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ETHICAL QUANDARIES: THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT AND CLAIMS FOR WORKS IN PUBLIC MUSEUMS

CHARLES CRONIN[†]

INTRODUCTION

In 2016 agents from United States Homeland Security Investigations stopped by Craig Gilmore's house in Los Angeles to determine whether he owned a painting by the seventeenth-century artist Melchior Geldorp.¹ The picture they were seeking, *Portrait of a Lady*, had been owned by the National Museum in Warsaw, but had disappeared when the Nazis demolished the city after the Uprising of 1944 toward the end of WWII.²

Since 1992, the Polish Ministry of Culture has been gathering and publicizing information on cultural property that disappeared from Poland during WWII.³ The Geldorp picture was included in the Ministry's Catalogue of Wartime Losses. Polish authorities ultimately traced it to Doyle's, an auction house in New York.⁴ In 2006, Gilmore purchased the painting from Doyle's through an online auction for about \$3,400.⁵ The Department of Homeland Security acquired this information after the United States agreed to pursue the painting on behalf of

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¹ See Craig Gilmore, *Looted by Nazis, Then Seized From My Dining Room*, L.A. TIMES, Dec. 4, 2016, at A25. Homeland Security Investigations is the investigative arm of the Department of Homeland Security. See *Homeland Security Investigations*, DEPT OF HOMELAND SECURITY, <https://www.ice.gov/hsi> (last visited October 1, 2018).

² See Dep't of Homeland Security, Restitution Claim – M. Geldorp, *Portrait of a Lady* (on file with author).

³ See POLISH MINISTRY OF CULTURE AND NATIONAL HERITAGE, DIVISION FOR LOOTED ART, <http://lootedart.gov.pl/en/> (last visited October 1, 2018).

⁴ See *Product War Losses*, POLISH MINISTRY OF CULTURE AND NATIONAL HERITAGE, <http://lootedart.gov.pl/en/product-war-losses?ID=13&pN=14> (last visited October 1, 2018); see Dep't of Homeland Security, Restitution Claim – M. Geldorp, *Portrait of a Lady* (on file with author).

⁵ See Letter from Laura B. McGill, Purchasing Accounts, Doyle New York, to Doyle New York Client (October 26, 2006) (on file with author).

the Polish Government.⁶ On October 11, 2016, Gilmore handed over the picture to the agents,⁷ who told him it would be forwarded to the National Museum in Warsaw.⁸

Melchior Geldorp was the son of a more prominent Flemish painter named Gortzius.⁹ Paintings by Gortzius, or those attributed to him, have commanded prices in the tens of thousands of dollars.¹⁰ Paintings attributed to Melchior and others, identified as “followers” or “circle” of Gortzius, however, are typically sold for about a quarter of the price.¹¹

It is remarkable that the U.S. Government likely spent considerably more than the economic value of Gilmore’s picture to investigate, acquire, and transport the work at the behest of the Polish government.¹² This restitution claim is also unusual in that it involves a public museum asserting rights to a privately owned work. This differs from most Nazi-era art claims to date that have usually involved private parties lodging complaints against public museums.¹³ The unusual circumstances surrounding the recent return of the Geldorp portrait to a public museum gives rise to the issue this Article covers: whether the status of claimants and defendants in

⁶ See Dep’t of Homeland Security, Restitution Claim – M. Geldorp, *Portrait of a Lady* (on file with author).

⁷ See Gilmore, *supra* note 1, at A25.

⁸ As of Oct. 12, 2018 the Polish Ministry’s Catalogue of Wartime Losses still indicates the work as missing. See *Product War Losses*, POLISH MINISTRY OF CULTURE AND NATIONAL HERITAGE, <http://lootedart.gov.pl/en/product-war-losses?ID=13&pN=14> (last visited October 1, 2018).

⁹ See 2 JOHN DENISON CHAMPLIN, JR., *CYCLOPEDIA OF PAINTERS AND PAINTINGS* 120 (1905).

¹⁰ In January 2016 Sotheby’s sold *Portrait of an Elegant Woman in the Guise of Venus*, attributed to Gortzius Geldorp, for \$22,500. See *Portrait of an Elegant Woman in the Guise of Venus*, SOTHEBY’S, <http://www.sothebys.com/en/auctions/ecatalogue/2016/master-paintings-sculpture-day-sale-n09461/lot.454.html?locale=en> (last visited October 1, 2018).

¹¹ In April 2013 Christie’s sold *Portrait of a Lady* by “[a] follower of Gortzius Geldorp” for \$5,000—\$1,000 below the published low estimate. See Auction Results of *Portrait of a Lady, Bust Length, in a Lace Collar and Headdress*, CHRISTIE’S, https://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5669555 (last visited October 1, 2018).

¹² The U.S. Embassy & Consulate in Poland also offered to fund a trip from Los Angeles to Warsaw for Gilmore and his partner, but later revoked the invitation. See E-mails from Craig Gilmore to Author (Jan. 23, 2017, 18:14 PST; Feb. 8, 2017, 13: 41 PST) (on file with author).

¹³ See discussion *infra* Part III.A and Part III.B.

Holocaust-era art claims as public entities or private citizens implicates ethical issues that should bear on the disposition of these cases, and if so, to what extent.

Part I considers the origins of these claims during WWII, and the temporal legal obstacles they may encounter many years after the events that engendered them. Part II discusses the recently enacted Holocaust Expropriated Art Recovery Act of 2016 (“HEAR”), which established a national six-year statutory limitation period applicable exclusively to claims for artworks lost as a result of Nazi expropriation.

Part II examines specific disputes that are identified in HEAR’s text as demonstrating the need for this legislation, and also claims purportedly enabled by its subsequent enactment. While these disputes have involved temporal defenses, the courts adjudicating them have also exhaustively reviewed the factual bases of the claims and, in every case, found them deficient. In other words, these claims would fail on their merits alone, regardless of the fact that they also involved obstacles based upon “legal technicalities.”¹⁴ This raises the question whether HEAR’s prohibition of temporal defenses may be used, at least in part, as a pretext by which to reopen, or affect the disposition of, disputes already adjudicated or currently being litigated.

Most of these claims have targeted works in public collections. Part III considers the public’s role in generating value, and thereby an element of public ownership, in artworks in museums. Part IV concludes with the suggestion that, as private claimants become increasingly attenuated from forbears whose property was appropriated by a genocidal political regime, the public interest should progressively bear upon the resolution of claims involving works now in the collections of museums and other public trusts.

I. DISPLACEMENT AND RESTITUTION OF HOLOCAUST-ERA ART

As a youth, Adolf Hitler worked as an amateur artist painting hundreds of representational works, primarily watercolors, including many landscapes featuring buildings with

¹⁴ See Simon J. Frankel & Ethan Forrest, *Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART TECH. & INTELL. PROP. L. 279, 303–04 (2013) (positing that temporal defenses are not based on “technicalities” and that the Supreme Court has repeatedly emphasized that decisions based on statutes of limitations are decisions on the merits).

distinctly Germanic architectural features.¹⁵ Vienna's Academy of Fine Arts checked Hitler's ambitions to become a professional artist, twice rejecting his applications for admission.¹⁶ Despite—perhaps because of—these snubs from culturally sophisticated Vienna, Hitler spent the rest of his life obsessing over establishing a colossal art museum housing Europe's greatest artworks in Linz, the provincial Austrian city in which he spent his childhood.¹⁷

The museum's collection was to contain works appropriated by the Nazis from public and private collections throughout Europe.¹⁸ This appropriation was part of the Nazi's wholesale confiscation from their victims, whether governments or individuals, of objects of any economic value, particularly personal property owned by Jews.¹⁹

By the time Germany surrendered to the Allied forces in 1945, it had amassed, and secured in remote castles and mines, enormous hordes of valuables. Most significantly, these included precious metals and artworks appropriated from families and institutions throughout Europe. At the end of and following the

¹⁵ Hitler's representational style and conventional subjects are worlds apart from the styles and subjects of works that were being created by his contemporaries in cities like Berlin and Vienna, many of which the Nazis deemed "degenerate." See SHEARER WEST, *THE VISUAL ARTS IN GERMANY 1890–1937: UTOPIA AND DESPAIR* 181–203 (2000) (discussing the political and aesthetic notions behind Nazi suppression of modern art, and the major exhibition in which it was reviled, held in Munich in November 1937).

¹⁶ See Peter Schjeldahl, *Hitler as Artist: How Vienna Inspired the Führer's Dreams*, *THE NEW YORKER* (Aug. 19, 2002), <https://www.newyorker.com/magazine/2002/08/19/hitler-as-artist> (discussing recent exhibitions and publications dealing with Hitler's artistic ambitions).

¹⁷ See HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 21 (1997).

¹⁸ See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994).

¹⁹ See Sarah Gensburger, *The Banality of Robbing the Jews*, *N.Y. TIMES*, Nov. 17, 2013, at SR8 ("Everything was taken: toys, dishes, family photos, tools, light bulbs."). The Bolshevik's plundering of private households in Russia approximately twenty years earlier has been similarly described:

From dressing chambers and drawing rooms, Russia's colossal collections of jewelry and precious stones now spilled out onto the streets. As Orlando Figes writes, 'the flea markets of Petrograd and Moscow were filled with the former belongings of fallen plutocrats: icons, paintings, carpets, pianos, gramophones, samovars, morning coats and ball dresses.' Family heirlooms passed down from generation to generation over centuries now passed through the hands of opportunistic strangers, heedless of their emotional value.

SEAN MCMEEKIN, *HISTORY'S GREATEST HEIST: THE LOOTING OF RUSSIA BY THE BOLSHEVIKS* 38 (2009).

War, the “Monuments Men,” a mostly American group of art historians and museum curators, located and secured these treasures.²⁰

In the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, more commonly known as the “London Declaration” of 1943, the Allies agreed not to recognize wartime transfers of property in Nazi-occupied countries.²¹ After the war, this rejection of the legality of documented transfers to the Nazis, which were typically forced sales or extortions, was the basis of the policies established by the Allies in 1945 to handle the vast accumulations of artworks and other valuables that the Nazis had removed to Germany during the preceding five years.²² Because the Allies determined that Nazi-era property transfers were invalid, the enormous stores of moveable property stored in Germany were regarded as stolen assets.²³

Also in 1943, the State Department, anticipating the U.S. role in effecting the return of Nazi-confiscated moveable property, founded the Interdivisional Committee on Reparations, Restitution, and Property Rights.²⁴ This Committee resolved that Nazi-confiscated property in the possession of the U.S. military would be returned to the governments of the countries from which the Nazis had removed them.²⁵ Under this “external restitution” policy, these foreign governments, in turn, were expected to determine the lawful owners of properties within their borders, and arrange for their return.²⁶

²⁰ See *The Monuments Men*, MONUMENTS MEN FOUND., <https://www.monumentmenfoundation.org/the-heroes/the-monuments-men> (last visited October 4, 2018). Most of the Monuments Men were Americans, and some of the “men” were women. *Id.*

²¹ *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, COMMISSION FOR LOOTED ART IN EUROPE, <https://www.lootedartcommission.com/inter-allied-declaration> (last visited November 2, 2018).

²² See *Restitution Appeals Reports*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/library/digital-collections/court-of-restitution-appeals-reports/> (providing digital access to twelve volumes of documentation covering hundreds of claims handled by the United States Court of Restitution Appeals).

²³ *Id.*

²⁴ See Brief for the United States as Amicus Curiae at 2–3, *Marei Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2011) (No. 09–1254).

²⁵ *Id.* at 2.

²⁶ *Id.* President Truman at the Potsdam Conference approved the Committee’s policies in 1945. *Id.* at 3.

At the end of the War, each of the three Allied Zones governing post-war Europe established similar regulations by which individual states would return properties to the parties from whom the Nazis had appropriated them.²⁷ These regulations established periods in which claimants had to assert their petitions and judicial agencies to adjudicate them.²⁸

The work of the Monuments Men, and the efficacy of the Allies' policies following the War, led to the return of a great deal of artwork and other valuables to the families and institutions from which the Nazis had confiscated them.²⁹ However, given the massive scale of moveable property that was dislocated during the War, it is not surprising that disputes over valuable works whose ownership and possession shifted during that tumultuous period continue to arise seventy years later.

The Nazi regime kept meticulous records of its acquisitions, despite—or perhaps because of—the fact that they typically involved forced sales or outright theft.³⁰ This documentation has helped individuals and institutions seeking to recover artworks confiscated by the Nazis, particularly in recent years as digital archives and search tools provide universal access to information about the current location of these objects.³¹

Organizations like the World Jewish Congress (“WJC”) have promoted continuing restitution of artworks displaced during the Holocaust.³² After Ronald Lauder’s brief stint as President Reagan’s ambassador to Austria,³³ Lauder focused on promoting

²⁷ See *id.* at 2.

²⁸ *Id.* at 3.

²⁹ See *Restitution Appeals Reports*, *supra* note 22; see also Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transnational Justice: The Perfect Storm or the Raft of Medusa?*, 22 EUR. J. INT'L L. 49, 54 (2011) (U.S. Forces alone recovered \$5 billion worth of art in the years directly following the war).

³⁰ See Sonia van Gilder Cooke, *Found: Nazi Records of Hitler's Looted Art*, TIME (Mar. 30, 2012), <http://newsfeed.time.com/2012/03/30/found-nazi-records-of-hitlers-looted-art/> (last visited on October 10, 2018). The precise recordkeeping may have been motivated by practical concerns, but was also intended to lend an aura of legitimacy to Nazi usurpation of private property.

³¹ See, e.g., *Holocaust-Era Research Resources* (2003), GETTY RES. INST., http://www.getty.edu/research/tools/guides_bibliographies/holocaust_provenance.html (last visited Oct. 10, 2018).

³² See COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org> (last visited Oct. 10, 2018).

³³ Mutual antipathy between Ronald Lauder and Austria's politicians prompted Lauder's departure, after eighteen months as U.S. ambassador, from Vienna. See Henry Kamm, *Vienna Journal; A New Yorker's Anguish in the Land of Waldheim*, N.Y. TIMES, Oct. 9, 1987, at A4.

the State Department's sponsorship of the Washington Conference on Holocaust Era Assets, and the ensuing Principles on Nazi-Confiscated Art.³⁴ The U.S. museum community adopted the desiderata that this meeting established when it promulgated rigorous protocols for acquisition and handling of Holocaust-era works.³⁵

Political pressure from initiatives like the 1998 Washington Conference has placed museums in the awkward position of making their collections more vulnerable to external claims in order to maintain their reputations for integrity, while simultaneously safeguarding their collections as public trusts. Accordingly, museums are attractive targets for such claims not only for the obvious reason that they deal primarily with valuable works of art, but also, and paradoxically, because many of them have made significant efforts to determine and identify publicly works in their inventories whose ownership changed during the Holocaust era.³⁶

II. HOLOCAUST-ERA ARTWORKS: LEGISLATION & LITIGATION

A. HEAR Act of 2016

Politicians and lawyers who have advocated on behalf of private parties asserting claims to Holocaust-era works in museums have complained of museums resorting to “technical” legal defenses, specifically statutes of limitations, to forestall

³⁴ See DORA APEL, *MEMORY EFFECTS: THE HOLOCAUST AND THE ART OF SECONDARY WITNESSING* 85 (2002).

³⁵ See *Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ALL. OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> (last visited on Oct. 4, 2018) (describing the protocols and ethical guidelines for acquiring and handling Holocaust-era works).

³⁶ Listings of ongoing and resolved disputes involving such works reveal the degree to which claimants have targeted public museums. A list compiled by the law firm Herrick Feinstein LLP in 2015, indicates that of fifty-seven claims the firm has identified as having been made in the United States over the past twenty years or so, museums were the defendants in thirty-one of them. See *Resolved Stolen Art Claims*, HERRICK FEINSTEIN (2015), <http://www.herrick.com/content/uploads/2016/01/2baf90026004c362078b75ecab983961.pdf> (last visited Nov. 7, 2018). Stephen Clark, The Getty's Chief Counsel, published a list of WWII restitution cases. Stephen Clark, *World War II Restitution Cases*, ALI – ABA COURSE OF STUDY; LEGAL ISSUES IN MUSEUM ADMINISTRATION (2009). Thirty-two of the forty-three U.S. cases he identified involved claims against museums; all but two of the thirty-five recorded claims in Europe were lodged against public museums. *Id.* at 371–400.

such claims.³⁷ In 2016, Ronald Lauder initiated a lobby seeking federal legislation that would preempt all existing federal and state statutes of limitation in such disputes.³⁸

The resulting bipartisan bill, HEAR, specifically exempts claimants litigating ownership of Holocaust-era artworks from extant state statutes of limitations, and guarantees them the opportunity to prosecute their claims anytime within six years of their actual discovery of the identity and location of the works in question.³⁹ In early December 2016, Congress passed the bill, which President Obama signed into law on the 16th of the same month.⁴⁰

Congress enacted HEAR hastily, after the chair of the Senate Judiciary Committee, Senator Grassley, expedited its consideration.⁴¹ None of the witnesses at the Senate Judiciary Committee hearing on HEAR represented the interests of art museums and the public they serve.⁴² Committee members were almost uniformly unquestioning in their support for the legislation; only Senator Mike Lee expressed skepticism as to the need for the proposed legislation, questioning: (1) why it would prohibit defendants from invoking the equitable doctrine of

³⁷ See, e.g., Lawrence M. Kaye, *Looted Art: What Can and Should be Done*, 20 CARDOZO L. REV. 657, 658–59 (1998) (“[H]olders of stolen art treasures often operate under the assumption that, if secrecy is maintained for a long enough time, the statute of limitations will ultimately protect them.”).

³⁸ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524. On June 7, 2016 two Senate Judiciary subcommittees held a hearing on HEAR. *Holocaust Expropriated Art Recovery Act: Hearing on S.2763 Before the Subcomm. on Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts of the S. Comm. on the Judiciary*, 114th Cong. (2016) (available at <https://www.c-span.org/video/?410737-1/actress-helen-mirren-testifies-recovery-art-confiscated-holocaust>) [hereinafter HEAR Senate Hearing].

³⁹ Holocaust Expropriated Art Recovery Act § 5. Actual knowledge does not require a claimant to demonstrate reasonable care or diligence that constructive knowledge requires. See *Actual Knowledge*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁰ 162 CONG. REC. H7333 (daily ed. Dec. 7, 2016); 162 CONG. REC. S7130 (daily ed. Dec. 9, 2016). Professor Herbert Lazerow has thoroughly parsed the legislative history and text of HEAR, observing that: (1) it is likely to have little effect in New York, the most popular state for litigating Holocaust recovery cases, (2) it will make litigation in this area more expensive, (3) it may be unconstitutional on equal protection grounds, and (4) by creating more uncertainty as to outcomes, will likely promote mediation and negotiation of these claims. See generally Herbert Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 INT’L LAW. 195 (2018).

⁴¹ See HEAR Senate Hearing, *supra* note 38.

⁴² *Id.*

laches, (2) why it should be limited to the consequences of one specific genocide, and (3) why federal law should deal with property theft—an area typically left to the states.⁴³

HEAR could affect the disposition of many Holocaust-era art claims, whether lodged against museums, dealers and auction houses, or private collectors.⁴⁴ The text of the bill specifically identifies the dispositions of two disputes, both involving claims against high-profile public museums, as evidencing the need for federal legislation to preempt existing temporal limitations for such claims.⁴⁵ In both these cases, however, while the courts were cognizant of statutes of limitations, they also carefully considered the claims' factual bases, which rendered them meritless regardless of their untimeliness.⁴⁶ Similar factual circumstances are in play in recently asserted Holocaust-era claims.⁴⁷

B. Holocaust Era Art Litigation & the HEAR Act

1. Seger-Thomshitz

Supporters of HEAR's *sui generis* constraints on statute of limitations defenses in Holocaust-era art disputes claim that defendants, museums in particular, who assert them to challenge the legitimacy of claims asserted decades after alleged misappropriations, are resorting to “technical defenses” that allow them to duck ethical quandaries and resolutions based “on the merits.”⁴⁸ They cite the dispositions of Claudia Seger-

⁴³ *Id.* The prohibition of defendants invoking laches was deleted from the text of HEAR prior to its enactment.

⁴⁴ Under HEAR, disputes previously barred by temporal limitations may be revived if fewer than six years have passed between actual knowledge by the claimant and the end of a statutory limitations period that barred it. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(e), 130 Stat. 1524, 1527 (2016). Two commentators have described HEAR as a minefield of contradictions and ambiguities, specifically as to whether HEAR is intended to limit claims discovered after 1999 but before 2016, or to resuscitate post-1999 claims otherwise barred by statutes of limitations. See Simon Frankel & Sari Sharoni, *More Uncertainty on Nazi-Era Art Restitution Claims*, LAW360 (Oct. 4, 2017), <https://www.law360.com/articles/970980/more-uncertainty-on-nazi-era-art-restitution-claims>.

⁴⁵ See Holocaust Expropriated Art Recovery Act § 2(6)(7).

⁴⁶ See *infra* Part II.B.

⁴⁷ See *infra* Part II.B.

⁴⁸ See Frankel & Forrest, *supra* note 14, at 299–30, 303–04 (criticizing the published opinions of Douglas Davidson, erstwhile State Department Special Envoy for Holocaust Issues, and the publications of law professor Jennifer Kreder, for

Thomschitz's simultaneous claims against Dunbar, a private collector in New Orleans, and Boston's Museum of Fine Arts, as examples of the inequitable consequences that stem from the application of extant statutes of limitation in claims involving Holocaust-era artwork.⁴⁹

In 2009, in a federal district court in Louisiana, Claudia Seger-Thomschitz claimed an Oskar Kokoschka painting once owned by Oskar Reichel. Oskar was the father of her benefactor, Raimund Reichel, to whom she was unrelated.⁵⁰ Reichel had sold the painting in Vienna during WWII to Otto Kallir, a well-known Jewish art dealer.⁵¹ The district court granted summary judgment in favor of Dunbar, a private collector from whom Seger-Thomschitz had sought to obtain the painting, and the Fifth Circuit upheld this decision.⁵²

The district court based its ruling upon evidence establishing that the claimant's in-laws had sold the work in a legal and voluntary sale.⁵³ The court noted that the Nazis had confiscated other property from the Reichels, for which the family had sought and obtained post-war restitution from the Austrian government.⁵⁴ In other words, the fact that those most knowledgeable about and directly entitled to property once owned by Oskar Reichel, claimed other works but not this Kokoschka work, indicated that they had no legal right to it.

While litigating her claim against Dunbar in Louisiana, Seger-Thomschitz brought a factually similar action against the Museum of Fine Arts (MFA) in Boston, claiming another

positing that museums have behaved unethically in responding to claims to Holocaust-era artworks).

⁴⁹ See, e.g., Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OREGON L. REV. 37, 72–75 (2009).

⁵⁰ *Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 661 (E.D. La. 2009), *aff'd*, 615 F.3d 574 (5th Cir. 2010). “It is not clear how Raimund [Reichel] and Seger-Thomschitz knew each other. She is described in one document as his ‘select-niece,’ but they are not blood relatives.” *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 4 (1st Cir. 2010).

⁵¹ See *Museum of Fine Arts*, 623 F.3d at 3–4. Otto Kallir ultimately settled in New York where he reestablished his dealership as the Galerie St. Etienne, now run by his granddaughter. See GALERIE ST. ETIENNE, <https://www.gseart.com/about> (last visited Oct. 10, 2018).

⁵² See *Dunbar*, 638 F. Supp. 2d at 659, *aff'd*, 615 F.3d 574 (5th Cir. 2010).

⁵³ *Id.* at 664.

⁵⁴ *Id.*

Kokoschka painting once owned by Reichel.⁵⁵ The MFA's exhaustive provenance research in response to the claim, which was noted by the court, established its good title to the work.⁵⁶ Only after the MFA had determined its rightful ownership did it assert that the plaintiff's claim was also barred by the Massachusetts statute of limitations.⁵⁷ Ultimately, the courts in both *Dunbar* and *MFA* dismissed Seger-Thomschitz's claims having reviewed the earlier actions of the Reichel family indicating that even if Seger-Thomschitz's claims were not time-barred, they would fail on the merits.⁵⁸

In both disputes, Seger-Thomschitz attempted to overcome state statutes of limitation that enabled the courts' efficient disposition of her claims, asserting that in the case of Holocaust-era claims, such statutes were preempted by her vaguely articulated "federal common law" based on U.S. foreign policy.⁵⁹ To this proposition, the circuit court in *Dunbar* responded: "No court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artwork."⁶⁰ HEAR now provides precisely such a "special federal limitations period" for such claims.⁶¹ The following review of other recent Holocaust-era art claims considers whether they indicate a need for, or reveal the potential efficacy of, this legislation, particularly in claims involving public collections.

⁵⁵ *Museum of Fine Arts v. Seger-Thomschitz*, No. 08-10097-RWZ, 2009 U.S. Dist. LEXIS 58826, at *1–*2 (D. Mass. Oct. 14, 2010), *aff'd*, 623 F.3d 1 (1st Cir. 2010).

⁵⁶ *See id.* at *19; *see also* *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 5 (1st Cir. 2010).

⁵⁷ *See Museum of Fine Arts*, 2009 U.S. Dist. LEXIS 58826, at *11–*13.

⁵⁸ *See Dunbar*, 638 F. Supp. 2d at 664–65 (E.D. La. 2009); *see also Museum of Fine Arts*, 2009 U.S. Dist. LEXIS 58826, at *27.

⁵⁹ *See Dunbar*, 615 F.3d at 576; *Museum of Fine Arts*, 2009 U.S. Dist. LEXIS 58826, at *16.

⁶⁰ *Dunbar*, 615 F.3d at 576–77. Seger-Thomschitz extrapolated her "federal common law" from principles agreed upon in the Terezin Declaration (2009) and Washington Conference Principles on Nazi-Confiscated Art (1998), neither of which is legally binding. *Id.* at 578. Even if they were, they would not have applied to this dispute, which did not involve Nazi-confiscated art. *Id.* at 576.

⁶¹ *Id.* at 576; Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §§ 3(2), 5(a), 130 Stat. 1524, 1525-26 (2016).

2. Bakalar & Nagy

In 2006, Milos Vavra and Leon Fischer, distant heirs of Austrian art collector Franz Grunbaum, claimed title to a drawing, "Seated Woman With a Bent Left Leg," by Egon Schiele, long owned by a good-faith purchaser David Bakalar.⁶² They asserted, in federal district court in New York, that the Nazis had looted the drawing from Grunbaum's collection.⁶³ Therefore, the drawing was stolen property to which they were entitled as Grunbaum's heirs.⁶⁴ However, the claimants were unable to establish that the Nazis had appropriated the work from Grunbaum and, given the preponderance of evidence to the contrary, the court concluded that the Nazis had not done so.⁶⁵ The district court also took note of the extraordinarily attenuated relationships between the claimants and the pre-WWII owner of the drawing.⁶⁶

The many heirs who predeceased Vavra and Fischer were aware of Grunbaum's collection, and the dreadful circumstances of his demise.⁶⁷ None of these heirs, all of whom were much more directly related to Grunbaum than the plaintiffs, ever claimed rights to the collection or alleged the Nazis had looted it.⁶⁸ And, even if they had had a colorable claim to the collection, by not asserting it, they abandoned it long ago.⁶⁹ To allow distant heirs to make a claim—even assuming it is asserted in good faith—that rightfully should have been made by others many years earlier, would be unjust to good-faith purchasers like Bakalar, whose ownership of the work went unchallenged for half a century.⁷⁰ The Second Circuit affirmed the district court's judgment on both grounds.⁷¹

By 2017, Fischer had died. Shortly after HEAR became law, Fischer's heirs—obviously even more distantly related to Grunbaum than was Fischer—and Milos Vavra, lodged another

⁶² See *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 294 (S.D.N.Y. 2011), *aff'd*, 500 Fed. App'x. 6 (2d Cir. 2012).

⁶³ *Id.* at 298.

⁶⁴ *See id.*

⁶⁵ *See id.* at 298–99.

⁶⁶ *See id.* at 296 (observing that Vavra is the nephew of the daughter of the sister of Grunbaum; Fischer is the son of the daughter of the brother of the wife of Grunbaum).

⁶⁷ *See id.*

⁶⁸ *See id.* at 296–97.

⁶⁹ *See id.* at 305–06.

⁷⁰ *Id.*

⁷¹ *See Bakalar v. Vavra*, 500 Fed. App'x. 6, 8-9 (2d Cir. 2012).

claim to Schiele drawings, this time in New York's Supreme Court.⁷² The case is remarkable in that it involves claims to works from the same Grunbaum collection that the federal district court, several years earlier in *Bakalar*, determined had not been stolen by the Nazis.⁷³

The factual and legal issues in this new claim are essentially the same as those of the claim these plaintiffs alleged previously against *Bakalar*, which was adjudicated against them in federal district court, and whose verdict the Second Circuit affirmed.⁷⁴ In fact, the defendant in the new case, London art dealer Richard Nagy, deliberately delayed purchasing the claimed works until after the district and appellate courts in *Bakalar* had established that the collection containing these works had not been looted, and that there was no basis for Fischer and Vavra's claim to them.⁷⁵

Fischer and Vavra brought their second claim in New York state court, hoping that this alternate forum might ignore or counter federal court precedent dealing with their earlier allegation with the same factual circumstances.⁷⁶ They referenced HEAR, claiming that this recently enacted federal legislation precludes Nagy's laches defense. In 2011 *Bakalar* successfully asserted the same defense—that the plaintiffs' forbears were well aware of Grunbaum's collection and did not pursue ownership of it—to establish rightful ownership of his Schiele drawing from the same collection.⁷⁷

⁷² See Memorandum of Law in Support of Motion for Summary Judgment at 1-2, *Reif v. Nagy*, 80 N.Y.S.3d 629 (N.Y. Sup. 2017) (No. 161799/2015), 2017 WL 2558345.

⁷³ *Id.* As the defendant's attorney observed: "[This claim is] kind of offensive to everybody who's been involved in this field, claimants and otherwise, to keep touting something which the courts have decided. You had your trial. Evidence was presented. It's over." William D. Cohan, *A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art*, N.Y. TIMES, Feb. 28, 2017, at C1.

⁷⁴ Cohan, *supra* note 73; see *Bakalar*, 500 Fed. App'x. at 8-9; see also *Bakalar*, F. Supp. 2d at 294.

⁷⁵ See Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 21-22, *Reif v. Nagy*, 80 N.Y.S.3d 629 (N.Y. Sup. 2017) (No. 161799/2015), 2017 WL 8801014.

⁷⁶ See Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 91-95 (2015) (arguing that allowing state courts to diverge from lower federal court precedent leads to intrastate conflicts and forum shopping).

⁷⁷ See *Bakalar*, F. Supp. 2d at 303.

Fischer and Vavra undoubtedly realized that the prohibition of laches defenses in the initial draft of HEAR was challenged during the Senate committee hearing on the legislation and struck from the text of the bill that was passed into law.⁷⁸ HEAR does not offer plaintiffs any new or stronger legal bases for their claims; Fischer and Vavra's invocation of this legislation is simply an attempt to influence the court's handling of the dispute with recent evidence of Congress's sympathy towards Holocaust-era claimants.

3. Ullin & Von Saher

a. Ullin v. Detroit Institute of Arts

The claimant in *Ullin* sought to obtain from the Detroit Institute of Arts ("DIA") a Van Gogh painting that his mother had sold in Switzerland, in 1938 to Jewish refugee art dealers with whom she was acquainted.⁷⁹ Just as the DIA had concluded earlier in its investigation of the painting's provenance, the district court determined that this sale had been voluntary and legal, and that the plaintiff's claim had no legal footing.⁸⁰ Ullin hoped to capitalize upon the impertinent fact that his mother had sold the painting after she left Nazi Germany in an effort to taint the legality and ethicality of the sale by which the DIA ultimately acquired the painting as a donation from a good-faith purchaser.⁸¹

Having expended resources to investigate Ullin's claim and having determined it was unfounded, the DIA naturally sought to dispose of the case as expeditiously and economically as

⁷⁸ See Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 24, *Reif v. Nagy*, 80 N.Y.S.3d 629 (N.Y. Sup. 2017) (No. 161799/2015), 2017 WL 8801014

(noting how HEAR was amended to remove prior references to laches); see Lazerow, *supra* note 40, at 33 (noting that the legislative history for HEAR establishes that Congress deliberately preserved the defense of laches by amending HEAR's original language).

⁷⁹ *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007).

⁸⁰ See *id.* at *2.

⁸¹ *Id.* at *1-*2; see also Complaint For an Order Quieting Title to Property Pursuant to 28 U.S.C. § 1655, Declaratory Judgment and Injunctive Relief at 8, *Detroit Inst. Of Arts v. Ullin*, No. 2:06-cv-10333, 2006 WL 360144 (E.D. Mich. Jan 24, 2006).

possible.⁸² To this end, it asserted that the claim was barred by the three-year state statute of limitations for conversion actions.⁸³ The court agreed with the museum and dismissed the claim “with prejudice,” prohibiting the plaintiff from litigating the claim further and signaling its opinion that the claim was baseless on its merits.⁸⁴

HEAR does not permit Claude Ullin to reopen his claim because he identified the location of the painting in question after 1998, and more than six years have passed since the district court ruled in favor of the DIA in 2007.⁸⁵ HEAR pointedly also identifies, however, the disposition of *Von Saher v. Norton Simon Museum of Art* as evidencing the need for a federal statute exempting claims to Holocaust-era artworks from temporal defenses.⁸⁶ The *Von Saher* litigation has involved temporal defenses, but also brings into focus ethical issues associated with claims asserted by attenuated private parties for works in public museums.⁸⁷ Accordingly, it is worth examining this dispute at some length.

b. *Marei von Saher v. Norton Simon Museum of Art*

i. Cranach’s Adam and Eve

Lucas Cranach the Elder (1472–1553), known among his contemporaries as “swiftest painter” (*pictor celerrimus*), produced over fifty paintings on the subject of the Temptation of Man.⁸⁸ He painted the works now owned by the Norton Simon

⁸² *Ullin*, 2007 WL 1016996, at *1–*2.

⁸³ *See id.*

⁸⁴ *See id.* at *4.

⁸⁵ Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(e), 130 Stat. 1524, 1527 (2016). The Washington Conference Principles were promulgated in 1998, the same year in which the U.S. Congress passed the Holocaust Victims Redress Act. *Id.* §§ 2(3), (4).

⁸⁶ *Id.* § 2(7).

⁸⁷ *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. VC 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *957–*58 (C.D. Cal., Oct. 18, 2007), *aff’d in part, rev’d in part*, 592 F.3d 954 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011), *remanded to* 862 F. Supp. 2d 1044 (C.D. Cal. 2012), *rev’d* 754 F.3d 712 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1158 (2015), *remanded to* 2015 WL 12910626 (C.D. Cal., Aug. 9, 2016).

⁸⁸ *See* CAROLINE CAMPBELL ET AL., *TEMPTATION IN EDEN: LUCAS CRANACH’S ADAM AND EVE* 19 (2007).

Museum as separate renderings of Adam and Eve, to be displayed as a pair.⁸⁹ The paintings were likely commissioned for the domestic delectation of a member of the Saxon court.⁹⁰

The paintings, at one point fused into a single panel, depict Eve as coy and nubile, and Adam as handsome but puzzled—raising his arm to finger curls on his head, conveying both hesitation and sensual allure.⁹¹ These works are among the most appealing of Cranach's treatments of this subject, along with his equally famous single-panel, *Adam and Eve*, in London's Courtauld Gallery.⁹² In 2006, the paintings at the Norton Simon were appraised at about thirty million dollars.⁹³

It is not known when the two paintings migrated to Russia, but in the 1920s, Sergei Giliarov, a museum official in Kiev, located them at the Holy Trinity Gate Church,⁹⁴ now a UNESCO world heritage site.⁹⁵ In documenting his discovery Giliarov noted: "From where, when, and in what manner this work could have arrived at the Trinity Church remains an open question."⁹⁶ Perhaps the Cranachs had belonged to an aristocratic family like the Stroganoffs, whose property had been confiscated by the Bolsheviks, transported, temporarily stored in Kiev, and then ultimately sold.⁹⁷ Or, perhaps centuries ago the paintings had

⁸⁹ See *Search the Collection*, NORTON SIMON MUSEUM, https://www.norton-simon.org/art/search-the-collection/result?title%5B%5D=&select_earliest_year=&select_latest_year=&earliest_year=&latest_year=&material=&accession_id=&sort=1&length=0&keyword=lucas%20cranach%20the%20elder (last visited Oct. 10, 2018).

⁹⁰ *Eve*, NORTON SIMON MUSEUM, <https://www.nortonsimon.org/art/detail/M.1991.1.P> (last visited November 3, 2018).

⁹¹ See SERGEI O. GILIAROV, A RECENTLY DISCOVERED WORK OF CRANACH IN THE MUSEUM OF ART OF THE UKRAINIAN ACADEMY OF SCIENCES 22 (1929).

⁹² See generally CAMPBELL ET AL., *supra* note 88.

⁹³ See Sarah Cascone, *Norton Simon Museum's Appeal Denied in Case of Nazi-Looted Lucas Cranach Paintings*, ARTNET NEWS (April 3, 2015), <https://news.artnet.com/market/norton-simon-appeal-denied-lucas-cranach-284850> (last visited Oct. 10, 2018).

⁹⁴ See GILIAROV, *supra* note 91, at 22.

⁹⁵ See *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list/527> (last visited Oct. 10, 2018).

⁹⁶ See GILIAROV, *supra* note 91, at 21-22.

⁹⁷ See McMEEKIN, *supra* note 19, at 35-53 (describing the systematic looting of the valuables of families and the Church before and during the Bolshevik seizure of power).

been donated to the Ukrainian Church and had been housed at the Holy Trinity Gate Church in Kiev until the Bolsheviks seized them early in the Twentieth Century.⁹⁸

ii. Bolsheviks' Confiscation and Liquidation of the Cranachs

In 1917, the Russian Revolution initiated its often violent campaign of looting moveable property owned by families, churches, synagogues, etc., whose land and buildings the Bolsheviks had expropriated.⁹⁹ The subsequently established U.S.S.R. obtained dominion over all this property.¹⁰⁰ In 1931, shortly after U.S.S.R. officials encountered the Cranach paintings in the expropriated Holy Trinity Church in Kiev, the Soviet government sold them in Berlin through Rudolf Lepke's auction house.¹⁰¹ Lepke, well known for dealing in confiscated property, had negotiated an agreement with the Soviets under which he would have the exclusive right to auction art works looted by the Bolsheviks.¹⁰²

Despite Western opprobrium in the 1920s toward the establishment of the Soviet Union, and its expropriation of the property of individuals and religious groups,¹⁰³ Germany accommodated, under the terms of the Rapallo Treaty (1922), the Soviets' plan to sell to Western collectors valuable art works that

⁹⁸ Luis Li, an attorney with the firm Munger Tolles, which is representing the Norton Simon Museum in the dispute with Von Saher, has suggested that it may be more likely that prior to the Revolution in 1917, *Adam* and *Eve* belonged to a private family collection rather than that of the Church. Images of women in iconography in the interiors of Russian Orthodox churches at that time invariably showed them fully clothed and veiled, unlike Cranach's image of Eve showing her virtually naked, with her breast exposed. Telephone Interview with Luis Li, Munger Tolles (Aug. 10, 2016). See SELLING RUSSIA'S TREASURES: THE SOVIET TRADE IN NATIONALIZED ART 1917–1938 124 (Natalya Semyonova & Nicolas V. Iljine, eds., 2013) (making the puzzling assertion: "Because the catalogue for the Lepke auction made no mention of the provenance of the paintings, it was thought that all of them came from the Stroganov collection. Thus, Stroganov heirs long contested the rights to the Cranach canvases until, having clarified the history of the matter in the Hermitage, they dropped their claims.").

⁹⁹ See generally MCMEEKIN, *supra* note 19, at 37–38.

¹⁰⁰ See generally *id.* at 39.

¹⁰¹ See RUDOLPH LEPKE'S KUNST-AUCTIONS-HAUS, SAMMLUNG STROGANOFF, LENINGRAD 40–41 (1931). See also Semyonova & Iljine, *supra* note 98, at 124.

¹⁰² See MCMEEKIN, *supra* note 19, at 211.

¹⁰³ See, e.g., the 1939 film *Ninotchka*, in which a humorless Soviet agent played by Greta Garbo is sent to Paris to retrieve jewels that had been seized from citizens during the Russian Revolution after Soviet delegates abandon the plan to sell them. *NINOTCHKA*, (Metro-Goldwyn-Mayer 1939).

had been confiscated by the Bolsheviks.¹⁰⁴ Under this agreement, Germany recognized the Soviet state in order to sell its goods—particularly military and industrial equipment—to the Soviet Union. Germany thereby enabled the near-bankrupt Soviets to pay for such material from the proceeds of sales to westerners, transacted in Germany, of properties that the Soviet state had confiscated from its own citizens.¹⁰⁵ The Rapallo Treaty also enabled Germany to develop and test weapons that were later used by the Nazis in their European offensive—violating the terms Germany had agreed to under the Treaty of Versailles at the end of the First World War.¹⁰⁶

iii. Goudstikker's Brief Ownership of the Cranachs

When Dutch art dealer Jacques Goudstikker purchased Cranach's *Adam* and *Eve* at the Lepke auction, he was aware of their sordid provenance.¹⁰⁷ He may have believed that the paintings had been confiscated from the Stroganoff family rather than the Ukrainian Church because the Soviets had included the paintings in the inventory of an auction identified as "The Stroganoff Collection."¹⁰⁸

Goudstikker paid 47,000 Reichsmarks for the two paintings¹⁰⁹—roughly \$11,000 in 1930, and about \$150,000 in 2016 dollars.¹¹⁰ Today, the paintings would likely sell for hundreds of times the adjusted amount of the 1931 sale.¹¹¹ In other words, Goudstikker acquired at fire-sale prices works from the vast caches of looted and then nationalized art, jewelry, etc., with which the Soviet government flooded the market in the 1920s and 1930s in its desperate effort to generate cash.¹¹² Other

¹⁰⁴ See MCMEEKIN, *supra* note 19, at 199–215 (documenting the militarist and commercial motivations of this treaty between Germany and the Soviet Union).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See John Elliott, *Stroganoff Art Sold in Berlin by Soviet Order*, NEW YORK HERALD TRIBUNE, May 13, 1931, at 15 (noting Goudstikker's acquisitions and the public warning issued by the Stroganoff family that they would hold the buyers responsible for any harm done to the pictures "they thus illegally acquire").

¹⁰⁸ SAMMLUNG STROGANOFF, *supra* note 101. See also Semyonova & Iljine, *supra* note 98, at 119.

¹⁰⁹ SAMMLUNG STROGANOFF, *supra* note 101, at 40–41.

¹¹⁰ See Harold Marcuse, *Historical Dollar-to-Marks Currency Conversion Page*, U.C. SANTA BARBARA, <http://www.history.ucsb.edu/faculty/marcuse/projects/currency.htm> (last visited Sep. 25, 2018).

¹¹¹ See Cascone, *supra* note 93 and accompanying text.

¹¹² See SUZANNE MUCHNIC, *ODD MAN IN: NORTON SIMON AND THE PURSUIT OF CULTURE* 179–80 (1998).

Western dealers did likewise, including the lately disgraced and now defunct, Knoedler Gallery in New York. Knoedler obtained extraordinarily fine works in this fashion that it peddled to Andrew Mellon, former U.S. Treasury Secretary, and a prized, and spectacularly wealthy customer.¹¹³

While the Stroganoff family or the Ukrainian Church may have owned the Cranachs for centuries, Jacques Goudstikker owned them for less than a decade.¹¹⁴ In 1940, Goudstikker, fearing Nazi persecution, left the Netherlands, leaving behind a large inventory of paintings, including the Cranachs.¹¹⁵ Without his authorization, his associates remaining in Amsterdam sold most of the firm's inventory through a forced sale to Hermann Göring, who moved the Cranachs to his estate near Berlin¹¹⁶—relatively near in fact, to Wittenberg, where Cranach had lived four centuries earlier.¹¹⁷ Göring paid the Goudstikker firm two million guilders for the works he appropriated from it—approximately the same total amount Jacques Goudstikker had paid over time to acquire the same works.¹¹⁸

After the U.S. military impounded Göring's collection in the aftermath of WWII, in accordance with the U.S. policy of external restitution, the Cranachs were entrusted to the Dutch government, which assumed responsibility for ultimate

¹¹³ See MCMEEKIN, *supra* note 19, at 220 (“In one of the most grotesque ironies of Communism, it was Western fat-cat capitalists like Mellon who inherited the greater part of Russia's patrimony, while the Russian proletariat received only the lash.”).

¹¹⁴ See Carolina A. Miranda, *Court Rules Museum Can Keep Nazi-Looted Adam and Eve Masterpieces with a Hidden Past*, L.A. TIMES (Aug. 22, 2016), <http://www.latimes.com/entertainment/arts/miranda/la-et-cam-norton-simon-good-title-cranach-20160817-snap-story.html#>.

¹¹⁵ *Id.*

¹¹⁶ See Plaintiff's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 6–7, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866 JFW (SS) (C.D. Cal. June 13, 2016). Göring paid approximately the total purchase price for the collection, but not its “replacement value” which was presumably a good deal more having been enhanced by Goudstikker's connoisseurship. Defendant's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 6, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866 JFW (SSx) (C.D. Cal. Aug. 1, 2016)..

¹¹⁷ See generally PETER MOSER, *LUCAS CRANACH: HIS LIFE, HIS WORLD AND HIS ART* (Kenneth Wynne trans., 2005).

¹¹⁸ Defendant's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 13, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866 JFW (SSx) (C.D. Cal. Aug. 1, 2016).

distribution of such property.¹¹⁹ Goudstikker had died in an accident on the ship on which he left the Netherlands, and his wife, along with other family members with financial interest in Goudstikker's inventory, resolved not to submit a claim to the Dutch government for the paintings acquired by Göring.¹²⁰

They did not submit a claim because obtaining the paintings would result in the government annulling the forced sale that Göring had imposed on the Goudstikker firm to acquire the works.¹²¹ The family did not want this voidance because it would entail forfeit of Göring's two million guilders, or what remained of that payment, to obtain the inventory of an art dealership that Goudstikker's heirs did not want to revive.¹²²

By electing not to file a claim to recover the firm's erstwhile inventory in favor of retaining the monies Göring had paid for it, the Goudstikkers transferred ownership of the inventory to the Dutch government.¹²³ The government then sold many of the works and placed others, including the Cranachs, in various national museums.¹²⁴

In 1961, George Stroganoff, descendant of the exiled Russian family, claimed four paintings he asserted the Bolsheviks had confiscated from his ancestors, and which were among those returned by the Allied forces to the Dutch government at the end of WWII.¹²⁵ Among the four works, were the Cranachs that Goudstikker had acquired at Lepke's "Stroganoff Collection" auction in Berlin thirty years earlier.¹²⁶

While the Dutch government asserted good title to the paintings, it may have recognized the injustice of the Bolsheviks' seizure of the Stroganoff's property. For, in 1966, the Dutch government negotiated a settlement under which George Stroganoff abandoned another claim for a Rembrandt painting,

¹¹⁹ *Id.* at 7.

¹²⁰ *Id.* at 6, 12.

¹²¹ *Id.* at 13, 14.

¹²² *Id.*

¹²³ *Id.* at 19.

¹²⁴ See Semyonova & Iljine, *supra* note 98, at 124.

¹²⁵ See Plaintiff's Notice of Motion and Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof at 20–22, Von Saher v. Norton Simon Museum of Art, No. 07-2866 JFW (SS) (C.D. Cal. June 13, 2016).

¹²⁶ Proceedings (In Chambers): Order Denying Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted at *1–*3, Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx), 2015 WL 12910626 (C.D. Cal. Apr. 2, 2015).

but was allowed to purchase the Cranachs from the government.¹²⁷ Stroganoff subsequently sold the two Cranach paintings to Norton Simon.¹²⁸

iv. Von Saher's Pursuit of Goudstikker's Inventory

In 2007, Marei von Saher initiated legal proceedings against the Norton Simon Museum seeking legal ownership of the Cranachs.¹²⁹ Von Saher, née Langenbein, a figure skater from Germany, had married Jacques Goudstikker's son Eduard who, in turn, had assumed his stepfather's surname.¹³⁰ Eduard died prematurely in 1996 and Marei was his sole heir.¹³¹

The Goudstikkers had effectively conveyed to the Dutch government title to works they had elected not to claim in order to retain instead the funds Göring had paid for them.¹³² Nevertheless, in the late 1990's Marei von Saher attempted to obtain these works, or their monetary value, by appealing to the Dutch courts, which summarily rejected her claims as legally deficient.¹³³

¹²⁷ See Defendant's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 21, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866 JFW (SSx) (C.D. Cal. Aug. 1, 2016).

¹²⁸ *Id.* at 22.

¹²⁹ *Von Saher v. Norton Simon*, 2007 WL 430276, No. CV 07-2866-JFW (JTLx), at *1 (C.D. Cal. Oct. 2007).

¹³⁰ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044, 1046 (C.D. Cal. 2012); Nicholas Glass, *Collection of Grievances*, FINANCIAL TIMES (Nov. 24, 2006), <https://www.ft.com/content/a51c4668-79f7-11db-8d70-0000779e2340> (noting that Marei von Saher met her husband in Berlin where she had been performing in an ice-dancing revue while he was stationed there as an American GI). In pursuing their defense of ownership of the Cranachs, lawyers representing the Norton Simon Museum learned that Marei von Saher's father had been a member of the Nazi party. See Defendant's Opposition to Plaintiff's Motion for Summary Judgment at 60, *Von Saher v. Norton Simon Museum at Pasadena*, No. 07-2866 JFW (SSx) (C.D. Cal. July 1, 2016). Marei cannot be held responsible for her father's actions, but given that he was part of the regime responsible for confiscating the Cranachs from Goudstikker in Amsterdam, it is undeniably inconsonant that his daughter should be claiming ownership of them. *Id.*

¹³¹ Glass, *supra* note 130.

¹³² See Defendants' Notice of Motion and Motion for Summary Judgment, Memorandum of Points and Authorities in Support Thereof at 14–18, *Von Saher v. Norton Simon Museum of Art*, No. 07-2866 JFW (SSx) (C.D. Cal. Aug. 1, 2016) (providing an exhaustive account of the Goudstikker firm's deliberate strategy, based on financial interest, to seek "selective restitution" of property it was forced to sell, by which the Dutch government became owner of the Cranachs).

¹³³ See *id.* at 23.

In response to political pressure from the United States, specifically, promulgation of the Washington Principles of 1998, the Dutch government established a Restitution Committee that recommended less legally oriented consideration of Holocaust-era claims.¹³⁴ In the spirit of this policy, and despite its position that it held good title to the works, in 2006, the Dutch government gave Von Saher around 200 paintings from national collections, which had once been within Goudstikker's inventory.¹³⁵

Since this accommodation by the Dutch government in 2006, Von Saher has embarked on a spree of claims, seeking to obtain from European and American museums and private collectors as many of the works once in Goudstikker's stock that she can locate.¹³⁶ Using proceeds from sales of works she has successfully procured from the Dutch government and others, she has funded a prosecutorial enterprise involving lawyers and detectives.¹³⁷

v. *Von Saher's Claim Against the Norton Simon Museum*

In 2007, when Marei von Saher brought her initial claim against the Norton Simon Museum in federal district court in Los Angeles, the court did not evaluate her assertion of ownership of the Cranachs because it determined that she had based her case upon an unconstitutional California statute.¹³⁸ In 2002, prior to filing her claim, Von Saher's lawyers, realizing that the claim was long barred by the California statute of limitations, successfully lobbied the California legislature, through the temporarily established "Jewish Community Relations Committee," to enact tailored legislation to accommodate Von Saher's claim.¹³⁹ The statute privileged claims against museums,

¹³⁴ See Brief of Amicus Curiae Commission for Art Recovery in Support of Petitioner at 11, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2010) (No. 09-1254).

¹³⁵ See Alan Riding, *Dutch to Return Art Seized by Nazis*, N.Y. TIMES (Feb. 7, 2006), <https://www.nytimes.com/2006/02/07/arts/design/dutch-to-return-art-seized-by-nazis.html>.

¹³⁶ See Benjamin Genocchio, *Seized, Reclaimed, and Now on View*, N.Y. TIMES (April 27, 2008), <https://www.nytimes.com/2008/04/27/nyregion/nyregionspecial2/27/brucect.html> (discussing past and ongoing claims pursued by the law firm Herrick Feinstein LLP on behalf of Marei von Saher and her daughters).

¹³⁷ See Glass, *supra* note 130 ("The hunt for Goudstikker paintings goes on unremittingly.").

¹³⁸ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *9-*10 (C.D. Cal. Oct. 18, 2007).

¹³⁹ See Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof at 2, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866-JFW (JTLx) (C.D. Cal. Dec. 27, 2011) (emphasis added).

based on assertions by the original owners or their heirs or beneficiaries, that the claimed artworks had been misappropriated during the Holocaust.¹⁴⁰ Under this *sui generis* legislation, until 2010, these claims were to be exempt from California's statute of limitations governing similar claims not involving Holocaust-era artifacts.¹⁴¹

The district court determined that this exemption for disputes involving Holocaust-era artworks was an unconstitutional intrusion by the California legislature on the federal government's exclusive authority over U.S. foreign policy.¹⁴² In other words, the statute, enacted at Von Saher's behest, constituted *ex-post-facto* meddling by the California legislature in policies and procedures that had been agreed upon between the United States and the Netherlands at the end of WWII regarding the disposition of art works returned to the Netherlands by Allied forces.¹⁴³

When Von Saher appealed the district court's dismissal of her claim, the Ninth Circuit agreed with the lower court's determination that the statutory basis of her claim was unconstitutional.¹⁴⁴ Nevertheless, it granted Von Saher the opportunity to reassert her claim if she believed she could demonstrate that she had asserted it within the three-year period of California's statute of limitations for the recovery of personal property.¹⁴⁵

Immediately following the appellate court's decision, Von Saher's lawyers again lobbied the California legislature to carve out an exception to the statute of limitations for actions to recover stolen property, which might accommodate her claim.¹⁴⁶

("Seeing the writing on the wall, [Von Saher] sought, and obtained, an attempted legislative work-around. In an amendment to Section 338, that was proposed by *Plaintiff's counsel*, the California legislature purported to lengthen the limitations period and substitute an actual-notice rule for the constructive-notice rule.").

¹⁴⁰ Cal. Code Civ. P. § 354.3(b) (West 2006).

¹⁴¹ *See id.* § 354.3(c).

¹⁴² *See* Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757, at *8 (C.D. Cal., Oct. 18, 2007).

¹⁴³ *Id.* at *7-8.

¹⁴⁴ *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1019 (9th Cir. 2009) ("We agree, and affirm the district court's holding that § 354.3 is preempted.").

¹⁴⁵ *See id.*

¹⁴⁶ *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1048 n.4 (C.D. Cal. 2012) ("Although the bill was sponsored by the Committee on Judiciary, the 'idea' for the bill came from Randol Schoenberg, whose law firm represents Plaintiff in this action.").

And in 2010, the legislature amended the statute, doubling the period in which claimants could lodge claims against museums for specific artworks that may have been misappropriated within the past century.¹⁴⁷

Von Saher also appealed the 2009 affirmation of the Ninth Circuit that the California Holocaust claims statute was unconstitutional, to the United States Supreme Court.¹⁴⁸ The Supreme Court in turn solicited the opinions of the U.S. Departments of State and Justice on this question.¹⁴⁹ In their amicus brief, these departments repudiated the California legislature's intrusion on the foreign affairs prerogatives of the U.S. government through the statutory amendment enacted on Von Saher's behalf, and recommended the Supreme Court not entertain Von Saher's appeal.¹⁵⁰

Despite this disapproval by the U.S. government, in 2011, Von Saher reasserted her claim in district court, which again dismissed her claim outright.¹⁵¹ Regardless of the claim's colorable viability under the revised California statute of limitations, the court observed incredulously that Von Saher "disputes that the Solicitor General has accurately expressed United States foreign policy, and asks the Court to supplant the Solicitor General's statement of current United States foreign policy with her own."¹⁵²

When Von Saher appealed this dismissal in 2014, Ninth Circuit Judge Dorothy Nelson justified her overturning of the lower court's decision with the equivalent of a similar effort "to supplant the Solicitor General's statement of current United States foreign policy with her own."¹⁵³ The majority's opinion is rife with prejudice and dubious factual conclusions. It discusses at length Göring's confiscation of the Cranachs through a forced sale, but never mentions the Bolsheviks' looting that led to Goudstikker's questionable acquisition of them.¹⁵⁴ It declares it

¹⁴⁷ *Id.* at 1048.

¹⁴⁸ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2011).

¹⁴⁹ Order Inviting the Views of the Solicitor General, 562 U.S. 821 (2010).

¹⁵⁰ Brief for the United States as Amicus Curiae at 9–10, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 821 (2010) (No. 09-1254).

¹⁵¹ *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044, 1053 (C.D. Cal. 2012).

¹⁵² *Id.* at 1051.

¹⁵³ *Id.*; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 715 (9th Cir. 2014).

¹⁵⁴ *Von Saher*, 754 F.3d at 715.

“[u]nfortunate[]” that the Dutch government did not have custody of the Cranachs when Von Saher made a claim against it in 2004, because the government had sold them to Stroganoff in 1961.¹⁵⁵ It opines that the paintings may not have been subject to bona fide post-war restitution proceedings in the Netherlands despite the fact that both the U.S. and the Dutch governments have established unequivocally that they were.¹⁵⁶

The majority found that Von Saher’s claim does not conflict with U.S. foreign policy because it is a dispute between private parties.¹⁵⁷ Its opinion goes on to suggest, however, that if the Dutch government’s disposition of the Cranachs invoked the Act of State doctrine, such implication could potentially impede consideration of her claim by a U.S. court.¹⁵⁸ In other words, if the sale of the Cranachs to Stroganoff constitutes an official act of the Dutch government, U.S. courts must respect it, particularly if failing to do so might conflict with U.S. diplomatic relations with the Netherlands.¹⁵⁹ The Ninth Circuit then remanded the case to the district court to investigate the applicability of this doctrine to the dispute.¹⁶⁰

In 2016, the district court granted Norton Simon’s motion for summary judgment and established the museum’s good title to the Cranachs.¹⁶¹ Rather than exploring the potential applicability of the act of state doctrine to this dispute, as the Ninth Circuit had advised, the court addressed the more fundamental question as to whether the Dutch State had ever owned the Cranachs.¹⁶² Both parties agreed that if the Dutch State had once owned these works then Norton Simon would now have good title to them.¹⁶³ Accordingly, the dispute could be settled by answering that question.

¹⁵⁵ *Id.* at 718.

¹⁵⁶ *Id.* Unsurprisingly, Nelson’s opinion, subscribed to by her similarly seasoned colleague Judge Harry Pregerson (age 92), provoked a dissenting opinion from the third member of the panel, Judge Kim Wardlaw. In Wardlaw’s dissent, the majority’s position constitutes an unauthorized and deleterious countering of the Executive’s pronouncement of U.S. foreign policy that was specifically expressed in connection with Von Saher’s claim. *See id.* at 727–29 (Wardlaw, J., dissenting).

¹⁵⁷ *See id.* at 725.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-2866-JFW (SSx), 2016 WL 7626153, at *14 (C.D. Cal. Aug. 9, 2016) (granting defendants’ motion for summary judgment).

¹⁶² *See id.* at *10.

¹⁶³ *Id.* at *8.

The court based its affirmative answer to this question by considering various royal decrees promulgated by the exiled Dutch government during WWII.¹⁶⁴ These laws, the court found, unequivocally establish that during the restitution period following the war, the Dutch government became the owner of the Cranachs, and not merely a custodian as Von Saher claimed.¹⁶⁵ Von Saher immediately appealed this determination to the Ninth Circuit, claiming the district court had incorrectly interpreted Dutch law.¹⁶⁶

In July 2018 the Ninth Circuit affirmed the district court's decision, determining that the Dutch Government's post-war disposition of the Cranachs, and specifically its transfer of their ownership to Stroganoff, was an act of state.¹⁶⁷ The court observed that under the Act of State Doctrine, U.S. courts must recognize acts of state by foreign governments unless they violate principles of international law.¹⁶⁸ The Dutch Government's transfer of ownership to the Cranachs was an official and legitimate state transaction.¹⁶⁹ Moreover, unlike commercial transactions effected among private citizens, the transfer of state property clearly implicated Dutch polity.¹⁷⁰ In her concurring opinion, Judge Kim Wardlaw barely conceals her contempt for the plaintiff's dogged pursuit of this wasteful claim:

This case should not have been litigated through the summary judgment stage. The district court correctly dismissed this case on preemption grounds in March 2012 . . . So here we are in 2018, over a decade from the date Von Saher filed her federal action, reaching an issue we need not have reached, to finally decide that the Cranachs, which have hung in the Norton Simon Museum nearly fifty years, may remain there.¹⁷¹

¹⁶⁴ *Id.* at *10.

¹⁶⁵ *See id.* at *14. The district court's extensive discussion of the question of the Dutch government's ownership relies heavily on the defendants' motion for summary judgment—a *tour de force* that handily dissects the extraordinary tangle of applicable Dutch and U.S. law and policy in this case.

¹⁶⁶ *See* Appellant's Opening Brief, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018) (No. 15-56308).

¹⁶⁷ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018).

¹⁶⁸ *See id.* at 1154.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1156 (Wardlaw, J., concurring).

In light of the court's exhaustive analysis of the facts and law involved in this dispute, and Judge Wardlaw's trenchant concurrence as to the claim's lack of merit, Von Saher's subsequent petition for an en banc rehearing by the Ninth Circuit appears almost truculent. Unsurprisingly, the court denied her petition.¹⁷²

Von Saher plans to appeal the Ninth Circuit's decision to the Supreme Court, which mandates a three-month period from the date of the decision in which to file a petition for a Writ of Certiorari.¹⁷³ Von Saher, a seasoned and well-heeled litigant, was undoubtedly aware of the probability of the Ninth Circuit's ruling, and could have filed her petition to the Supreme Court within the prescribed period. Instead she applied directly to Justice Elena Kagan (Ninth Circuit Justice) seeking an extension of an additional three months in which to file, which Justice Kagan granted.¹⁷⁴

Most of Von Saher's Application to Justice Kagan is devoted to arguments about the merits of her claim, followed by dubious justifications for the extension, like her attorneys' busy schedules, the feast of Chanukah and, most hubristic, the likelihood that the Supreme Court would grant her petition for Certiorari.¹⁷⁵ Accordingly, Von Saher's Application based upon a purported need for an extension, appears more likely to be an attempt to lay a foundation within the court, of a consensus in favor of granting her petition, by targeting the attention of a Justice she hopes may be sympathetic to her claim.

vi. The HEAR Act and Von Saher's Claim Against the Norton Simon Museum

HEAR cites Von Saher's claim to support its premise that disputes involving Holocaust-era artworks should be exempt from temporal defenses.¹⁷⁶ The timeliness of Von Saher's claim,

¹⁷² See *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 16-56308, 2018 U.S. App. LEXIS 25758 (9th Cir. Sep. 11, 2018).

¹⁷³ SUP. CT. R. 13.

¹⁷⁴ See Petitioner's Application to Extend Time to File Petition for a Writ of Certiorari, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. ___ (U.S., Nov. 20, 2018); Letter from Clerk of Supreme Court to Clerk of the Court of Appeals for the Ninth Circuit, *Marei Von Saher v. Norton Simon Museum of Art at Pasadena*, et al. Application No. 18A543 (Nov. 26, 2018).

¹⁷⁵ See Petitioner's Application, *supra* note 174, at 8.

¹⁷⁶ Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 2(6), 130 Stat. 1524, 1525 (2016).

however, had no bearing on the district court's recent decision in favor of the Norton Simon Museum. As in the earlier *Ullin* and *Seeger-Thomschitz* disputes, the district court found that even if Von Saher's claim had been timely, it was meritless based on the facts of the case.¹⁷⁷

In 2009, when the Ninth Circuit ruled against Von Saher because California's law exempting Holocaust claims from statutory time limits was unconstitutional, the court observed: "California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery."¹⁷⁸ The apparent objective of HEAR is to create a similarly friendly forum, but on a national scale, which would privilege claimants for Holocaust-era artworks by providing them an exceptional period in which to assert claims.

HEAR enables claimants to overcome both challenges that their claims are untimely, and also that they are based on state law that impermissibly intrudes on the federal government's exclusive authority over foreign policy.¹⁷⁹ In other words, by enabling previously barred claims against foreign states and individuals, HEAR becomes *de facto* U.S. foreign policy, regardless of potential conflicts with the Executive, and the State Department in particular.¹⁸⁰ Given that HEAR's purpose is to disallow the use of statutes of limitations as the means to dismiss cases, it is worth considering the salutatory objectives of such defenses, and whether these may be met even when applied in Holocaust-era artwork claims.¹⁸¹

As the time between an injustice and claims for reparation based on that injustice increases, society grows less sympathetic to the interests of claimants. This ebbing is reflected in statutes of limitation that promote timely resolution of claims when facts relating to the injustice are freshest. With the passage of time

¹⁷⁷ *Von Saher*, 2016 WL 7626153, at *8.

¹⁷⁸ *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1026 (9th Cir. 2009).

¹⁷⁹ See Holocaust Expropriated Art Recovery Act § 5(a).

¹⁸⁰ HEAR is not limited to claims against U.S. defendants. This is troublesome from a foreign policy perspective in its potential to affect the disposition of claims involving works owned by foreign governments, like those of European state collections.

¹⁸¹ Holocaust Expropriated Art Recovery Act § 2(6).

both defendants and also claimants become increasingly attenuated from the parties responsible for the injustice, and the victims of it, respectively.

For example, claims for financial reparations to African Americans living today, based on the enslavement of ancestors endured in the South until the Civil War, have gained little traction.¹⁸² Americans who instigated and benefited from the injustice of slavery, southern landowners in particular, are long dead and, like the Nazis eighty years later, were defeated in war. Owners of any remaining properties whose economic enhancement can be legitimately traced to enslaved labor are only distantly, or un-related to perpetrators of the earlier injustice. Wresting assets from descendants and innocent purchasers 150 years after their wrongful acquisition is akin to holding children responsible for the crimes of their parents, or further-removed ancestors. American society is, therefore, more comfortable with attempts to rectify the lingering injustices of slavery with efforts like affirmative action in education that, at least theoretically, benefit an entire class of people whose ancestors suffered a profound injustice.

Likewise, statutes of limitation applied to property disputes reflect a collective belief that the right of a good-faith purchaser to hold title to legitimately acquired property outweighs the right of a claimant to assert at any time a legal interest in that property.¹⁸³ They are not arbitrary or procrustean “technical” defenses that promote unethical outcomes by enabling defendants to thwart claimants from litigating justifiable claims of alleged civil wrongs.¹⁸⁴ Rather, statutes of limitation for property claims promote fairness, and are intended to curb unjust outcomes that turn on documentation and memories that

¹⁸² Georgetown University, along with a number of well-established U.S. universities that once benefited financially from slavery, recently took steps to atone for this past, by offering a preferential admission policy—not financial awards—to identifiable descendants of slaves whose lives they once capitalized on. See Rachael L. Swarns, *Georgetown University Plans Steps to Atone for Slave Past*, N.Y. TIMES, Sept. 1, 2016, at A1.

¹⁸³ See Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1019–1025 (1997) (identifying the two main objectives of limitations statutes as: (1) Determining when the interests at stake weigh in favor of barring claims due to lapse of time, and (2) Providing defendants with peace of mind).

¹⁸⁴ See Frankel & Forrest, *supra* note 14, at 302–04 (noting that the Supreme Court has repeatedly emphasized that “decisions based on statutes of limitations *are decisions on the merits*”) (emphasis in original).

have become increasingly stale and sketchy, as well as chains of title that have become progressively convoluted with the passage of time.¹⁸⁵

HEAR, however, turns this objective on its head, insofar as it is premised on the fact that because the Holocaust occurred long ago, claims in U.S. courts for Nazi-appropriated art should be exempt from statutes of limitation.¹⁸⁶ HEAR's sui generis limitations period tolls only when a claimant had actual knowledge of the current location of a work, and not at the point when a claimant might reasonably be expected to act on information made available to him.¹⁸⁷

In her discussion of the potential use of temporal defenses in Holocaust-era art claims, and the equitable defense of laches particularly, Alexandra Minkovich has argued that good-faith purchasers who assert this defense "are innocent parties who risk losing possession of a work for which they gave valuable consideration and to which they believed they had valid title."¹⁸⁸ Paradoxically, Minkovich notes that the growing resources of information about the theft and movement of artworks during the Holocaust, should make laches defenses more viable as dilatory plaintiffs may more readily be perceived as having "slept on their rights."¹⁸⁹ Minkovich also observes that: "[c]ourts may find the policy of returning property stolen by the Nazis to its original owners less compelling when the plaintiff is several generations removed from the original owner, never knew the original owner, and has no connection with the stolen property."¹⁹⁰

¹⁸⁵ See *id.*

¹⁸⁶ Holocaust Expropriated Art Recovery Act § 2(6) ("Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record . . ."). On the other hand, Allen Gerson a former State Department official, has claimed that Russia is deliberately attempting to capitalize on the fact that claims weaken over time by suppressing information about its vast caches of Nazi-looted art that were shipped from Germany to Russia at the end of WWII. See Allan Gerson, Opinion, *Guarding its Loot*, N.Y. TIMES (Dec. 2, 2008), <https://www.nytimes.com/2008/02/22/opinion/22iht-edgerson.1.10305450.html>.

¹⁸⁷ See Holocaust Expropriated Art Recovery Act § 5.

¹⁸⁸ Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J. L. & ARTS 349, 350 (2004).

¹⁸⁹ See *id.* at 351.

¹⁹⁰ *Id.* at 381.

HEAR is also problematic in that it was motivated by judicial dispositions of claims for restitution of art works that are now owned by public institutions.¹⁹¹ Given the complexity of many claims hitherto against museums, for artworks displaced, transferred, or stolen during the Holocaust, it is worth considering whether HEAR will likely promote more equitable and socially desirable dispositions of such disputes.

III. PUBLIC INTEREST, PUBLIC MUSEUMS, AND HOLOCAUST-ERA CLAIMS

A. *Museums as Targets of Holocaust-era Restitution Claims*

Most of the claims asserted in the United States relating to artwork displaced during WWII have been against public museums or other non-profit organizations, and the U.S. or state governments.¹⁹² Museums are attractive targets for such claims for the obvious reason that they deal primarily with works of art. Ironically, they are also attractive targets because many have made significant efforts responding to initiatives like the Washington Conference Principles on Nazi-Confiscated Art, to identify publicly all works in their inventories that changed ownership during WWII.¹⁹³

Public museums are not only “where the art is” but also, ultimately from the claimants’ perspective, “where the money is.” Claimants routinely profess that their claims are motivated by a desire to seek justice for persecuted relatives—commonly long deceased—or by sentimental attachment to works of art with

¹⁹¹ See *supra* notes 43–44 and accompanying text.

¹⁹² See Stephen Clark, *World War II Restitution Cases*, ALI – ABA COURSE OF STUDY; LEGAL ISSUES IN MUSEUM ADMINISTRATION (2009) (identifying thirty-two claims against U.S. museums, eleven against other U.S. defendants, and thirty-five against foreign museums). See also *Resolved Stolen Art Claims*, HERRICK FEINSTEIN (2015), <http://www.herrick.com/content/uploads/2016/01/2baf90026004c362078b75ecab983961.pdf> (last visited Nov. 7, 2018) (illustrating that thirty-one of fifty-two U.S. claims listed were lodged against museums; the percentage of claims that have been made against European museums versus private parties is considerably higher).

¹⁹³ See Press Release, Washington Conference Principles on Nazi-Confiscated Art, U.S. Dep’t of State (Dec. 3, 1998) (available at <https://www.state.gov/p/eur/rt/hlcst/270431.htm>) (last visited Nov. 7, 2018) (released in connection with the Washington Conference on Holocaust Era Assets, Washington DC, Dec. 3, 1998). One hundred and seventy-nine American museums have contributed documentation on Holocaust Era works in their collections to The Nazi-Era Provenance Internet Portal (<http://www.nepip.org/>) maintained by the American Alliance of Museums.

which they had little or no acquaintance earlier in their lives.¹⁹⁴ However, many, if not most of the works that have been turned over by museums and governments to these claimants have been subsequently sold to the highest bidder, and the works disappear from museum collections into the hands of private collectors.¹⁹⁵ Most likely, some then migrate to storage vaults in Switzerland or the Cayman Islands where they are seen by no one, like precious metals stored in darkness by owners anticipating appreciation over time.¹⁹⁶

In some cases, museums have simply paid successful claimants the estimated market value of a work to retain ownership of it.¹⁹⁷ This is a desirable approach in so far as it reduces transaction costs and leaves the work in the public sphere. Unwarranted “buy backs,” however, siphon resources from, and thereby debilitate, public museums, particularly those with relatively modest financial reserves whose primary assets are works of art often acquired by bequest.

This was the case, for instance, in the disposition of the claim to a well-known portrait by Egon Schiele owned by Austria's Leopold Museum. In 2010, a decade after District Attorney Robert Morgenthau's widely disapproved seizure of the portrait while the Leopold was lending it to New York's Museum of Modern Art,¹⁹⁸ the Leopold paid \$19 million to the heirs of an

¹⁹⁴ See, e.g., SIMON GOODMAN, *THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY'S ART TREASURES STOLEN BY THE NAZIS* 317 (2015) (discussing his acquisition of valuable artworks, including works in public museums—most which he then sold—once owned by his grandfather, in connection with his status as a particular child designated “as a ‘memorial candle’: one who took on the mission of preserving the past and connecting to the future”).

¹⁹⁵ See generally Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1 (discussing how claimants who successfully obtained Klimts from the Austrian government sold one of the works for \$135 million).

¹⁹⁶ See, e.g., MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 222–225 (2003) (discussing how claimants who successfully obtained Matisse's *Odalisque* from the Seattle Art Museum immediately sold it to casino mogul Steve Wynn who then sold it to a company in the Grand Cayman Islands, whence it was ultimately shipped to Switzerland for an unknown buyer).

¹⁹⁷ See Carol Vogel, *A Schiele Going, a Schiele Staying*, N.Y. TIMES, May 5, 2011, at C28.

¹⁹⁸ See Robert Hughes et al., *Hold Those Paintings! The Manhattan D.A. Seizes Alleged Nazi Loot*, TIME, Jan. 19, 1998 (suggesting that Robert Morgenthau's conduct was the result of politicking by former Republican Senator Alfonse D'Amato who was seeking Jewish support during an election year, for a bill on Holocaust Era property restitution).

early owner of the work.¹⁹⁹ To cover this payment, whether restitution or ransom, as well as over \$4 million of legal fees, the museum was compelled to de-accession other works in its collection.²⁰⁰

B. Holocaust-era Artwork Claims and the Perception of a “Holocaust Industry”

In his controversial book, *The Holocaust Industry*, Norman Finkelstein claims that a cadre of lawyers, politicians, and leaders of several Jewish organizations have coopted the Holocaust and used it as a cudgel to extort assets from Switzerland, Germany, and Austria.²⁰¹ According to Finkelstein, negligible portions of the assets they obtained have benefited Holocaust survivors.²⁰² Most ended up in the hands of a few prominent Jewish organizations, and extravagantly compensated lawyers.²⁰³

Only a minute segment of the European Jewish population that was decimated during the Holocaust owned Swiss bank accounts, life insurance policies, and works by Klimt and Schiele.²⁰⁴ During WWII, wealthy Jewish families tended to fare better than middle class and poor families who lacked the assets and influence that made it easier to escape the worst Nazi

¹⁹⁹ See Vogel, *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ See NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* 86–139 (2000). See Omer Bartov, *A Tale of Two Holocausts*, N.Y. TIMES (Aug. 6, 2000), <https://www.nytimes.com/2000/08/06/books/a-tale-of-two-holocausts.html> (deeming Finkelstein’s book “an ideological fanatic’s view of other people’s opportunism, by a writer so reckless and ruthless in his attacks that he is prepared to defend his own enemies . . .”); Roger Cohen, *Book Calling Holocaust a Shakedown Starts a German Storm*, N.Y. TIMES (Feb. 8, 2001), <https://www.nytimes.com/2001/02/08/world/book-calling-holocaust-a-shakedown-starts-a-german-storm.html>.

²⁰² See FINKELSTEIN, *supra* note 201, at 81, 83–88, 106–07, 123.

²⁰³ See *id.* at 81–102, 104–10, 114–24, 131–36, 138–39. Finkelstein’s doubts regarding Melvyn Weiss’s ethics were borne out when Weiss was imprisoned and disbarred for racketeering in connection with his class-action practice. See Jonathan D. Glater, *Class-Action Lawyer Gets 30 Months in Prison*, N.Y. TIMES, June 3, 2008, at C3. See also Charles Krauthammer, *The Holocaust Scandal*, WASH. POST, Dec. 4, 1998 (“[T]he only thing certain to come out of this grotesque scramble for money is a revival of Shylockian stereotypes.”).

²⁰⁴ See BAZYLER, *supra* note 196, at 287 (quoting Anti-Defamation League leader Abraham Foxman’s remarks that restitution litigation “trivialized the Holocaust . . . and made it to be that Jews didn’t die because they were Jews but because they had Monets, Swiss bank accounts, Stradivarius violins. The fact is that a tiny, tiny, tiny, tiny, tiny, percentage had Swiss bank accounts.”).

persecution.²⁰⁵ Unsurprisingly, offspring of these families of ordinary means are disconcerted by claimants who have garnered enormous financial windfalls in part by invoking the genocide of millions of Jews, most of the descendants of whom obtained nothing.²⁰⁶

C. *Museums and Public Interest*

Works of art are among the least fungible forms of moveable property. Artworks' uniqueness generates greater emotional bonds between them and their individual or collective owners than those that exist between owners and fungible assets like cash or insurance policies.

When an artwork enters the collection of a public museum, its prestige and financial worth increase because the public values not only the work itself, but also the museum's imprimatur of connoisseurship. Because the public generates value, it also, over time, develops an affinity with the work and

²⁰⁵ Peter Tammes, *Survival of Jews During the Holocaust: The Importance of Different Types of Social Resources*, 36 INT'L J. OF EPIDEMIOLOGY 330, 331–32 (2007); Yoav Ben-Shlomo & Zeev Ben-Shlomo, *Commentary: From Links to Bonds—What Factors Determined the Survival of Jews During the Holocaust?*, 36 INT'L J. OF EPIDEMIOLOGY 335, 335 (2007).

²⁰⁶ See BAZYLER, *supra* note 196, at 272 (observing that many Holocaust survivors are livid when they hear the claim that “the entire Jewish people are the heirs of survivors,” and one survivor’s reaction to the tactics of organizations like the World Jewish Congress: “How dare these institutions presume to spend ‘restituted’ funds for their favored ‘philanthropic’ projects . . . using money claimed from the most terrorized victims of the past century?”); Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30 (on file with the author); see also Ulrike Knofel, *A Question of Morality: An End to Restitution of Nazi Looted Art?*, SPIEGEL ONLINE (Apr. 9, 2009), <http://www.spiegel.de/international/germany/0,1518,618400,00.html> (discussing Norman Rosenthal's opposition to restitution); SPIEGEL Interview with British Art Expert: “We Must Live in the Present,” SPIEGEL ONLINE (Apr. 9, 2009), <http://www.spiegel.de/international/germany/0,1518,618399,00.html> (interviewing Norman Rosenthal regarding his controversial opposition to the return of art stolen by the Nazis). *But see* Catherine Hickey, *Germany Rejects Call for End to Restitution of Nazi-Looted Art*, BLOOMBERG (Apr. 9, 2009), <https://www.lootedart.com/news.php?r=NKTO1A333041> (quoting German Culture Minister Bernd Neumann's statement that the German government remains committed to restitution despite Norman Rosenthal's *Der Spiegel* interview).

thereby acquires interest akin to ownership of it.²⁰⁷ This is why museums' attempts to de-accession works to generate funds, even to survive, are typically met with vociferous opposition.²⁰⁸

The import of the public's contribution to the prestige of cultural artifacts was implicated in the outcome of Maria Altmann's recent claim against Austria for five Klimt paintings. Altmann's aunt Adele, the original owner, and subject of the most famous of the five works, unequivocally wished the paintings to be ultimately, and permanently, displayed for the public's enjoyment in the State Museum in Vienna.²⁰⁹ If Altmann had prosecuted her claim—the subject of a fanciful recounting in a recent feature film produced by Harvey Weinstein²¹⁰—against a private collector or dealer who kept these works out of public

²⁰⁷ See Frankel & Forrest, *supra* note 14, at 298. (“Claimant-museum relationships are not bilateral. They are triangular, with the public providing the third point of consideration.”). In most cases the public also indirectly pays, through admission fees and taxes, for the maintenance of the collection and the museum.

²⁰⁸ See, e.g., Robin Pogrebin, *A Chastised Museum Returns to Life*, N.Y. TIMES, April 17, 2011, at C1. (discussing sanctions imposed by the American Association of Art Museum Directors on the National Academy Museum and School in New York, which sold two paintings to extricate itself from dire financial straits); Daniel Grant, *Is the University's Museum Just a Rose to be Plucked?*, WALL ST. J., Feb. 3, 2009 (noting the outraged response to Brandeis University's plans to sell artworks from its Rose Museum in order to address rising operating costs and a plunging endowment in the wake of the Bernie Madoff scandal). Public opinion can also impel the sale or removal of artworks. See Liam Stack, *Here's Lucy! 'Scary' Statue is Replaced With One that Looks Like Her*, N.Y. TIMES, Aug. 9, 2016, at A17; Grace Glueck, *What Part Should the Public Play in Choosing Public Art?*, N.Y. TIMES, Feb. 3, 1985 (discussing public outcry over Richard Serra's “Tilted Arc”, which was ultimately removed from a public plaza in lower Manhattan).

²⁰⁹ See Will of Adele Bloch-Bauer (Jan. 18, 1923) (on file with author).

²¹⁰ See Ramin Setoodeh, *'Woman in Gold' Premieres in New York without Harvey Weinstein*, VARIETY (March 31, 2015), <http://variety.com/2015/scene/vpage/woman-in-gold-premieres-in-new-york-without-harvey-weinstein-1201463354/>. *Woman in Gold* (2015) received mostly tepid reviews, in part because of its ham-handed, one-dimensional presentation of a complex dispute of ambiguous merit. See Tim Robey, *Woman in Gold Review: 'Distinctly Ordinary'*, THE TELEGRAPH, April 9, 2015 (“Prime opportunities are missed here to explore the conundrum, controversy and morality of the art restitution struggle, especially in the way it conflicted here with Adele's own dying wishes: that the painting stay put.”); Peter Debruge, *Film Review: 'Woman in Gold'*, VARIETY, Feb. 9, 2015 (“Nuance is nowhere to be found... and though a certain audience won't object to being forced how to feel, there's a monumental issue at stake here that the film scarcely acknowledges: Does (or should) anyone really own art?”).

sight, we would be less perturbed by the outcome of the dispute in which Altmann sought the greatest possible monetary profit by selling all five paintings to private parties.²¹¹

This outcome was lamentable, however, because the works were taken from a museum whose location and admiring public had, over decades, generated much of the paintings' significance and economic value.²¹² When Altmann sold the paintings, a handful of distant heirs, private buyers, and lawyers arrogated and liquidated this public investment and appreciation.²¹³ Today, of the five Klimts, only the painting purchased by Ronald Lauder is in the permanent collection of a museum open to the public, the Neue Galerie in New York.²¹⁴

Museums have been extraordinarily accommodating of claims to Holocaust-era works in their collections.²¹⁵ Descendants of Holocaust victims have lodged most of these claims, although the governments of Italy and Poland have asserted claims as well.²¹⁶ For instance, in 2010, Italy claimed a Renaissance-era work, then in Boston's Museum of Fine Arts ("MFA"), had been looted during WWII from the premises of a

²¹¹ See Kimmelman, *supra* note 195, at E1 (noting that by briefly lending the paintings to the Los Angeles County Museum of Art and Ronald Lauder's Neue Galerie, Altmann garnered "presale publicity of a sort that no auction house could organize"). In other words, after obtaining the five paintings from Vienna's Belvedere Museum, Altmann also capitalized on the imprimatur and repute of public museums in the United States to boost the prestige and, ultimately, sale prices of the works. Ronald Lauder participated in this strategic plan when he paid \$135 million—the highest sum ever paid for a painting—for *Portrait of Adele*, thereby priming the pump for the later sale at auction of the remaining four pictures. See Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E7.

²¹² See Kimmelman, *supra* note 195, at E1.

²¹³ Such investment and ownership is akin to what Herbert Lazarow identifies as the "endowment effect" underlying statutes of limitations: "It has been observed that people will demand more to sell property that they own than they will pay to acquire the same property. [That] [a]ttachment to property grows as the period of possession lengthens." Lazarow, *supra* note 40, at 225.

²¹⁴ See *About the Collection*, NEUE GALERIE, <https://www.neuegalerie.org/collection/about-the-collection>. Unlike similarly specialized collections, which are typically public charities governed by boards of trustees, the Neue Galerie is a private foundation that Ronald Lauder established and controls. *Id.*

²¹⁵ See Frankel & Forrest, *supra* note 14, at 329–35 (listing thirty-two claims since 1998 in which museums either relinquished the claimed works to the claimants, or kept them after negotiating financial settlements with the claimants).

²¹⁶ See *id.* at 329–34.

small museum in Trento.²¹⁷ After investigating the claim, the MFA—which acquired the work in good faith in 1946 from an Italian dealer no less—returned it to the Trento museum.²¹⁸

Legitimate institutional claims that result in a museum's forfeit of a disputed work—like that involving the Boston and Trento museums—raise fewer ethical misgivings than do claims against museums made by private parties like Marei von Saher and Maria Altmann. This is true because when a work is transferred between two public institutions, the cultural and economic value generated by the public is not lost, or usurped by a private party.

This is true also because the more attenuated the relationship between private complainants and original owners of purportedly stolen works, the less sympathetic we are to their claims, particularly those lodged against public resources.²¹⁹ With public/institutional claimants, on the other hand, the passage of time does not necessarily diminish public sympathy for the claims, and might even augment it.²²⁰

Let us suppose that privately owned real property confiscated by the Nazis in the 1930s was acquired in good faith in the 1970s. The good-faith buyer subsequently donates the property to establish a public park. His gift has positively affected the lives of thousands over the past forty years—a positive outcome from the wake of a terrible era. Imagine too, that a well-heeled heir of the family whose property had been confiscated asserts a claim to it, or its cash value, decades after the property has been used to effect a public good. Regardless of the legal basis of the claim, it is ethically fraught if capitulating to the claim would debilitate or eradicate a public resource that has enhanced the lives of many, to benefit an individual with a tenuous association with the resource.

²¹⁷ See *id.* at 334.

²¹⁸ See *id.* at 326.

²¹⁹ See, e.g., Complaint, at ¶¶ 1, 5, Michael Hulton et al. v. Bavarian State Paintings Collections et al., No. 16-cv-9360 (RJS), 2016 WL 4757949 (S.D.N.Y. Dec. 5, 2016). Recently the great nephew of an erstwhile owner of eight paintings filed a claim in a U.S. district court against the Bavarian State Museum, based on speculation about how the museum may have obtained the works. *Id.*

²²⁰ For example, public sympathy for Greece's claim to the Parthenon Marbles owned by the British Museum has waxed in recent years to the extent that today even many citizens of Great Britain believe that the works should be returned to Athens. See Trevor Timpson, *Stephen Fry's Parthenon Marbles Plea Backed in Debate Vote*, BBC NEWS (June 11, 2012), <http://www.bbc.com/news/uk-18373312>.

Therefore, the identity of the defendant in a restitution claim influences our perception of its legitimacy. Claimants against museums, however, may regard such institutional defendants along the lines of storehouses of fungible properties, like banks, rather than stewards of unique artworks held in public trusts. For instance, Eric Simon, who is hostile to the interests of the museum founded by his grandfather, has suggested in connection with Von Saher's claim: "The choice should be an easy one: replace the two paintings on the wall of the museum with two of many works of art kept indefinitely in storage, or be singled out as an apologist for Nazi art theft."²²¹

This suggestion reflects an insidious notion that art museums should readily capitulate to restitution claims simply to avoid negative publicity, or even scandalous insinuations of anti-Semitism within their managerial ranks.²²² One commentator has noted how this threat has affected museums' handling of restitution claims:

When the [provenance] record is less clear, museums often return a claimed work, even if they do not fully believe that the claimant is entitled to it. Thus, a critic of one of the most well-known restitution specialists, Clemens Toussaint, has said that "[h]is restitution tactics are almost like blackmail because museums are so afraid of the bad publicity, they feel they have no choice."²²³

In most cases, museums have negotiated directly with claimants, partly to avert negative publicity, even if baseless, that invariably attaches to simply being named a defendant in such a lawsuit.²²⁴ And these settlements have typically resulted in the museum giving the work, or its cash value, to the claimant.²²⁵

²²¹ Mike Boehm, *Simon Family Member Chides Museum, Grandson Urges the Institution to be 'Just' with 'Adam' and 'Eve'*, L.A. TIMES (Nov. 14, 2014), <http://www.latimes.com/entertainment/arts/la-et-cm-norton-simon-grandson-20141113-story.html>.

²²² It also runs counter to a general policy that is hostile to de-accessioning works in public institutions. See Robin Pogrebin, *A Chastised Museum Returns to Life*, N.Y. TIMES, April 17, 2011.

²²³ Erin L. Thompson, *Cultural Losses and Cultural Gains: Ethical Dilemmas in WWII-Looted Art Repatriation Claims Against Public Institutions*, 33 HASTINGS COMM. & ENT. L.J. 407, 427 (2011).

²²⁴ See *id.* at 432.

²²⁵ See Stephen K. Urice, *Elizabeth Taylor's Van Gogh: An Alternative Route to Restitution of Holocaust Art?*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 8 (2011) (noting that only a handful of Holocaust art claims have been lodged against private parties, and fewer than half of these were settled).

CONCLUSION

In *Francofonia*, Alexander Sokurov's phantasmagorical contemplation on the migration of cultural works, the film director laconically observes that significant works of art are destined to migrate and settle where war brings them.²²⁶ Many recent efforts that attempt to reverse the consequences of this ineluctable movement, including claims by attenuated heirs for works looted by Nazis that are now in public museums, imply philosopher Max Weber's "theodicy of disprivilege."²²⁷ As Michael Roth explains in his review of David Rieff's recent *In Praise of Forgetting*, this is

[T]he belief that salvation comes to those who've suffered most. Who has endured more, Jews or Palestinians? Or is it African-Americans? The sordid competition among groups for beatitude through traumatization has become a fact of American cultural life.²²⁸

Only those who directly suffered at the hands of the Nazis may comprehend the pain and loss inflicted on Jews and other minorities during the Holocaust. But this is true of the consequences of any genocidal or monstrously unjust political regime. Accordingly, the more attenuated the relationship between those who actually suffered persecution, and downstream claimants of their confiscated property, the more likely such claims appear to have questionable grounds. They may be perceived to be motivated less from the preservation of memory as a "nourishing connectivity," and more as a means to financial windfalls and, in Roth's words, "the perpetuation of resentment and the desire for revenge."²²⁹

Accordingly, perhaps the most problematic aspect of HEAR, and hortatory proclamations like the Washington Conference Principles on Confiscated Art and the Terezin Declaration, lies in their according heirs the same moral and legal standing as direct

²²⁶ See generally FRANCOFONIA (Idéale Audience 2015). Much of the film deals with the parlous state during WWII of the Louvre's collection, which, ironically, contains a great number of works acquired as loot ("spoils of war"), particularly during the Napoleonic era.

²²⁷ See MAX WEBER, THE SOCIOLOGY OF RELIGION 113 (Ephraim Fischhoff trans., Beacon Press, 4th ed. 1993) (1963).

²²⁸ Michael S. Roth, *Don't Speak, Memory*, WALL ST. J., (June 26, 2016), <https://www.wsj.com/articles/dont-speak-memory-1466975713?ns=prod/accounts-wsj>.

²²⁹ See *id.*

victims of Nazi persecution and predation.²³⁰ Because most of these victims who survived the Holocaust are now deceased, the end result of initiatives like HEAR may be to benefit a few claimants—and their contingency-fee lawyers—who neither directly suffered at the hands of the Nazis, nor worked to acquire the artworks the Nazis looted from their forbears.

Legislative carve-outs like HEAR privilege a narrow segment of a particular class of living descendants from victims of a particular appalling injustice. But a vast number of living individuals are ultimately descended from ancestors persecuted and robbed during one or another violent and unjust regime, e.g.: Great Britain's genocide of over two million Irish in the 1840s;²³¹ Stalin's extermination of millions of Russians and Ukrainians in the 1930s;²³² Hirohito's massacre of millions of Chinese and Koreans during WWII;²³³ Castro's violation of human and private property rights in the early 1960s.²³⁴ While descendants of other once-victimized populations may pursue legislative preferential treatment like HEAR, such efforts that enable so few to benefit so handsomely risk tarnishing the collective remembrance of barbarities that affected millions.

HEAR asserts that its prohibition of time-based defenses for Holocaust-era art claims is necessary because it is only now, seventy-five years after the Holocaust, that some claimants have located works or information indicating that an ancestor who was persecuted during the Holocaust may have once owned an

²³⁰ See generally Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308 [HR 6130], 130 Stat. 1524, 1525 (2016); *Terezin Declaration*, HOLOCAUST ERA ASSETS CONF. (Jun. 30, 2009), <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/>; *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE, ¶¶ 5, 7, 8, 9 (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

²³¹ See EMER O'SULLIVAN, *THE FALL OF THE HOUSE OF WILDE* 43 (2016) (noting that Ireland was forced, during the Great Famine, to export to Britain great quantities of food produced in Ireland that would have been sufficient to feed the Irish population).

²³² See generally NORMAN M. NAIMARK, *STALIN'S GENOCIDES* (2010) (documenting Stalin's killing of untold millions by violent and indirect means like orchestrated famine).

²³³ See, e.g., IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* 4 (1997). RUDOLPH J. RUMMEL, *STATISTICS OF DEMOCIDE: GENOCIDE AND MASS MURDER SINCE 1900* 32 (1998).

²³⁴ See Alistair Bell, *Despite Detente, Search for Art Looted in Cuba Could Take Years*, REUTERS ENTERTAINMENT NEWS, (Jan. 7, 2015), <http://in.reuters.com/article/cuba-usa-art-idINKBN0KG0EH20150107> (discussing Cuban government's confiscation and sale of privately owned art and other property).

object.²³⁵ But it is also true that the passage of time has rendered claimants more attenuated from the actual victims. Moreover, many works that have been claimed have surfaced in museums that acquired them legally, and have made them available to the public long after the deaths of those who owned them before the Holocaust.

Our perception of the ethicality of an art restitution claim, therefore, depends in part on attributes of both the claimant and the defendant. Accordingly, we would almost certainly be sympathetic to claims by actual victims of the Nazis against dealers who knowingly trafficked in, and profited from, artworks stolen from them. Likewise, the positive perception of museums' recoveries of works privately owned—like the National Museum of Warsaw's recovery of the Geldorp portrait purchased in good faith by a private party—is enhanced by the ensuing public benefit.²³⁶ By the same token, we are less sympathetic to claims lodged by second or third-generation descendants against public museums that acquired in good faith once-confiscated works that have already been subject to legitimate restitution proceedings.

Exemptions from temporal defenses may be reasonable insofar as they may allow claimants to hold accountable dealerships and auction houses that knowingly capitalized upon the poisoned fruits of Nazi injustice. Museums that are public charities, however, which believe they have good title to a claimed work, should not be prevented from using temporal defenses to avoid devolutions to jury trials and inappurtenant campaigns to influence public opinion.

²³⁵ Holocaust Expropriated Art Recovery Act § 2(6).

²³⁶ See *supra* Introduction.