover, even those cases like *Altmann* which ended with a dramatically successful result for our firm, can often be very time-consuming and economically and emotionally draining for both the claimant, in Maria's case an elderly but very sharp widow, and for her or his family members.

Looking to early international pronouncements on these issues, the initial Hague Conventions date back to 1899 and 1907, respectively. The 1899 Convention banned the taking of most forms of non-military property. Unfortunately, however, no Convention provided for potential worldwide authority for a state to take action against violators in their own tribunals, and there was no such Convention approved until our country was well into the post-World War II era in the 1950's.<sup>51</sup> Finally, in the spring of 1954 after a series of proposals had been vetted and discussed, an Intergovernmental "Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict" was adopted by the United States and many other countries. The treaty provided a clear definition of "cultural property," and under the terms of Article 28 all signatories must move forward with "all necessary steps to prosecute and impose penal and disciplinary sanctions" upon any country's violators. China and Japan, but not the United Kingdom, became signatories in 2000 and 2007, respectively. While the United States signed the treaty in 1954, we only formally ratified it within the last year. The full scope and future utilization of the Hague Conventions is a subject well beyond the scope of this Article. There seems to be an ongoing debate as to whether the Conventions' treaty provisions can be considered binding as customary international law.

The more modern and well-known development of the American legal principles governing the disposition of looted art can be traced to the 1998 Washington

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<sup>48</sup> The most-referenced exception has traditionally been Poland, although there are political groups in that country who reportedly have come out in favor of such legislation and further suggestions that their efforts may well ultimately be successful.

<sup>49</sup> See *Mirvish v. Mott*, 18 N.Y.3d 510, 942 N.Y.S.2d 404 (2012) *reconsideration denied*, 2012 WL 1988434 (N.Y. Ct. App. June 5, 2012).

<sup>50</sup> See, e.g., the so-called "discovery rule" applied in New Jersey. Judith Wallace, *New York's Distinctive Rule Regarding Recovery of Misappropriated Art After the Court of Appeals; Decision in Mirvish v. Mott*, *Spencer's Art Law Journal* (Spring 2012), <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-7-18-12.asp#wallace>; see also *O'Keefe v. Snyder*, 83 N.J. 478 (1980).

<sup>51</sup> See Colin Woodard, *The War Over Plunder: Who Owns Art Stolen in War?*, 5, *MHQ* (Summer 2010).

Conference on Holocaust Era Assets. In that year representatives from forty-four countries met in Washington, D.C. and developed the so-called “Washington Conference Principles,” consisting of eleven principles concerning Nazi confiscated art, including two basic principles that have come to be referred to as the “Washington Conference Principles.” These underlying principles are: (i) that pre-war owners and their heirs and assigns should be encouraged to come forward to make their claims known; and (ii) that reasonable steps should be undertaken on an expeditious basis to develop “fair and just claims procedures” with expanded rules of evidence so that the looted art can be returned to its rightful owners. A comprehensive description of the development of these and the other principles is found in Stuart Eizenstat’s interesting book entitled *IMPERFECT JUSTICE*.<sup>52</sup>

In the period since the Washington Conference convened, it is self-evident that a number of American and foreign government authorities have looked far more closely at art that has any type of questionable provenance. Many auction houses, museums, and collectors are determined to avoid dealing with art with any serious gaps in its reported provenance at any time during the Nazi era. On a country-wide basis, some of the most affected nations have enacted helpful laws and regulations governing state entities such as state museums. Some of these positive developments were related to the development of the Washington Conference Principles. However, many of these Principles are, in too many instances, being ignored or, at minimum, being bypassed. Moreover, the Principles, while respected on at least a moral level, do not have the full force of the law attached to them. In a survey conducted in conjunction with the 2009 Prague Conference on Holocaust Assets, there was evidence presented of a clear disparity between those nations that appear to be moving forward and those that are not improving the process. The authors of the study found the practices of the governments of Hungary, Poland, Russia, and the Baltic Republic to be particularly at fault.

### III. THE SUBSEQUENT DEVELOPMENT OF LOOTED ART LEGAL PRINCIPLES

Beginning in the mid- to late-1990s, the heirs of survivors, museums, and even some government authorities, particularly those individuals and entities residing in the United States, finally began to seriously reexamine the history of the artworks that had been looted by the Nazis but never returned to the families of the original owners. In this context the end of the Cold War led to the availability of many previously classified archives in the Eastern Bloc. Furthermore, the development of the Internet effected a substantial change in the ability to research this area, and more serious scholars turned their attention to writing books about Nazi looting. *THE RAPE OF EUROPA* by Lynn Nicholas,<sup>53</sup> which formed the basis for a full-length and well-received documentary film, was completed in 1994 and served as an example for what was to follow. The following year, Konstantin Akinsha and Grigori Koslov, two very competent researchers, worked with Sylvia Hochfeld of *Art News* to

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<sup>52</sup> See STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (PublicAffairs 2003).

<sup>53</sup> LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Knopf 1994).

publish BEAUTIFUL LOOT. Indeed it is difficult, if not impossible, to accurately consider the comparative significance of these developments in the development of the legal principles culminating with the *Altmann* case.

It is also very difficult to adequately discuss in a short period the leading cases with which I and/or my colleagues have been involved, to concurrently review all that has happened in connection with Holocaust restitution claims in the U.S. since the mid-1990s, and to provide the reader with a reasonable prediction as to what the future holds for this in flux area of American law, and to some extent foreign law. I have tried to do as much as I can to describe this history, highlight at least some of the recent developments, and hopefully provide some reasonable insight into the current legal framework for Holocaust restitution claims.

I have personally and extensively been involved in dealing with the legal issues involved with Nazi-looted art for many years. It is a fascinating area of law, which combines traditional legal research, historical conceptualization, and not a small amount of detective work as my colleagues and I attempt to retrace the historical details of the enormous art theft carried out by the Nazis. There is a very small cadre of American lawyers who regularly practice in this field, and while my closest colleagues tend to primarily represent a fair number of plaintiffs, we are also periodically called upon by galleries, museums, auction houses, and even private owners to sort out their conflicting ownership claims in a mutually fair manner. In this regard I have been very impressed with the sense of professionalism and courtesy that prevails not just among our group but also among many of our opposing counsel, who represent current owners, museums, and galleries on a regular basis and who have generally been fair adversaries in the courtroom, the classroom, the auction houses, and on the lecture circuit, while remaining zealous opponents in connection with a particular dispute.

In facing the daunting task of trying to describe my involvement in this fascinating area of the law in a relatively brief period of time, I have been making oral presentations since 2005 using a brief PowerPoint presentation which begins with a dedication to a courageous heroine, Maria Altmann, followed by a historic overview of the work of the U.S. Army's "Monuments Men," and then proceeds to depict the actual paintings from cases involving issues that have arisen. The highlight of these slides has traditionally been the depiction of the actual five Gustav Klimt paintings which were involved in our seminal *Altmann* case.<sup>54</sup> The paintings were successively retrieved and resold for the benefit of the family, one in a private sale and four in a collective and well-attended subsequent auction at Christie's New York City. There is also a depiction of a Picasso gem entitled "Femme En Blanc," which was once a "lost painting" and resulted in some vindication in *Bennigson v. Alsdorf*.<sup>55</sup>

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<sup>54</sup> Republic of Austria v. Altmann, 541 U.S. 677 (2004).

<sup>55</sup> Bennigson v. Alsdorf, S124828 (Cal. July 28, 2004), available at <http://appellatecases.courtinfo.ca.gov>; Alsdorf v. Bennigson, No. 04 C 5953, 2003 WL 2806301, at \*1 (N.D. Ill. Dec. 3, 2004).

## IV. PORTRAIT OF WALLY, VON SAHER, MOVSESIAN AND OTHER MORE RECENT AMERICAN FILINGS (PART ONE)

In overviewing this area, I have in my earlier Vanderbilt Law School article<sup>56</sup> discussed in some detail the significance of the seminal California-based *Altmann* and *Benningson* cases. Both cases involved years of arduous litigation, *Altmann* in the federal courts and *Benningson* through the state and federal courts in Los Angeles and Illinois. In this section of my follow-up article, I focus on the issues in the D.C.-based *Portrait of Wally* case, a drawn-out proceeding with a good and very important end result; the *Von Saher* case which is set to go to trial in the California District Court within the year; and a number of cases in various judicial venues (mostly federal) which have been decided, at least in part, in the intervening years.

In the *Altmann* case, we litigated against the Austrian government on important procedural issues at each level of the American federal courts, including the United States Supreme Court, and were awaiting the ultimately successful and unanimous decision by the specially-selected Austrian arbitration tribunal, which was featured in the film about our case. In *Benningson*, as explained in my prior article, we felt like ping-pong balls being directed back and forth between state and federal tribunals in California and Illinois, the home of the very well-connected defendant Mrs. Alsdorf (a wing of the Chicago Museum of Art bears her name), before ultimately entering into a significant settlement in excess of \$6 million for our client, a Berkeley law student and the grandson of the former owner of the classic Pablo Picasso painting.<sup>57</sup> Since the article was published, our client has been fully paid and the painting remained on the defendant's walls in Chicago until she sold it for an amount well in excess of the monies paid in settlement to Mr. Benningson.

The *Portrait of Wally* case began with a subpoena issued in January of 1998 by New York District Attorney Morgenthau at the behest of the heirs of Lea Bondi Jaray, a looted art seizure victim. Ms. Bondi had owned a 1912 painting by Austrian painter Egon Schiele of Valerie "Wally" Neuzil, a teenager who was one of Schiele's favorite models. The painting, along with another Schiele work, had allegedly been wrongfully seized by the Austrian Nazi authorities from their family in 1939. The "Wally" portrait had in turn been obtained in 1954 by the well-known collector Rudolf Leopold, and became an important part of his Leopold Museum's collection. Meanwhile, Ms. Bondi died in 1969. At the time of the subpoena, both paintings were included in a 1997-98 exhibition of Schiele's work at the Museum of Modern Art ("MoMA") in New York City. The provenance of the painting was first revealed to the heirs by an article in the New York Times and Mr. Morgenthau's subpoena was issued seeking to forbid its return to Austria.

In September of 1999, the New York Court of Appeals ruled that the painting could not be seized under state law. Acting on the heirs' request, the United States Customs Service subsequently seized it under *federal* law and eleven years of legal in-fighting followed. In bringing their private action through Mr. Spiegler and his firm, the heirs contended that Ms. Bondi had made repeated efforts to reclaim the painting and that the museum's alternative contentions: (i) that it was not a looted

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<sup>56</sup> See Burris and Schoenberg, *supra* note 2.

<sup>57</sup> *Id.*



painting; and (ii) that Ms. Bondi had agreed to give up her claims in 1954; were both without merit.

In 2002, the Leopold and MoMA filed a comprehensive series of motions to dismiss on various grounds, including the alleged lack of scienter and intent on the parts of Dr. Leopold or the Leopold Foundation and the contention that the action denied due process to the museums. Each one was rejected by Judge Mukasey on April 12, 2002. Judge Mukasey concurrently granted a motion for summary judgment brought by the Bondi heirs, which dismissed the competing claim brought by the heirs of Ms. Bondi's husband, Alexander Jaray.<sup>58</sup> Finally, in 2009 Judge Loretta A. Preska of the Southern District of New York ruled that there was enough evidence regarding ownership of the paintings to allow a jury trial on the merits to proceed. Judge Preska found that the Leopold Museum's representatives were aware of the provenance issues when the painting was sent to MoMA in 1997. The main issue was whether it could be established that Mr. Leopold was aware of the painting's tainted provenance when it was sent to the United States to be exhibited.

Mr. Leopold died in June of 2010. One month later the protracted legal proceedings were finally and positively terminated by a settlement, pursuant to which the Leopold Museum agreed to pay \$20 million to the heirs for the right to rehang the painting together with a Schiele self-portrait. In addition to its specific ramifications for museums and collectors interested in loan arrangements, the case served as further post-*Altmann* recognition of the rights of families to seek redress for Nazi looting in the face of a defendant-museum's procedural and substantive denial of the claims. It also represented another example, analogous to the situation in our *Benningson* case,<sup>59</sup> of a group of experienced looted art attorneys successfully working together with the helpful cooperation of the federal authorities to bring some comfort to the families of the victims of Nazi art looting.

Another American case of some significance is the California-based case of *Von Saher v. Norton Simon Museum*,<sup>60</sup> an ongoing case in which I served for some time as local counsel for the claimant. This case involves a very well-known work (really a "double work") by Lucas Cranach the Elder entitled "Adam and Eve" which is prominently displayed at the Norton Simon Museum in Pasadena, California. The *Von Saher* litigation presents another somewhat complicated looted art scenario with the plaintiff based on the East Coast and California's legislature enacting a new compromise statute of limitations legislation after the first unfavorable decision, and another case, much like *Altmann*, where the initial forum was the local Central District of California. By contrast, *Benningson* was initially a California state court filing as there was no complete diversity jurisdiction between the parties as required by federal law—the plaintiff and her co-defendant were both California citizens. A subsequent complaint was filed in the federal district court by the Assistant United States Attorney who became interested in what he perceived as an injustice that allegedly violated federal law. Any reader with some familiarity with American

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<sup>58</sup> *United States v. Portrait of Wally, A Painting by Egon Schiele*, 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

<sup>59</sup> *See United States of America v. One Oil Painting Entitled "Femme En Blanc" By Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

<sup>60</sup> *Von Saher v. Norton Simon Museum*, 754 F.3d 712 (9th Cir. 2014).

television programming will understand why we often refer to the Cranach work as the “Desperate Housewives” painting since it was used by the show’s producers as a backdrop to the opening credits for the somewhat controversial Sunday evening soap opera of the same name.

The developing case law in this area has also led to certain relatively consistent and comprehensive practices for our claimant bar. As I noted earlier, this legal area has been rightly described as “expensive and uncertain,” and the attorneys who work in this field are as much detectives as they are lawyers. Each case presents its own set of historical facts and circumstances which must be carefully researched either in the first instance based on a blank slate or where the alleged facts are brought to the table by the client, and reviewed carefully by the lead attorneys for their legal implications. At that point the litigating attorneys must transform themselves into zealous and careful advocates and in the process deal with a wide range of procedural and substantive issues, with particular reference to the applicable forum law, any gaps in the provenance of the works, the applicability of potential legal defenses as personal jurisdiction, sovereign immunity, and the applicable statute of limitations or statute of repose beyond the applicability of more standard time-related potential defenses.

One leading defense with self-evident international overtones is the international application of the time-honored sovereign immunity defense, which was extensively dealt with and ultimately rejected by the Supreme Court in the *Altmann* case. This was also one of the defenses raised in the Ninth Circuit’s complex *Cassirer v. Thyssen-Bornemisza Collection Foundation* case,<sup>61</sup> which involved a classic Pissarro oil painting entitled “Rue Saint Honore, Apies midi” that was seized in 1939 by a Nazi government agent. The plaintiff was a Californian who was the grandson of a Jewish art collector that was forced to “sell” the priceless painting for about \$360 in order to be allowed to flee Germany. After the grandson learned that the painting was part of a collection purchased by the Spanish Government and transferred to a museum foundation, his counsel brought an action against both Spain and the Foundation in 2005.

In the course of the *Cassirer* action, the California federal courts had to deal with a wide range of international issues such as personal jurisdiction, standing, justiciability, sovereign immunity, and the potential liability of a country or entity which was not “involved” in the actual looting. The early Ninth Circuit decision rejected the claim of immunity under the Foreign Sovereign Immunities Act (“FSIA”).<sup>62</sup> In a later opinion of the Court,<sup>63</sup> a second panel<sup>64</sup> reversed, ruling that Judge Walter had wrongfully dismissed the action as the plaintiff’s claims were not in conflict with federal policy regarding the “internal restitution” but represented the equivalent of private property claims. On June 4, 2015, Judge Walter granted the defendants’ motion for summary judgment and trial was vacated pending appeal, an unfortunate sequel. The appeal is now pending. On February 4, 2016 a glimmer of

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<sup>61</sup> *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

<sup>62</sup> *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009).

<sup>63</sup> Cited as *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010).

<sup>64</sup> Judge Alexander, who had passed away, was replaced by Judge Wardlaw and Judge Nelson authored the opinion.

hope was provided by the California Attorney General who filed an amicus brief supporting the appellant in regard to at least one issue.<sup>65</sup>

Two additional and significant post-*Altmann* cases handled by other firms involved complicated fact patterns and important opinions by the United States Court of Appeals for the First Circuit. In the 2008 case of *Vineberg v. Bissonette*,<sup>66</sup> the appellate court granted summary judgment in favor of the successors in interest to the original owner of the valuable painting “Madchen aus den sabiner Bergen” by France Xavier Winterhalter (the “Winterhalter Painting”). The Winterhalter Painting was looted from Dr. Stern’s gallery by means of a forced sale to the Lempertz Auction House (“LAH”), a government owned purveyor, and sold by LAH for the benefit of the Nazi authorities. Dr. Stern fled to Canada and was not even provided with the severely diminished auction proceeds. After a series of post-war restitution claims made by Dr. Stern through British, Canadian, and German authorities, a German court awarded him damages for lost profits from the extensive looted inventory.

Dr. Stern passed away in 1987 and bequeathed the residue of his estate, including any interest in the Winterhalter Painting, to the “Stern Estate.” In 2004, the Stern Estate trustees began to make serious inquiries as to the provenance and whereabouts of the painting. The Trustees and the family discovered that the Winterhalter Painting had been purchased from the LAH in 1937 by Dr. Karl Wilharm and sequestered for over sixty years in a private collection owned by him and his descendants (with a brief exhibition in Kassel, Germany in the early 1950’s). In 1991, the painting was formally inherited from Dr. Karl Wilharm’s widow by his step-daughter Baroness Maria-Louise Bisson (hereinafter referred to as “the Baroness”), who had resided in America since 1956 and had taken physical possession of the Painting in 1959.

In 2003 the Baroness, a resident of Rhode Island, consigned the Winterhalter Painting to Estates Unlimited, a Rhode Island-based auction house. An auction was set to be conducted on January 6, 2005. Shortly before that date the auction house cancelled the auction because of the provenance objections raised by the Stern Estate representatives. Subsequently, the Stern Estate filed a claim with the New York Holocaust Claims Processing Office (“HCPO”) and the parties engaged in extensive negotiations. When the negotiations proved fruitless, the Baroness shipped the Winterhalter Painting back to Germany and commenced legal action in a German court, an obvious attempt to keep the Winterhalter Painting temporarily out of America. This caused the Stern Estate to file an action in the Rhode Island Federal District Court. The plaintiffs were the three trustees of the Dr. and Mrs. Stern Foundation and their complaint replevied for the Winterhalter Painting or, in the alternative, to obtain reimbursement for its value.

In an opinion that was helpful to our fellow plaintiff-attorneys, the District Court granted the trustees’ motion for summary judgment<sup>67</sup> and applied Rhode

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<sup>65</sup> Brief for The State of California as Amicus Curiae Supporting Plaintiffs-Appellants, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, (05-cv-03459-JFW), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/2016.01.29.jak\\_Cassirer\\_Amicus\\_Brief\\_of\\_California%20\[Corrected%20to%20Add%20Form%206%20Certificate\].pdf?](https://oag.ca.gov/system/files/attachments/press_releases/2016.01.29.jak_Cassirer_Amicus_Brief_of_California%20[Corrected%20to%20Add%20Form%206%20Certificate].pdf?)

<sup>66</sup> *Vineberg v. Bissonette*, 548 F.3d 50 (1st Cir. 2008).

<sup>67</sup> This was filed by my friend Tom Kline.

Island state law rather than German substantive law with regard to the replevin claim, based on the waiver of the defendants' right to argue that German law applied. According to the court, laches was not an appropriate defense because the plaintiffs had been diligent in pursuing their claims and the defendants had not established any provable prejudice. Finally, the district court rejected the claim that the defendant was entitled to reopen discovery on these issues.<sup>68</sup> While the ruling was obtained through creative lawyering by another friend, Tom Kline, it was helpful in many respects. Any counsel intending to rely on the ruling must be aware of the five footnotes appended to the opinion. These footnotes are set forth below and serve as admonitions to counsel who might otherwise be tempted to overstate the precedent.

The ruling, set forth in an opinion written by Judge Selya, first upheld each conclusion of the District Court, based on the premise that "the court had an appropriate rationale for granting the plaintiffs' motion for brevis disposition."<sup>69</sup> Judge Selya went on to set forth the following five footnotes:

1. The defendant has not argued either claim preclusion or offset based on the German decree. Therefore, we do not probe the point more deeply.
2. The named plaintiffs are also executors of Dr. Stern's last will and testament. In this will, Dr. Stern bequeathed the residue of his estate, including any interest in the Painting, to the Foundation.
3. Although laches historically had force under Rhode Island law only in equitable proceedings<sup>70</sup> the district court assumed, without deciding, that it could be invoked in a replevin action.<sup>71</sup> As the parties have not raised this issue on appeal, we indulge the same assumption.
4. The defendant did allude to the difficulty of locating documentary evidence in her objection to a motion to compel discovery, but she did not relate that supposed difficulty in any way to her laches defense.
5. Execution of the judgment may prove to be a different matter. The record indicates that the Winterhalter Painting is now in Germany, and it is not clear to what extent (if at all) it is still subject to the defendant's control. The plaintiffs, however, have not yet attempted to execute the judgment of replevin, so this issue is not before us.<sup>72</sup>

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<sup>68</sup> Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D.R.I. 2007).

<sup>69</sup> Vineberg v. Bissonnette, 548 F.3d 50, 59 (1st Cir. 2008).

<sup>70</sup> See, e.g., Jonklaas v. Silverman, 117 R.I. 691, 370 A.2d 1277, 1280 (1997)

<sup>71</sup> Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 308 n. 16.

<sup>72</sup> Vineberg v. Bissonnette, 548 F.3d 50, n. 1-5 (1st Cir. 2008).

The other First Circuit case, *The Museum of Fine Arts (Boston) v. Seger-Thomschitz*,<sup>73</sup> decided several years after *Vineberg*, contains a complicated factual scenario like many of the other cases that have been decided in the years following the Supreme Court's ruling in *Altmann*. The ultimate First Circuit decision in *Seger-Thomschitz* was unfortunately unfavorable to the claimant. A family nurse was designated as the "universal successor" in the will of the Austrian former owner of the painting at issue in the case, who had "transferred for sale" the painting to a Parisian gallery in 1939 along with several other paintings. After the Anschluss, he was forced by the Austrian Nazis to list on a required form "declaration" of all of his valuable properties as a prelude to their seizure.

The significance of *Seger-Thomschitz* is not only its outcome and its relatively recent date, but also the fact that the American museum-defendant<sup>74</sup> aggressively pursued a modern procedural museum remedy: a declaratory judgment action based on the traditional Massachusetts three-year statute of limitations without being required to rebut the factual allegations supporting the plaintiff's position.<sup>75</sup> Many claimant lawyers believe that this tactic, characterized by some as "winning the race to the courthouse," 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. This issue is, to say the least, very current and controversial with no small debate over whether these types of statutory defenses are substantive or procedural. Furthermore, it is also debatable whether they represent a defense interposed by defense counsel on the merits of the case after the museum lawyers have carefully researched the subject, or simply an important procedural roadblock based on technical arguments that have little to do with the particular facts of a case. This debate is ongoing, and is likely to remain ongoing for some time. The position of our fellow claimant attorneys was in my view well stated by Stuart E. Eizenstat, the former State Department envoy who negotiated the Washington Principles, and stated that "the essence of the Washington Principles comes down to one sentence; let decisions be made on the merits of the case rather than technical defenses."<sup>76</sup>

Any discussion of the repatriation of Nazi-looted art must include the group of relatively unsung heroes, the aptly named "Monuments Men" who, as described earlier, served in a special and relatively unknown section of the American Armed Forces and were devoted to the tracking and return of stolen European art and treasures. Many of the well-known American generals, such as General Eisenhower and General Bradley, were generally supportive of the efforts of these soldiers despite having a very difficult series of war campaigns to manage. As far as the paintings were concerned, while some of the works were inventoried in museums,<sup>77</sup>

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<sup>73</sup> *The Museum of Fine Arts v. Seger-Thomschitz*, 623 Fed.3d 1 (1st Cir. 2010).

<sup>74</sup> Through my museum attorney friend, Simon Frankel.

<sup>75</sup> Among the prestigious museums which have been cited as using this tactic are the Detroit Institute of the Arts; Toledo, Ohio Museum of Arts; the Museum of Fine Arts (Boston); and the Guggenheim Museum in New York.

<sup>76</sup> Patricia Cohen, *Museums Faulted on Restitution of Nazi-Looted Art*, N.Y. TIMES, (June 30, 2013).

<sup>77</sup>With particular reference to Parisian museums such as the "official" storage point at the Jeu De Paume.

others were hidden away in salt and copper mines that were difficult to access,<sup>78</sup> and some simply were hung on the walls of German and Austrian museums or of prominent Nazi plunderers.<sup>79</sup>

Nearly twenty-five percent of the Berlin Museum's art collection was reportedly found by accident by soldiers serving under General Patton as they were interrogating local civilians who lived near the Merkers, Germany mine. The mine was located in a massive cave with a flimsy wooden elevator that carried occupants down in excess of two thousand feet to view a treasure trove with bags of gold and cash and hundreds of valuable paintings and sculptures.<sup>80</sup> Still other works were hidden in basements, castles, monasteries, convents, family chests, and cellar furnishings with the latest "discovery" consisting of the above-referenced oil paintings, watercolors, prints, and drawings rolled up behind canned foods or furniture in Cornelius Gurlitt's shabby Munich apartment. As noted earlier, other works were brazenly kept on the walls of various Nazis until they were arrested in the post-war era. Added to this looting, and beyond the scope of this article or my experience, was the seizure by the Soviet troops in Germany and other Nazi-occupied countries of massive amounts of European cultural treasures,<sup>81</sup> including invaluable art, books, and archival documents and their transshipment to Russian museums.<sup>82</sup>

A few years after the Washington Conference, my friends and fellow restitution counsel Larry Kaye and Howard Spiegler—through their New York-based firm, Herrick and Feinstein—became involved in a very lengthy dispute over the "Portrait of Wally" painting. The case turned out to be the longest-running Nazi looting art case beginning with the painting being subpoenaed by District Attorney Morgenthau and involving over ten years of litigation. In the end, the perseverance of the attorneys led to a very good result. The litigation ended on July 20 with the Estate of Lea Bondi, the rightful owner, obtaining a nineteen million dollar settlement.

Not long after *Portrait of Wally* was finally resolved, a restitution claim was filed in the Netherlands against the Norton Simon Museum by Messieurs Kaye and Spiegler, with my firm serving as the initial California local counsel, on behalf of the claimant Marei Von Saher ("Marei"), the sole heir of the much respected pre-war Dutch-Jewish art dealer Jacques Goudstikker. The complaint sought to recover more than two hundred Old Master works that had been looted by the Nazis but ended up in the hands of the Dutch Government. Before World War II, Jacques Goudstikker ("JG") was one of the foremost art dealers in Europe, with an extraordinary collection housed at his Amsterdam Gallery.<sup>83</sup> After the Nazi invasion of Holland commenced, Herman Goering arranged a forced sale of approximately eight hundred of the best

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<sup>78</sup> This includes the mines at Merkers, Altaussee and Siegen which were used for both looted art and pre-war German and Austrian treasures.

<sup>79</sup> One of the paintings recovered by Ms. Altmann, Klimt's "Houses in Unterach on Lake Attersee," was traced to the walls of an important Nazi's residence.

<sup>80</sup> See BILL O'REILLY AND MARTIN DUGARD, *KILLING PATTON: THE STRANGE DEATH OF WORLD WAR II'S MOST AUDACIOUS GENERAL* 221 (Holt 2014).

<sup>81</sup> The Russian looting was said by at least one commentator to exceed more than 2.5 million European treasures. Colin Woodard, *The War Over Plunder: Who owns Stolen Art in War?*, MHQ (Summer 2010).

<sup>82</sup> KONSTANTIN AKINSHA AND GRIGORRI KOZLOV, *BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES* (Random House 1995).

<sup>83</sup> Many of these works of art were attributed to Dutch, Flemish, and Italian Old Masters.

artworks from the gallery's collection. JG, who had fled the Netherlands with his wife and their young son, managed to escape as the Nazi troops first began landing. JG managed to take with him a small black leather notebook containing an inventory of the majority of his collection. Although he tragically accidentally fell to his death aboard the ship carrying him and his family to safety, his family was ultimately able to cite the notebook as a basis for establishing their claims to the looted artworks.

In 1945, the Monuments Men recovered more than two hundred of JG's works that had been looted by Goering and sent them to the Munich Central Collecting Point where they were organized and catalogued. The works were then returned to the Dutch government in accordance with established Allied policy arising out of the 1943 London Declaration, which mandated that "acts of Nazi dispossession would be undone" and the local government was to hold the artworks in trust for their lawful owners. In 1946, JG's widow tried to unsuccessfully recover his property from the Dutch government and the government simply retained the works in its National Collection without having obtained legal title to them.

As discussed elsewhere in this article, following the seminal 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 determining these claims on the merits. The Netherlands is one of the six European countries which currently has such restitution commissions in existence.<sup>84</sup> In addition to setting up a commission, the Dutch government announced a policy that allowed claims to be made for the restitution of artworks that had been returned following the war but not yet restituted to their rightful owners.

Shortly after the deaths of JG's wife and adult son, in the mid-1990s a Dutch journalist informed the son's widow Marei, a resident of Connecticut, that much of the collection was still being held by the Dutch Government. In 1998, she filed a claim under the new restitution program. Unfortunately, the Netherlands State Secretary in charge of "Cultural Affairs" denied her application and subsequent court proceedings proved to be unsuccessful. In 2002, the Dutch Government adopted additional restitution guidelines closer in principle to the Washington Principles, and a new independent Restitutions Committee was formed and asked to make recommendations to the Ministry of Education, Culture and Science as to how such claims should be resolved.

In 2004, Marei filed a new application, through the Herrick firm, under the revised guidelines. With the assistance of the dedicated lawyers pursuing her Dutch claim, Marei ended up spending several years dealing with the claims process. This effort culminated in a hearing before the new Committee which issued its recommendation in December 2005 substantially in Marei's favor. That advice, however, remained confidential pending a final decision by the Dutch State Secretary. On February 6, 2006, the State Secretary formally announced that the Dutch government would retribute two hundred Goudstikker paintings to Marei<sup>85</sup> finding that the works had been involuntarily taken from JG by reason of Goering's forced sale. Following this restitution, Marei organized a traveling exhibition of a number of the restituted works, which travelled to several key locations throughout

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<sup>84</sup> See discussion *infra* Section VI.A.

<sup>85</sup> This included various priceless works by well-known artists.

the United States, including the San Francisco-based Jewish Museum and Christie's auction house gallery in New York which lovingly recreated a 1930's era European gallery as a creative backdrop for its exhibition.

Unfortunately, it is estimated that thousands of the looted works were never located by the Allies after the war and still, even at this late date, remain missing. To date, most of the restitution of works from the Goudstikker collection has in fact come from collections and institutions outside of the United States. As reported by Mr. Kaye, North American museums and collectors appear to have simply and generally been less cooperative than their Western European counterparts when presented with such claims by the family.

My participation in the effort to recover the Goudstikker paintings centered around the most well-known and valuable work looted by the Nazis from JG, a double work which consists of distinctive images of Adam and Eve painted by Lucas Cranach the Elder many centuries ago. In the early 1970s, the paintings came into the possession of the Norton Simon museum located in Pasadena. Marei discovered them there and attempted negotiate their release.

After years of unsuccessful and confidential settlement negotiations, a formal restitution action was commenced in the Los Angeles Federal District Court with my firm listed as formal local counsel, and the case was assigned to Judge Walter. Judge Walter subsequently granted the defendant Museum's motion to dismiss holding that a California statute that specifically extended the statute of limitations applicable to actions against museums and galleries for the recovery of Nazi-looted art was unconstitutional on the constitutional ground that the state statute infringed on the federal power to make and resolve war. We filed an appeal to the Ninth Circuit that was supported by the Attorney General of California and several other amici. The Court of Appeals affirmed in part and reversed in part.<sup>86</sup> The Court reinstated the case on the grounds that Marei could proceed under the general California statute of limitations provision for stolen cultural property,<sup>87</sup> but affirmed the ruling on the important constitutional issue holding that California had no "traditional state interest" in enacting the statute and that the statute thereby violated the foreign affairs preemption doctrine recognized by the Supreme Court in *Zschernig v. Miller*<sup>88</sup>. There was a strong dissent written by Judge Pregerson.

Marei's subsequent Petition for Rehearing was denied<sup>89</sup> and the Ninth Circuit agreed to stay the issuance of its mandate pending her petition for a writ of certiorari to the Supreme Court. In response to this petition, at our request the Court issued an order inviting the Acting Solicitor General to file a brief expressing the views of the United States on the question of whether California had the power to pass the statute. After the Solicitor General's brief was submitted, the certiorari request was ultimately denied.<sup>90</sup>

At the Ninth Circuit's direction, *Movsesian v. Victoria Versicherung AG*,<sup>91</sup> which presented similar statute of limitations issues in the context of certain Armenian

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<sup>86</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 970 (9th Cir. 2010).

<sup>87</sup> Cal.Code of Civ. Proc. § 338.

<sup>88</sup> *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>89</sup> *Von Saher*, 592 F.3d at 957 (9th Cir. 2010).

<sup>90</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037, *cert. denied*, (2011).

<sup>91</sup> *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2015).



genocide claims, and *Von Saher* were treated as related cases and were argued on the same day before the same three-judge panel. In *Movsesian*, the court considered the constitutionality of a similar California statute that extended the statute of limitations for victims and their heirs to recover on insurance claims in connection with the Armenian genocide allegedly perpetrated by Turkey. The majority decisions in *Movsesian* and in *Von Saher* were handed down nearly simultaneously, and the two statutes at issue were found unconstitutional because they conflicted with the Federal Government's foreign policy, to which the Ninth Circuit gave preemptive weight. Both decisions were authored by the late Senior Circuit Judge Thompson with dissents authored by Judge Pregerson. There was, however, one big procedural distinction in their disparate treatment. The plaintiffs in both cases filed petitions for rehearing and the *Von Saher* petition was denied within four months. Surprisingly, the Ninth Circuit did not rule on the *Movsesian* petition for approximately fourteen months! Then on December 10, 2010, long after Marei filed her certiorari petition, the court *granted* the *Movsesian* petition.<sup>92</sup> In this decision, the majority relied on *Alperin v. Vatican Bank*<sup>93</sup> and found that the statute fell within a traditional area of state interest and would only have an incidental effect on foreign affairs because it involved garden variety property claims. This was the exact argument Marei made to the Ninth Circuit a year earlier and which was summarily rejected. Marei immediately filed a supplemental brief with the Supreme Court to bring this astounding development to the Court's attention. Subsequently, Judge Thompson passed away and was replaced on the Ninth Circuit panel by Judge Wardlaw.

In the meantime, on September 30, 2010, Governor Schwarzenegger signed into law a bill amending California's Code of Civil Procedure § 338. This legislation extended the statute of limitations from three to six 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."<sup>94</sup> The bill also changed the accrual date for these claims, so that the statute of limitations will 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."<sup>95</sup> Under the prior law, a "discovery rule" applied, meaning that the statute began to run when the claimant either discovered *or reasonably could have discovered* her claim to the artwork. This legislative history suggests that it was designed to present a fairer and compromise approach to all looted art claims.

Marei filed a First Amended Complaint in the district court before Judge Walter, the same judge who had initially dismissed the case. Norton Simon's counsel subsequently filed a new motion to dismiss, Marei opposed it, and the motion was scheduled to be heard on March 26, 2012. Judge Walter again cancelled the hearing

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<sup>92</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010). Judge Pregerson, who originally dissented in both cases, was now writing the majority opinion in favor of the plaintiffs. Judge Thompson, who originally wrote the majority decision in both cases, was now dissenting.

<sup>93</sup> *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005).

<sup>94</sup> Cal. Code Civ. Proc. § 338(3)(A).

<sup>95</sup> *Id.* at (3)(A)(i).

and granted the motion to dismiss, rejecting Marei's arguments as to the new statute.

In 2014, the Ninth Circuit in its *second* decision, with the new statute at issue, finally decided an important procedural issue in our favor.<sup>96</sup> The majority found that under the new California statute, the claims of our client were not inconsistent with the federal government's internal restitution policy and remanded the case to determine if the litigation would implicate the act of state doctrine. What is more significant than the result was the language in Judge Nelson's opinion characterizing our client Marei as:

just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims, again, because the Cranachs were never subject to internal restitution proceedings. Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Goering during the war, even if such a result is no longer capable of being expeditiously obtained.<sup>97</sup>

After the case was remanded to Judge Walter, he denied yet another motion by Norton Simon to dismiss the case and the case is now in its pre-trial stage, with the trial expected to commence before the conclusion of 2016. It is difficult and somewhat inappropriate to speculate at this time as to the final outcome. One can only appreciate the intestinal fortitude of Marei and the timeless efforts of her counsel, the Herrick and Feinstein team, who are actively preparing the case for trial. Any questions about the current status of the case should be directed to Mr. Kaye, Mr. Spiegler, or Darlene Fairman at the Herrick Feinstein firm.

## V. ADDITIONAL SIGNIFICANT AMERICAN LITIGATION (PART TWO)

This article's summary overview should make it clear that in America, Nazi-forced sales are treated the same as outright theft and do *not* convey good title under the London Declaration. Starting with our *Altmann* case and continuing through the more recent cases described herein, many American courts are finally acknowledging that sales by Jews during the period 1933-1945 would not have been made but for their persecution during the Holocaust and *may* also be invalid. One example of this type of judicial pronouncement is in *Schoeps v. The Museum of Modern Art*.<sup>98</sup>

The *Schoeps* decisions rendered on January 27, 2009 involved two significant Picasso paintings, "Boy Leading a Horse" and "Le Moulin de la Galette," in the

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<sup>96</sup> See *Von Saher v. Norton Simon Museum of Art*, 754 F. 3d 712 (9th Cir. 2014).

<sup>97</sup> *Id.* at 723.

<sup>98</sup> *Schoeps v. The Museum of Modern Art*, 594 F. Supp.2d 461 (S.D.N.Y. 2009); *Schoeps v. Museum of Modern Art*, 603 F.Supp.2d 673 (S.D.N.Y. 2009).

possession of MoMA and the Solomon R. Guggenheim Foundation. The claimants were the heirs of Paul von Mendelssohn-Bartholdy who, according to documents executed in 1935, had given the paintings to his wife Elsa as a wedding gift in 1927. This transfer was purportedly a pretext to protect the works from Nazi seizure in the face of anti-Jewish laws in Germany. 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. Paley subsequently donated the painting to MoMA in 1964. 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. In 2007, Bartholdy’s great nephew Julius Schoeps sent letters to both MoMA and the Guggenheim claiming that the sale to Thannhauser was a product of Nazi duress, and thus that the Bartholdy heirs were the rightful owners of the works.

Judge Rakoff, applying an interest analysis choice of law test, held that German law applied to the issue of whether the 1935 transfer of the paintings by the owner was legally recognizable as a product of duress. He further held that issues of fact existed as to whether Mr. Bartholdy would have transferred the paintings had it not been for his fear of Nazi persecution. The court found that even though the record regarding the transfer was meager, “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.”<sup>99</sup> 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].”<sup>100</sup> Summary judgment was denied, leaving it for a New York jury to decide whether the original owner, a persecuted Jew, was under duress as defined by the German Civil Code when the artworks were transferred. Most analysts would agree that this was a very favorable ruling for the claimants.

The court next determined that New York law and not Swiss law should govern the validity of the 1936 sale from Thannhauser to Paley. Here, applying New York and standard American legal principles, the court equated the alleged duress sale with theft for the purpose of determining whether Paley, as a good faith purchaser, acquired good title to the artwork.

Finally, the court discussed the museum’s laches defense. In earlier rulings, including one by the same judge, New York courts often decided the laches defense on preliminary motions. However, in *Schoeps*, Judge Rakoff determined that since laches is a fact-intensive question he would decide the issue only after trial. In his ruling, he 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 doctrine of unclean hands from arguing laches. This was another significant ruling in the case that could have lasting repercussions.

The *Schoeps* trial was scheduled to start shortly after this ruling, but the case was settled by means of a confidential settlement. There was another interesting twist in this case. About two months later, Judge Rakoff issued a formal six-page opinion expressing the court’s dissatisfaction with the parties’ decision to keep the terms secret in light of the significance of this case to the public and to other victims

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<sup>99</sup> *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d at 466.

<sup>100</sup> *Id.*

of Nazi looting. In his words, the judge concluded, it “baffles the mind and troubles the conscience” that Schoeps and his relatives would want to keep the settlement private.<sup>101</sup>

Many observers and commentators were disappointed that *Schoeps* did not proceed to trial and that there was no final decision as to the issues of duress and laches. A later case, by contrast, *Bakalar v. Vavra*,<sup>102</sup> serves as one of the few modern-era Nazi-looted art cases to actually go to trial in the United States. The basic issue in *Bakalar* was the question of proper title to an Egon Schiele drawing entitled “Seated Woman with Bent Left Leg” that had been part of a collection of nearly four hundred and fifty artworks owned by Franz Friedrich Grunbaum. Much of this collection was subject to a Nazi forced sale in order to pay taxes and penalties imposed on Jews. Neither Grunbaum nor his wife survived the war, but his wife’s sister did and she sold the drawing, which had remained in her possession, to a Switzerland gallery in 1956. The drawing was then transferred to another gallery in New York.

The District Court held that under New York’s conflicts of law rules, the jurisdiction in which title was purportedly transferred determined which law applied. 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. On appeal to the Second Circuit, the court vacated the decision and remanded the case to the district court holding that New York law, rather than Swiss law, should govern the case.<sup>103</sup> The Second Circuit rejected the district court’s application of the traditional situs rule in favor of an interest analysis rule. It found that the compelling interests of New York authorities in making sure that New York did not become a haven for stolen property overrode any competing interests that the Swiss might have in connection with a transaction where the purchased property left the country almost immediately. On this point, *Bakalar* is entirely consistent with the *Schoeps* analysis. After trial, *Bakalar* was again appealed to the Second Circuit and was affirmed in 2012.<sup>104</sup>

Another major Holocaust recovery proceeding was the *De Csepel*<sup>105</sup> suit originally filed in the District of Columbia District Court in the summer of 2010. The suit was brought by the heirs of Baron Mór Lipót Herzog, a Budapest collector of fine art who assembled an outstanding pre-War collection in Europe and died in 1934, against the Republic of Hungary, three Hungarian museums, and a Hungarian university. In this case, commonly referred to as the “Baron Herzog case,” the heirs sought to recover many paintings and other works taken in the early 1940’s that either remained in or came into the possession of various Hungarian government museums. The list includes Renaissance paintings and sculptures, some ancient works of art, and major paintings of high quality by artists such as El Greco, Lucas Cranach the Elder, Zurbarán, and Gustave Courbet. The family initially tried negotiating with the Hungarian Government after the Soviet Bloc’s dissolution, but after eight frustrating years they filed suit in Hungary and their claims were

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<sup>101</sup> *Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d at 676.

<sup>102</sup> *Bakalar v. Vavra*, 237 F.R.D. 59 (S.D.N.Y. 2006).

<sup>103</sup> *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010).

<sup>104</sup> *Bakalar v. Vavra*, 500 Fed. Appx 6 (2d Cir. 2012).

<sup>105</sup> *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011).

ultimately rejected by the Hungarian courts. At this point the heirs turned to the American courts.

The 2010 action brought by the heirs in America alleged that Hungary and Nazi Germany initially seized the collection and that in 2008 their then-current governments breached bailment agreements with the heirs when they refused to return the promised pieces. Counsel for Hungary and the defendant-museums, including Thad Stauber, an experienced California-based museum lawyer and friend, moved to dismiss the action asserting that the Herzog heirs and the court lacked jurisdiction over the defendants under the United States Foreign Sovereign Immunities Act. They argued the further defense that even if there was jurisdiction the claim should be barred by the applicable statute of limitations and/or because of the prior claims which had already been heard by the Foreign Claims Settlement Commission. On September 1, 2011, Judge Huvelle confirmed Hungary's right to retain certain paintings, ruling that this portion of the case should be dismissed on comity grounds because they had been at issue in the earlier Hungarian suits.<sup>106</sup> Judge Huvelle generally denied the defendants' motion to dismiss on all other grounds.<sup>107</sup> Two weeks later, she stayed all further proceedings pending the further ruling of the Court of Appeals for the D.C. Circuit.

The issues before the D.C. Circuit were fully and comprehensively briefed and oral argument was presented on January 23, 2013. On April 19, the Court reversed the partial dismissal based on the allegations of due process having been denied in the Hungarian courts, and affirmed the remaining claims on the grounds that the federal courts had jurisdiction under the "commercial activity" exception to the FSIA, bailment claims were outside the scope of the "treaty exception," and presented the equivalent of a private claim involving an alleged breach of a bailment agreement.<sup>108</sup>

On remand to the District Court the defendants renewed their motion to dismiss the heirs' claims on jurisdictional grounds. In a forty-one page Memorandum Opinion issued on March 14, 2016 Judge Huvelle granted the new motion in part and denied it in part.<sup>109</sup> It is too early to judge the scope of the principles set forth in Judge Huvelle's opinion.

The final well-reported and representative post-*Altmann* case included in this article is ironically also a drawn out proceeding (although restricted to an American venue) involving the Estate of George Grosz and MoMA.<sup>110</sup> Mr. Grosz's reputation as a leading Expressionist artist was well-developed at the time the Nazis effectively seized power in Germany in 1933 (he was forty years old at the time). While he was not Jewish, he was a virulent and outspoken anti-Nazi and anti-establishment individual. In fact, his anti-establishment activities preceded the Nazi takeover and resulted in early police detention.

Mr. Grosz's underground activities increased as the Nazis were seizing power and he was forced to flee in 1933, leaving behind his most valuable works with Arthur Flechtheim, his Berlin-based designated dealer. These included two oil

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See* De Csepel v. Republic of Hungary, 714 F.3d 591 (2013).

<sup>109</sup> *See* De Csepel v. Republic of Hungary, No. 10-1261, 2016 U.S. Dist. LEXIS 32111 (D.D.C. Mar. 14, 2016).

<sup>110</sup> Much of the historic background in this factual summary is taken from the court's summarization. *See* Grosz v. Museum of Modern Art, 772 F. Supp. 2d 472, 476 (S.D.N.Y. 2010).

paintings, “Poet Max Herman Niesse” and “Self-Portrait with Model,” and one valuable watercolor titled “Self-Portrait with Model.” Unfortunately, Mr. Flechtheim was Jewish and a Nazi target himself who was forced to flee to Paris without the works a few months after Mr. Grosz’s forced departure and after Mr. Flechtheim’s gallery was raided by the Nazis. Although Mr. Flechtheim left the gallery in the hands of a trusted employee, the gallery was eventually taken over by Nazi art dealer Alexander Vomel who was a member of the notorious SA Brown Shirts. Mr. Flechtheim died in London in 1937 without further communicating with Mr. Grosz about the paintings.<sup>111</sup> In a current leading case before the German Advisory Commission, his heirs have been involved in a state-run non-binding mediation process concerning one of the seized paintings entitled “Violin en ecrire” by Juan Gris, which made its way to a German museum.

Sometime between 1940 and 1952 MoMA purchased, in separate transactions, the three valuable Grosz works. In 1953, Mr. Grosz visited MoMA and noticed that the “Poet Max Herrmann-Neisse” was hanging on the wall. He wrote his brother about it but took no other action prior to his death in 1959. Even the painting that became his most famous legacy, “Eclipse of the Sun,” was reported to have been traded for a car repair bill and later to settle a \$104 business debt. Years later in 1968, the Heckscher Museum of Art in Huntington, New York purchased this painting for \$15,000,000 with funds raised by the museum from public subscriptions. In his later years in America, Mr. Grosz was sometimes criticized for turning out overly-sentimental works which were not considered to be on a par with his early masterpieces.

In 1994, the artist’s son Martin Grosz and Martin’s sister-in-law jointly retained Ralph Jentsch, an art historian, to search for Mr. Grosz’s stolen works. Almost ten years later, in 2003, Mr. Jentsch discovered that the paintings were at MoMA and made a formal request for their return. For two years, multiple meetings were held and correspondence exchanged with various MoMA representatives. Finally, on July 20, 2005 MoMA’s Director formally denied the request. Subsequently, in January of 2006 the MoMA’s Board of Directors retained former Attorney General Nicholas Katzenbach to prepare a report. On April 12, 2006 MoMA sent another letter again rejecting the claim based on Mr. Katzenbach’s conclusions. In 2009, the two heirs filed suit in the United States District Court for the Southern District of New York seeking a declaration of title and replevin as to all three paintings and damages for their unlawful conversion. Not surprisingly, MoMA’s counsel filed a Rule 12(b) motion to dismiss on the grounds that New York’s three-year statute of limitations had effectively expired. The district court granted the motion based on New York’s “demand and refusal” principle. In granting the motion, the court

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<sup>111</sup> Mr. Flechtheim’s story is particularly tragic from a personal level. Like many other Jews involved with degenerate art, he left Germany with no assets, paintings, or otherwise. In 1937, while trying to do business in London, he fell on a patch of ice, was taken to a London hospital, punctured his leg on a rusty nail in his hospital bed, and died of septicemia after his leg was amputated. His wife’s fate was equally sad. After watching her husband succumb to his illness, she returned to Berlin and committed suicide in 1941 to escape deportation. What she had managed to regain of her own art collection as of 1941 was seized in its entirety by the Nazis. See Nicolas O’Donnell, *Flechtheim Heirs Suspend Limbach Commission Proceedings Over Juan Gris Painting in Dusseldorf*, Art Law Report (Feb. 24, 2016), <http://blog.sandw.com/artlawreport/flechtheim-heirs-suspend-limbach-commission-proceedings-over-juan-gris-painting-in-dusseldorf>.

rejected a number of the claimants' arguments including the argument that the conditional language and continued negotiations equitably "tolled" the statute of limitations until the post-Katzenbach Report had been issued with its more definitive refusal. According to the court, the continuing negotiations and discussions did not constitute the type of fraud or misrepresentation necessary to invoke the equitable estoppel defense.

Since MoMA's earlier 2005 actions were considered to constitute a refusal as a matter of law and suit was not brought until April 10, 2010, the action was dismissed as falling outside the statute of limitations. On appeal, the Second Circuit upheld the district court's ruling.<sup>112</sup> The Supreme Court denied certiorari.<sup>113</sup> Meanwhile, the museum's representatives consistently maintained that, apart from the limitations issue, their research and the Katzenbach Report fully supported their contentions that the works were not Nazi-looted and that there is no legitimate basis for disputing MoMA's ownership claim. Thus, unless MoMA's Board were to reverse its legal course these works are destined to remain in perpetuity at the Museum.

There have been other relatively recent disputes too numerous to completely discuss in one section of a law review article, which have not ended up in state or federal courts or have been too recently filed to have yet spawned any meaningful interlocutory rulings. The area is clearly in some stages of continued development and the more recent rulings may establish important precedents, and perhaps more importantly, set settlement values for those of us in the litigation trenches. Recognizing that there is no (and may never be any) litmus paper test, I have tried to be a reasonable prognosticator in the next section of this article.

## VI. INTERNALIZATION AND THE FUTURE DIRECTION OF LOOTED ART LAW

As a looted art attorney whose perspective is generally as a claimant attorney, I have observed that the restitution cases filed in the United States and argued before American forums have been moving in several directions with mixed results. One carry-over problem, as noted above, is that in many cases the defendants inevitably assert technical defenses such as the statute of limitations and laches for the very self-evident purpose of avoiding judicial resolution, notwithstanding the fact that the Washington Principles urged that all Holocaust cases be decided on the merits. Another frustration has been the inability or unwillingness of many governments to actively pursue looted art through the Hague Conventions, other enunciations of international understandings, and international tribunals.

In June 2009 to cite a relatively recent positive step, a Holocaust-era assets conference was convened in Prague where some forty-nine governments and 152 nongovernmental organizations came together to review the applicability of the Washington Principles since their adoption. At the close of the Conference, the participating nations urged, among other things, that the signatories enact laws that facilitate decisions on the merits,<sup>114</sup> but their pronouncements were not as specific in

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<sup>112</sup> *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2010).

<sup>113</sup> *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2d Cir.), *cert. denied*, 132 S. Ct. 102 (2011).

<sup>114</sup> i.e. not assert what claimants' counsel refer to as technical defenses.

this regard as some observers had hoped. In any event, over the years many (but not all) museums and other defendant-lawyers have subsequently ignored this general admonition, stating that it is their good-faith belief that more recent decisions such as *Seger-Thomschitz*<sup>115</sup> are based on the premise that the limitations period is designed in essence to define substantive defenses, as opposed to mere procedural defenses.<sup>116</sup>

On the other hand, American jurisprudence seems to some extent to be moving in favor of providing the claimant with some preliminary determination as to the objective provenance of the works in question. It is clear, however, that most lawyers practicing in this field cannot confidently and precisely predict how the courts in future cases will deal with issues such as personal jurisdiction, sovereign immunity, the statutes of limitations, duress, laches, choice of law, and many other defenses, whether characterized as procedural or substantive. In addition, focusing on the California *Von Saher* litigation, we do not yet know whether other state and federal courts will address the issues in a similar manner and consider properly drafted statutes of limitations to be recognized as a state prerogative in this area. In a similar manner, we do not yet know if the United States Supreme Court and the lower federal courts, particularly a 4–4 deadlocked Supreme Court, will continue to narrow the applicability of the *Altmann* ruling with regard to sovereign immunity in an effort to “avoid the floodgates.”

#### A. *The European Commissions*

While there continue to be a number of American-based discoveries in museums; individual collections; or simply free hangings on residential, business, or museum walls; and resulting in negotiations and formal cases regarding the general issues relating to looted-art, it seems that a substantial portion of the looted art legal focus has shifted to the European setting. As noted earlier,<sup>117</sup> six nations have established somewhat permanent commissions for the study of looted art claims. They are identified as: (i) the German Advisory (Limbach) Commission; (ii) the Austrian “Beirat”; (iii) the Dutch Elkhart or “Restitution” Committee; (iv) the French Commission for Compensation for Victims of Spoliation; (v) the English Spoliation Advisory Board; and (vi) the Czech Republic (“The Rychetsky Commission”). In addition to these commissions, European government entities have also set up special administrative bodies whose functions, which obviously vary by country, are basically to examine the provenance of and arrange for the restitution of particularly

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<sup>115</sup> *Museum of Fine Arts v. Seger Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

<sup>116</sup> By contrast, critics such as my friend Professor Jennifer Anglin Kreder, who wrote an amicus brief in the *Grosz* case, have suggested in blogs that the “museums are breaking their own ethics codes and causing the U.S. government to break its international commitments by invoking our courts to resolve Holocaust-era art claims on technical grounds rather than on the merits.” Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENNUMBRA 253 (2011). Professor Kreder has periodically updated a useful chart entitled *Chart of Dismissed Federal Holocaust cases*. Jennifer Anglim Kreder, *Chart of Dismissed Federal Holocaust-Era Art Claims Since 2004* (March 5, 2013).

<sup>117</sup> See *supra* note 47.



valuable and/or well-publicized collections, without the need for formal, expensive, and intrusive legal proceedings.

As a reaction to the Washington and Prague Conferences, both organized by the United States in the first instance to consider the mechanisms for reaching fair results in Nazi-looted art cases, various European countries proceeded to set up some form of art commission on a somewhat more permanent basis. While the concept of an American or world-wide administrative body in this area has been suggested by many lawyers and commentators, it has also been viewed by others as unworkable in our American system, and the overall concept has never been implemented in this country. I have set forth below a general overview of the delegated responsibilities of the six somewhat permanent European looted property commissions,<sup>118</sup> with great credit to our New York-based colleague and friend David Rowland's seminal article on the subject and the Herrick firm researchers who provided him with much of the materials.<sup>119</sup>

### 1. The Austrian "Beirat"

Austria has set up perhaps the most well-publicized agency, officially titled in English, The Art Restitution Commission, and commonly known as the Beirat Commission. This commission was organized in 1998 pursuant to the "Federal Law regarding the return of artworks from Austrian Federal museums and collections,"<sup>120</sup> in order to establish a permanent body (briefly referenced in the *WOMAN IN GOLD* movie) to review and research Nazi-era art claims and to also appoint an advisory committee, which was charged with responsibility for issuing recommendations concerning the return of the Nazi-era artworks. These eight permanent members, selected from various ministries and from the ranks of leading art historians, are considered an investigation arm of the Commission for provenance research and for the review of any materials submitted by the families of the former owners. After completing its review, the Committee's procedures call for a written recommendation by a majority vote at the end of each session. The recommendation in turn is

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<sup>118</sup> The author would like to give special mention to Mr. Rowland and to my Boston-based colleague, Nicholas O'Donnell, for their independent efforts in researching and unearthing the materials about each of the European commissions and for guidance as to the structural points in this section of the article. Both highly-skilled attorneys were also kind enough to personally and courteously talk directly with the author about this subject and they should in substance be viewed as the equivalent of co-authors of this section. Credit should also be given to Nick O'Donnell for his further insights on the "Beirat" and other European administrative entities and his general supportive attitude in his work with me. See also Graham Bowley, *Nations Called Lax in Returning Art Looted from Jews*, *NEW YORK TIMES*, (Sept. 10, 2014); Wesley A. Fisher and Ruth J. Weinberg, *Holocaust-Era Looted Art: A World-Wide Preliminary Overview*, Claims Conference/World Jewish Restitution Organization (Sept. 10, 2014), <http://art.claimscon.org/wp-content/uploads/2014/11/Worldwide-Overview.pdf>. In each case, while giving David and Nick great credit for their assistance and ideas, the reader should bear in mind that any errors are solely attributable to the author of this article.

<sup>119</sup> David Rowland, *Nazi Looted Art Commissions After the 1998 Washington Conference: Comparing the European and American Experiences*, 15 *KUNST UND RECHT* 83 (2013).

<sup>120</sup> The Federal Law on the Restitution of Works of Art (Art Restitution Act) No. 181/1998, 2009 (Austria).

directed to be made on the basis of the Austrian Art Restitution Law, which makes reference to the Nullification Act of 1946. Perhaps most importantly for this process, the Nullification Act includes a presumption that all transactions entered into by persecuted Jews during the Nazi era are considered to be *void*, a sweeping procedure which, in theory, goes well beyond American rulings, which have legitimized transactions entered into to obtain funds to escape.

Although our firm's experience in dealing with the Austrian authorities was initially, as depicted in *WOMAN IN GOLD*, quite disappointing, later rulings have been more thoughtful and, at least on some occasions, much more positive. As of David Rowland's most recent blog report, the Beirat had issued approximately three hundred recommendations and ordered the return of approximately three-quarters of the art works in dispute that had been brought to their attention.

One positive and well-publicized post-*Altmann* action was the Beirat researchers' conclusion in connection with a relatively rare portrait of a young Jewish woman, Gertrud Loew Felsóványi, by Gustav Klimt, which was painted in 1902 at the direction of Ms. Loew's father, Dr. Anton Loew, one of Klimt's physicians. Like many of the other cases in this area, this painting had its own discrete and complex background story. Gertrud inherited the painting from her father but in 1939—by then a widow—she fled Austria, leaving the painting and most of her possessions behind. The painting was acquired by Gustav Ucicky, a Nazi propagandist and film-maker, who was reputed to be Klimt's first illegitimate son. Mr. Ucicky in turn passed away in 1961, leaving the work to his widow Ursula Ucicky, who formed the Klimt Foundation and gave the work to the Foundation in 2013, with the important admonition that any ongoing provenance issues be resolved. After the Beirat's researchers determined that there was some legitimacy to the claims of the Felsóványi heirs, the heirs and the Foundation agreed to a settlement whereby the painting would be auctioned at Sotheby's-London and the proceeds shared between the heirs and the Foundation. In July of 2015, the painting was auctioned for \$39.1 million and sold to a wealthy British investor. The administrative actions in connection with the portrait and the historic circumstances are worth focusing on because they represent an example of the positive action of a permanent and public art administrative body, which resulted in a mutually acceptable compromise. Ironically, the same auction in which the painting was sold included the 1901 Max Liebermann painting "Two Riders on the Beach" which was restituted from Gurlitt's apartment<sup>121</sup> and sold for \$2.9 million.

## 2. *The French Commission for Compensation for Victims of Spoliation*

France, the geographic center for a significant portion of the looting and/or resales to benefit the Nazi war machine, established the "Commission d'indemnisation des victimes de spoliations intervenues du fait des législations anti-Semites en vigueur pendant Occupation," also referred to as the "Commission for the Compensation of Victims of Spoliation resulting from the anti-Semitic legislation in force during the Occupation" (referred to herein as "CIVS"). In 1995 President Jacques Chirac, in reaction to the imposition of political pressure, had

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<sup>121</sup> See discussion *infra* Section VI.C.

publicly recognized the responsibility of the Vichy Government for the persecution and deportation of French Jews. Two years later, in 1997, the French Matteoli Commission was created to study the issue of the theft of property from French Jews during the Nazi occupation. This in turn led to the establishment of the CIVS in 1999 to analyze individual cases and compensate French-based Nazi persecution victims.

From a structural perspective, the CIVS consists of sixty members, with ten members delegated the responsibility for determining the recommendations. Once a claim is submitted by an individual claimant, the CIVS personnel undertake research, an expert report is drafted by designated individuals chosen by CIVS and submitted to the CIVS' members. Claimants have the right to appear in person during CIVS' deliberations. Thereafter, the recommendation is based on general principles of fairness, and is submitted to the French Prime Minister who is directed to issue a binding decision based on the recommendation. The recommendation(s) can be reconsidered at the request of the claimants and the decision of the Prime Minister is appealable in the administrative courts. As a practical matter, the CIVS deals mostly with compensation claims for damages due to Nazi persecution; art restitution claims are less regularly submitted. According to a relatively recent survey, CIVS has dealt with 877 cases involving artworks, 115 of which were denied and compensation was awarded in the remaining 762 cases, except for a few special circumstances where the artwork was actually returned.

### *3. The English Spoliation Advisory Panel*

In 2000, the United Kingdom (UK) established through its governmental Department for Culture, Media and Sport a "Spoliation Advisory Panel" ("SAP") whose purpose was to serve as an advisory body to help resolve any conflicting claims to Nazi-looted cultural property. The SAP was in effect a successor in interest to the working group set up in 1998 by the National Museum Director's Conferences. It consists of nine members appointed by the UK Secretary of State and it can act upon the request of either individual claimants or the institution to return the artwork in question. The panel has the discretion to order an evidentiary hearing before a written recommendation is issued. After review, the panel issues a written recommendation. In making its recommendation, SAP is usually obligated to consider the moral strength of the claimant's case, and whether any moral obligation rests on the institution concerned. When SAP decides in favor of a claim, it can recommend the return of the object, payment to the claimant, or display of the object alongside an account of its history and provenance during and since the Nazi era. Since 2000, SAP has issued eleven recommendations: in four cases it recommended the return of the object; in one case it recommended payment; in another case it recommended the display of a plaque alongside the works; and in four cases SAP rejected the claims.

One major stumbling block in the UK was the fact that until 2009, British museums were precluded from returning works that were found to be lost due to Nazi persecution to the former owners because a law prohibited museums from deaccessioning any artworks which were subject to public ownership. In November

of 2009 this changed with the introduction of the “Holocaust (Return of Cultural Objects) Restitution Act.”

#### *4. The Dutch Elkhart or “Restitution” Committee*

The Netherlands, although a small country, was in the forefront of early pre-World War II attempts to enact a cultural preservation statute or treaty, with the last attempt occurring just a few years before the very eve of the war. It is also the geographic locale of a number of major disputes over restitution, including the current dispute involving the Goudstikker collection being played out in the California courts which I discussed earlier in this article. The Dutch established a Restitution Committee by a decree from the Secretary of State for Education, Culture, and Science on or about November 16, 2001. According to the official decree outlining the Committee's rules and procedures, the Committee has two basic tasks. The first is to advise the Minister of Education, Culture, and Science regarding claims for the restitution of artworks in Dutch state-owned collections. The second task is to issue a recommendation upon the request of two private parties, the claimant who has brought the restitution claim and the then-current possessor. The Committee is directed to compile a detailed research report and to subsequently issue a public recommendation explicitly based on principles of fairness and the Washington Principles. According to one study, the Committee has reviewed in excess of 130 cases and issued a significant number of positive recommendations—some for full restitution and a lesser amount for partial restitution—while recommending against approving approximately thirty-four claims.

#### *5. The German Advisory (Limbach) Commission*

Germany established an Art Advisory Commission in 2003. The Commission consists of eight members and is chaired by Jutta Limbach, the former President of the Federal Constitutional Court who has lent his name to the Commission's nickname, the Commission now being commonly referred to as the “Limbach Commission.” The Commission acts as a mediator between the current possessors and the former owners of looted cultural property. Its recommendations are based on the Joint Declaration of the Federal Government, the Federal States, and the National Associations of Local Authorities on the Tracing and Return of Nazi-confiscated art, as well as the “Handreichung,” the restitution guidelines issued in accordance with the Joint Declaration. The Joint Declaration is directed to the private parties who are to follow its goals. Once a case is submitted, it is reviewed by an individual member of the Commission and is later submitted to the entire panel for a final ruling.

As described above, the German panel serves strictly as a mediation service and was recently in the headlines because of its failure to successfully mediate a dispute between the California-based heir of Alfred Flechteim, the Jewish art dealer mentioned in my discussion of the Grosz dispute, and a German museum with regard

to a Juan Gris painting. As my friend Nicholas O'Donnell has written, "The Advisory Commission enjoys little international support."<sup>122</sup> Mr. O'Donnell and other lawyers in this field have, with virtual unanimity, suggested that there needs to be substantial changes in the Commission's procedures and processes in order to make it a more viable institution. It appears from everything the author has reviewed that the Limbach Commission appears to have a shakier record with recognizing the invalidity of "forced sales" than other commissions, such as the Beirat .

#### 6. *The Czech Republic ("The Rychetsky Commission")*

The final European nation to have set up a regularly-convened Commission is the Czech Republic, whose Commission is sometimes ignored by commentators. In 1998, the Czech Republic established a "Commission for Mitigating some of the Injustice Caused to Holocaust Victims," whose name was later shortened to "the Czech Endowment Fund for Victims of the Holocaust." The Commission, which has been nicknamed "The Rychetsky Commission," includes representatives from various ministries, public institutions, and designated representatives from the Jewish Federation. While the enabling legislation specifically covers the return of Nazi-looted art if the work(s) is owned at the time of the proceeding by a Czech state museum or gallery, the detailed parameters of its responsibilities and limitations (including time deadlines and various jurisdictional and structural issues) appear to be somewhat murky. This may be part of the reason why some commentators will ignore the existence of this Commission when they cite the five others as the sole permanent bodies.

#### *B. The American Situation*

In stark contrast to the situation in Western Europe, and in part because our American museums and galleries are generally not state-run (other than institutions like the National Gallery) the United States does not have a permanent commission to consider and issue rulings on Nazi-looted art. Instead, museum administrators rely on a self-policing system pursuant to the two major museum organizations guidelines, the American Association of Museums (the "AAM") and the American Association of Museum Directors (the "AAMD"). These guidelines call for American museums to review their collections for any works with a "suspect provenance" between 1933 and 1945, and to at a minimum list those artworks and their provenances on websites.

Viewing the Guidelines in more detail, AMM Guideline 4 provides in pertinent part as follows:

If a museum determines that an object in its collection was unlawfully appropriated during the Nazi era without subsequent

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<sup>122</sup> Nicholas M. O'Donnell, *Flechtheim Heirs Limbach Commission Proceedings Over Juan Gris Painting in Düsseldorf*, ART LAW REPORT, (Feb. 24, 2016), <http://www.lexology.com/library/detail.aspx?g=09454ade-5537-41ed-a2d5-6178c1b58260>.

restitution, the museum should seek to resolve the matter with the claimant in an equitable, appropriate, and mutually agreeable manner . . . [and] when appropriate and reasonably practical, museums should seek methods other than litigation (such as mediation) to resolve claims that an object was unlawfully appropriated during the Nazi era without subsequent restitution.

Similarly, AAMD Guidelines E(2) and E(3) state that if, after determining the provenance, a member should determine that a work of art in its collection was illegally confiscated during World War II and not restituted, “the museum should try to resolve the matter in an equitable, appropriate, and mutually agreeable manner” and the “AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims and to waive statutory defenses, where appropriate.” While the reports are somewhat sketchy, it is believed that only a fraction of the outstanding pieces of looted art have been returned by the museums.

The procedures of the art commissions in each of these European countries present self-evident procedural differences, but on the other hand are, based on commentators’ reports,<sup>123</sup> generally directed to make their determinations on the merits, based primarily on the strengths or weaknesses of the claimants’ filings and are admonished to avoid raising the technical defenses that I discussed earlier. Because the United States does not have a federal art commission, the only forums available for adjudication are the state and federal courts and, where consented to, arbitration panels. This is not necessarily acceptable to all of my colleagues.<sup>124</sup>

Absent the procedural and substantive guidelines that might otherwise limit the defendants’ resort to technical defenses and any special American or international laws to deal with these matters, the attacks on procedural grounds made in our courts have intensified, with particular reference to attacks made on the technical grounds of state statutes of limitations and laches. In one instance noted earlier, the ongoing *Von Saher* case, the procedural attack was actually directed in an unfettered manner to the alleged unconstitutionality of the state limitations statute. Furthermore, at least in certain courts, the American system leaves American museum directors, even well-intentioned directors, in the strange position of being asked to determine whether the museum should retribute on moral grounds one or more showpiece works which may have been obtained without actual knowledge of their tainted provenance. It is unfortunate that the legal-moral distinction is not more sharply developed when such an inquiry is made.

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<sup>123</sup> Such as an excellent Internet blog by David Rowland, a very capable looted-art attorney in New York. See generally, ROWLAND & PETROFF, <http://rowlandlaw.com/index.php/news> (last visited Apr. 22, 2016).

<sup>124</sup> See Jennifer Anglin Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes- Creation of an International Tribunal*, 73 BROOK. L. REV. 155 (Fall 2007). Professor Kreder has also suggested that the United States institute a single federal title registration for documented works of art and antiquities, based on the Torrens registered land system. See Jennifer Anglin Kreder and Benjamin Bauer, *Protecting Property Rights and Unleashing Capital in Art*, 2011 UTAH L. REV. 881, 884 (2011). This suggestion has been criticized by other commentators as being unrealistic.

*C. The Gurlitt Apartment Treasure Trove (Munich)*

A very recent example of the creation of a specialized and limited European administrative agency occurred in connection with the complicated and strange Cornelius Gurlitt case which, because of the interest level it has generated, has been discussed in an entire sub-section below.

The underlying facts in connection with the Gurlitt apartment treasure trove are strange, but not very much in dispute and the basic facts have become well-known to a vast number of individuals across the globe, in part because of the surrounding publicity. In the course of investigating a potential modest criminal action by Cornelius Gurlitt, a somewhat reclusive Munich resident involved in the transfer of large amounts of euros (close to the legal limit of 10,000 euros per transaction) in currency across various national boundaries, the German police investigators literally stumbled upon a cache between 1,200 and 1,500 valuable and well-preserved art works<sup>125</sup> in Mr. Gurlitt's modest apartment in the Munich suburb of Schwabing. These works were casually dispersed or hidden behind foodstuffs in pantries, stoves, refrigerators, and hidden in other common household items throughout the apartment. The District Prosecutor of Augsburg was responsible for the ultimate confiscation of 121 framed and 1,258 unframed artworks from the apartment. When it was discovered that Mr. Gurlitt's father, Hildebrand Gurlitt, was one of Hitler's own favorite art dealers, the authorities seized the works but did not immediately release any information about the collection or its status. Finally, in November of 2013, the underlying facts were revealed in an article by the German magazine *Focus* and as the result of subsequent pressure brought by European lawyers representing families who had lost their art work as a result of the Nazi seizures. The article stated that Mr. Gurlitt hid the paintings in his apartment for many years, had occasionally sold some of the works to sustain himself, and the trove included works by legendary figures including Chagall, Degas, and Gauguin and included some of the finest Cubist, Impressionist, and Modernist works. Many of the paintings had been labelled as degenerate art, stolen from their mostly Jewish owners, and were considered at best missing and at worst destroyed by the end of World War II. In fact, as early researchers looking at the collection discovered, in 1945 the senior Mr. Gurlitt<sup>126</sup> had apparently ordered that the works be destroyed. The researchers also claimed that a vast percentage of the works came into Nazi hands in exchange for the small amounts that Jews not yet incarcerated and desperate to escape Europe were given by the purchasers.

The initial researchers looking at the hundreds of identifiable works were unable to identify the actual victims or their relatives who might be entitled to the restitution of one or more particular works.<sup>127</sup> An ironic exception was the portrait of a woman by Matisse which had belonged to the famous French-Jewish collector Paul Rosenberg and his family. Mr. Rosenberg fled France in 1940 and in the process

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<sup>125</sup> Including artworks by master artists such as Beckmann, Canaletto, Daumier, Klee, Matisse, Monet, Chagall, Picasso, and Renoir.

<sup>126</sup> According to some reports the senior Mr. Gurlitt was part-Jewish.

<sup>127</sup> Cornelius Gurlitt sold a number of paintings over the years, as he needed funds to live on. One example was Max Beckmann's "The Lion Tamer" which was sold for in excess of \$1,000,000 just before the collection was seized.

abandoned his extensive collection, including the Matisse portrait. For a number of years prior to the discovery of the Gurlitt works, Mr. Rosenberg's granddaughter Anne Sinclair had been seeking to recover some of his pictures which had been scattered all over the western art world. She first learned of the Matisse work as the result of the investigation, and the painting was restituted. This discovery was further ironic as Ms. Sinclair was the ex-wife of Dominique Strauss-Kahn, the discredited former head of the International Monetary Fund, who appeared in news reports with regard to a wholly different type of scandal.

On November 24, 2014, the Museum of Fine Arts in Berne agreed to access the collection once any issues regarding Nazi-era provenance were resolved. Five-hundred works remained in Germany to be further studied and three pieces were marked for an immediate return.<sup>128</sup> Two other identifiable works from the collection were recently claimed by David Toren, a ninety-year old Holocaust victim and legally blind attorney.<sup>129</sup> The New York Daily News describes how Mr. Toren, who lost his entire family in the Holocaust, has been working to retrieve two more recently identified paintings from the collection. This case dispute is still in its nascent stages.

Recognizing the value of this art collection encompassed not just oil paintings but also lithographs, watercolors, and charcoals, and facing great pressure from art collectors, journalists, politicians, and the "looted-art bar" here and in Europe, the German government set up a special Task Force which spent over two years looking into the provenance of the entire collection. Just recently, on or about January 14, 2016, Germany's Culture Minister presented the final report of the Task Force and, reacting in part to the disappointment with the Task Force's inquiry, announced that the government had established a new "German Lost Art Foundation" based in Magdeburg, Germany.<sup>130</sup> The legal community is hopeful that with a large budget of six million euros and a new direction, the Foundation will do a better and less secretive job of identifying which of the art works were wrongfully taken from Jewish owners. So far only five of the works studied were identified as Nazi-looted art, and only four of these have been returned to their rightful owners.

#### *D. Russia, Eastern Europe, Israel and Beyond*

Western Europe and North America are not the only venues where looted art disputes are currently arising. As an example, there is the enigmatic Russian situation. Because the Cold War began almost contemporaneously with the end of World War II and because of the overall secretive nature of the Communist regime, it is understandable that very few positive communications were exchanged between the former Allies and Russia about the whereabouts of Nazi-looted art. What has been unearthed is an enormous and systematic looting with regard to treasures and

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<sup>128</sup> Matisse's "Femme Assise" was returned to Paul Rosenberg's descendants; Libermann's "Two Riders on the Beach" was returned to the great-nephew of industrialist David Friedmann; and Carl Spitzweg's "Playing on the Piano" was returned to the heirs of music publisher Heri Hinrichsen, who was murdered at Auschwitz.

<sup>129</sup> David Toren is also the great-nephew of industrialist David Friedmann.

<sup>130</sup> See Stefan Dege, *How Germany had dealt with Nazi-looted art after spectacular Gurlitt case*, DEUTSCHE WELLE, (January 14, 2016).



other valuable items not only in Germany but in other occupied territories, most notably Poland—ironically Russia’s post-war ally who remained a member of the Communist bloc for some time.<sup>131</sup>

The intensity and size of the Soviet looting is also attributed to Stalin’s policies which encouraged looting (and worse actions) by the successful Soviet forces. This was directed at the German people in particular as a form of forced reparation, and in the view of Stalin and many Russians constituted an appropriate response to the Nazi destruction, murder, and looting as their armies first descended upon the Russians and cut a path through the country. While there have been occasions in which Russia agreed to return a particular item, its track record is mediocre at best. In 1998 the country passed the “Federal Law on Cultural Valuables Displaced to the USSR as a result of the Second World War and located on the territory of the Russian Federation.” Whatever positive spin could be put on the fact that Russia finally enacted a statute in this area, the Act in reality allowed Russia to keep the illegally stolen works and museum pieces, and to halt the prospect of any restitution to their rightful owners.

As the search broadens, the number of researchers swell, and our small fraternity-sorority of claimant lawyers remain active, looted art has been identified on a larger scale. It has even ironically been located with the individual or museum purchaser(s) residing in Israel. One well-known incident was a visit by a foreign student to the Ein Harod Museum of Art and led to the identification of a work entitled “The Beggar” by Eugene Zak. The work was taken from a Jewish home in Paris in 1944, sent on a train with other works bound for Moravia, and recaptured by members of the French Maquis. After the liberation of Paris it was sold to a Parisian dealer or collector, presumably at a substantially discounted price, all the while bearing its markings as looted art. Finally, the work was acquired by a Jewish curator based in Palestine in 1954, six years after the founding of Israel, and he gave it to the Museum. Researchers at Hashava, a leading non-profit Israeli Holocaust restitution organization which came into existence pursuant to a Knesset law in 2006, began researching the painting’s provenance in order to try to identify the family which owned it.<sup>132</sup> They have also been quoted as generally suggesting that there are other Israeli-based and international World War II-oriented museums which are allegedly being asked to become more forward and transparent, and to identify and help retribute any artwork with potentially questionable origins.<sup>133</sup>

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<sup>131</sup> See NORMAN DAVIES, *GOD’S PLAYGROUND: A HISTORY OF POLAND* (Columbia University Press 2005); see also RICHARD C. RAACK, *STALIN’S DRIVE TO THE WEST, 1938-1945; THE ORIGINS OF THE COLD WAR* (Stanford University Press 1999).

<sup>132</sup> The story behind the identification of “The Beggar” and the work of the Hashava personnel are well-told in Naomi Zemeloff’s article in *The Forward*. See Naomi Zemeloff, *How Did Nazi-Looted Art Wind Up in Israel-and What Can Be Done About it?*, *THE FORWARD*, (Jan. 10, 2016).

<sup>133</sup> Since its founding as a governmental-sponsored Holocaust restitution organization, Hashava Israel has often found itself in a difficult position and has occasionally claimed that such venerable institutions like the Jewish Museum and the Ghetto Fighters’ Museum at Kibbutz Lohamel Hagetaot are in possession of Nazi-looted art; and the museum directors have denied the claims. See, e.g., Jessica Steinberg, *Restitution Group withdraws claim museums illegally withholding looted art, wants to help*, *THE TIMES OF ISRAEL*, (January 26, 2014). At least some of these claims have been withdrawn, at least in part, in the end.

Even more dramatic, although somewhat collateral to the main focus of this article, has been the attempt to retribute the dramatic sketches and primitive but beautiful works created by doomed

## VII. CONCLUSION

As we worked on this article, I realized that unlike the usual law review article which looks toward a more definitive conclusion, it is very difficult with any degree of certainty to draw any iron-clad conclusions about the future of looted art law in America within a legal framework other than the fact that there continues to be an ongoing effort to identify all of the Nazis' plunder that is still unidentified. The goal, from our legal teams' perspective, is the return of as many items as possible to their rightful owners or, at a minimum, museums in their countries of origin. What is clear from our experience, whether the venues are in America, Europe, the Middle East, or possibly Cuba, is that simply labeling the artwork as "looted art" and setting forth the basic causes of action as common law replevin, theft or conversion, or as creative forms of tortious undertakings or withholdings does not ensure that a trier of fact will quickly, or even ultimately, agree with the claimant's legal position. This very untraditional area of law develops from the discrete facts and presentation of each case. We have learned one basic fact, and it has been taught to us by Maria Altmann, Marei Von Saher, and the other courageous claimants in the cases I have discussed in this article. The key ingredient to presenting a potentially successful claim in this area is not only careful and sensitive lawyering, but also a client's perseverance in the face of longstanding hardship and too-often temporary defeat. In each case, while not ignoring the Washington Principles and related legal doctrine, as lawyers we seek a recognition by the court of the overriding need to recognize how important the restoration of treasured family art is to each claimant and how the courts are necessary and positive instruments in this process. As the *Vineberg* appellate court stated:

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.<sup>134</sup>

Hopefully, these wheels will grind as fine as possible (and perhaps even somewhat more expeditiously) to provide some overdue comfort to the overwhelming deserving and innocent victims of the Nazi looting or, more commonly, their descendants or families.

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concentration camp inmates who were trying, like the ghetto and in-camp orchestras, to at least slightly enrich the barren lives of themselves and their degraded fellow inmates. In at least one instance the claimant survived to press her claim against the museum that housed her work.

<sup>134</sup> *Vineberg v. Bissonette*, 548 F.3d 50, 58 (1st Cir. 2008).