A "Just and Fair Solution": Creating an Environment for Resolving Nazi Era Art Restitution Claims Equitably

Jennifer Elisa Smith

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mjil

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mjil/vol31/iss1/12
Notes and Comments

A “Just and Fair Solution”: Creating an Environment for Resolving Nazi Era Art Restitution Claims Equitably

JENNIFER ELISA SMITH*

INTRODUCTION

A segment from the 2014 film, The Monuments Men, presents a poignant representation of the difficult nature of Nazi era art restitution. The segment begins with James Granger, an American curator and one of the Monuments Men, picking up a painting in a Paris warehouse filled with objects looted from Jewish families by the Nazi regime. He researches the painting, determines the family from which it was stolen, and brings it back to their home. What he finds is a ransacked apartment with no family, just overturned furniture. Finding a

© 2016 Jennifer Elisa Smith.


* J.D. Candidate (2017), University of Maryland Francis King Carey School of Law. The author worked as Exhibitions and Collections Manager at the Washington County Museum of Fine Arts from 2007 to 2014. She thanks Professor William Reynolds and the staff of the Maryland Journal of International Law for their guidance. She also thanks her family and friends for their support, especially her grandfather, Omer Fortier, Sr., for his example of perseverance.

2. THE MONUMENTS MEN (Columbia Pictures 2014).
nail on the wall he hangs the painting. Despite understanding that the family may never return, Granger attempts to restitute the painting to its rightful owners and make whole what was ripped apart by the Nazi regime. Granger’s fictional efforts have been the reality for over six decades as museums and countries grappled with determining just and fair solutions to the issues of Nazi era art restitution. Today, United States museums are in need of assistance and a new approach to resolving issues of Nazi era art restitution in order to create an environment for resolving claims equitably that balances the ethical and legal needs of all parties.

United States museums have recently been criticized for using procedural defenses to avoid litigating Nazi era art restitution claims on their facts and merits. The strongest criticism is from the World Jewish Restitution Organization (WJRO), which cited recent “aggressive litigation conduct of museums” in a 2015 report. Though this criticism may hold true in some cases, it does not take into account the complexity of resolving Nazi era art restitution claims in the United States nor does the WJRO report present well-defined, workable solutions. The criticism does highlight the need for United States museums, museum organizations, and the United States government to create a new, consistent, and equitable approach in order to resolve Nazi era art restitution claims.

This Comment examines current approaches to Nazi era art restitution in Europe and the United States and proposes a solution modeled on European countries that effectively utilize centralized restitution committees to promote and assist in implementing alternative methods of dispute resolution. Part I of this Comment examines the historical

3. Id.
4. WORLD JEWISH RESTITUTION ORG., REPORT CONCERNING CURRENT APPROACHES OF UNITED STATES MUSEUMS TO HOLOCAUST-ERA ART CLAIMS 1–52 (2015); see also Letter from Joseph Crowley, Congressman, et al. to John Kerry, Sec’y of State (June 29, 2015), http://crowley.house.gov/sites/crowley.house.gov/files/Letter%20to%20Secre-
5. WORLD JEWISH RESTITUTION ORG., supra note 4, at 2. The American Alliance of Museums (AAM) has also been criticized for not sanctioning museums engaging in “behavior that may not be in accord with standards set by the AAM” concerning Nazi era art restitution claims. Id. at 64–65.
6. Jennifer Kreder, Fighting Corruption of the Historical Record: Nazi–Looted Art Litigation, 61 KAN. L. REV. 75, 89, 131 (2012). The WJRO report made three recommendations to “promote merits-based resolution of claims,” first, to encourage museums to live up to the spirit of the Washington Principles, AAM guidelines, and the Terezin Declaration; second, the AAM “should ensure that museums comply with the spirit of the Guidelines” and sanction museums that do not; and third, “legislation should be considered to extend statutes of limitations” for Nazi era art restitution claims. WORLD JEWISH RESTITUTION ORGANIZATION, supra note 4, at 10–11.
and legal background of Nazi era art restitution. Part II analyzes differences between the United States and European museum communities. Part III discusses use of alternative methods of dispute resolution in Nazi era art restitution cases. Part III also proposes the formation of a centralized restitution committee in the United States to promote alternative methods of dispute resolution and assist museums and claimants.

I. HISTORICAL AND LEGAL BACKGROUND OF NAZI ERA ART LOOTING AND RESTITUTION

A. Historical Background of Nazi Era Art Looting and Restitution

From the time Adolf Hitler rose to power in 1933 to the fall of the Nazi regime in 1945, the regime employed a system of looting, theft, and coercive tactics to acquire an estimated 650,000 works of art. Notable works of art looted by the Nazi regime include Johannes Vermeer, *The Astronomer*; Jan and Hubert van Eyck, *Adoration of the Mystic Lamb* (*Ghent Altarpiece*); Egon Schiele, *Portrait of Wally*; Gustave Klimt, *Portrait of Adele Bloch-Bauer I*; and Raffaello Sanzio da Urbino, *Portrait of a Young Man*.

The Nazi regime looted art for economic, aesthetic, and discriminatory purposes. In order to fund the regime and purchase works of art deemed acceptable and worthy, the regime sold and traded works...
of art, particularly “degenerate” works. Additionally, looting contributed to the regime’s systematic collecting of acceptable and worthy art, specifically representational, non-abstract, European art. The Nazi regime aesthetic was best exemplified as “whatever Hitler liked, and whatever was most useful to the government from the point of view of propaganda.” Hitler wished to “discover and encourage the artists who . . . impress[ed] upon the State of the German people the cultural stamp of the Germanic race.” Many works of art were slated for inclusion in the Führermuseum, a massive museum planned for Hitler’s hometown of Linz, Austria.

In addition to economic and aesthetic purposes, the Nazi regime used looting to persecute the Jewish people, furthering the regime’s policies of national and racial supremacy. Works of art were seized...

---

14. Many works of art were sold at auction or were traded for works of art favored by Hitler. The most notable auction occurred at the Galerie Fischer in Lucerne, Switzerland, in 1939. Some buyers understood purchasing works of art meant funding the regime, despite being assured the funds would be used for German museums, and were conflicted about purchasing. Some buyers felt this was the only way to save these works of art and other buyers saw sales by the regime as an opportunity to acquire works of art by notable artists for potentially low prices. Though many of the works sold or traded were “banished from Germany as ‘degenerate art,’” the regime recognized the monetary value of these works of art. Selling works allowed the regime to raise “urgently needed foreign currency.” Nicholas, supra note 11, at 3–5. See also Frederic Spotts, Hitler and the Power of Aesthetics 167–168 (2002).


17. Nicholas, supra note 11, at 10.


20. Graefe, supra note 13, at 474; Pell, supra note 11, at 30.
from Jewish collectors for purposes of “Arayanizing” Jewish assets. The regime utilized outright taking of Jewish assets as well as forced sales of works of art. Additionally, property of Jews who fled Europe was “rendered stateless and was subject to immediate seizure.” The systematic looting by the Nazi regime on the European continent resulted “in the dispersal of looted art across the world.”

Immediately following the end of World War II, the Allied nations signed the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control*, colloquially known as the London Declaration. The United States, through the Monuments, Fine Arts, and Archives Section, assisted in restitution of works of art discovered by Allied forces during the war and immediately following the war. The United States returned works of art to the “national government of their country of origin or to international relief or successor organizations” in a process known as external restitution. Works of art were “restituted once the country of origin could be identified” and the “recipient government bore the responsibility” of locating and internally restituting the work of art to the rightful owner.

Countries receiving returned works of art were charged with internally restituting art to individuals or families from which they were stolen. Internal restitution policies varied by country, resulting in some policies deemed unfair and unjust by later generations.

---

21. Pell, *supra* note 11, at 32; PORTRAIT OF WALLY (Gravitas Ventures 2013); ADELE’S WISH (Cerebellum Corporation 2012).

22. Pell, *supra* note 11, at 32.

23. *Id.*


28. *Id.*


30. *Id.* An example of an early restitution practice deemed unfair is the Netherlands’ early restitution policy which required claimants “to return proceeds from forced sales as a condition
The Monuments, Fine Arts, and Archives Section ended operations in 1951. At the time, United States Department of State adviser, Ardelia Hall, stated “restitution may be expected to continue for as long as works of art known to have been plundered during [World War II] continue to be rediscovered.” Despite this statement, between 1951 and the 1990s issues of Nazi era art restitution were not “of great interest except to museum professionals and dispossessed owners.”

B. Nazi Era Art Restitution Since the 1990s

During the 1990s there was a renewed interest in righting the wrongs of Nazi era art looting. The end of the Cold War resulted in access to records previously made inaccessible since World War II, creating a renewed interest in Nazi era art restitution. In 1998, the Washington Conference on Holocaust Era Assets, sponsored by the United States Department of State, created the Washington Conference Principles on Nazi-Confiscated Art (hereinafter the Washington Principles). Forty-four countries, including the United States, signed the Washington Principles recognizing that “a number of problems emerged with post-war restitution policy, and as a result, impetus developed for a more equitable approach to recovery of Nazi-looted art.” The principles are “aspirational standard[s]” but are not a legally binding treaty.
1. European Responses to the Washington Principles

In response to the Washington Principles, European countries reevaluated and revised restitution policies to reflect “a more moral policy approach.” Many European countries established restitution committees to assist with the new, more equitable restitution processes. Specifically, Austria and the Netherlands implemented restitution laws and established committees tasked with assisting in restituting art looted during the Nazi regime.

In 1998, Austria enacted a restitution law “providing for the restitution of art found in state-run museums and art collections . . . looted by the Nazis or donated under coercion.” Based on this law, Austria established a Restitution Commission “charged with systematically researching public collections . . . to verify provenances of objects” and formed an Advisory Board to “issue recommendations to . . . Federal Ministers” concerning objects in public collections subject to restitution. Austria amended the restitution law in 2009 “to be less restrictive.”

The Austrian Restitution Commission works closely with the Austrian National Fund for Victims of National Socialism (hereinafter the National Fund) to identify heirs of objects determined to have been


40. See Austrian Art Restitution Law, supra note 39; The Restitution Committee’s History in Brief, supra note 39.

41. Pell, supra note 11, at 47.

42. The Austrian Art Restitution Law, supra note 39. The recommendations are not binding on Federal Ministers. The Ministers make a decision, based on the recommendation, whether a work is restituted. Id. See also Commission, COMMISSION FOR PROVENANCE RES., http://www.provenienzforschung.gv.at/kommission/?lang=en (last visited Feb. 21, 2016).

looted or coercively donated during the Nazi regime. The National Fund also “maintains a [publicly searchable] database of heirless art,” identified as “art and cultural objects . . . which may have been, according to latest provenance research, seized” during the Nazi regime.

The Netherlands established a restitution committee in 2001. The Netherlands’ Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (hereinafter the Restitution Committee) advises and gives opinions concerning Nazi era art restitution claims to the Minister of Culture. The Restitution Committee has two primary tasks. The first is to advise the Minister of Culture on restitution claims regarding works of art in the Dutch State Collection. The second is to advise and offer binding opinions relating to claims made by individuals whose property was lost during the Nazi regime, or their heirs, and the “current owner, who is not the State of the Netherlands.” Claims are submitted to the Committee for “investigation and opinion, as an alternative way of settling a dispute.”

44. *The Austrian Art Restitution Law*, supra note 39; *Fisher & Weinberger*, supra note 43; ART DATABASE NAT’L FUND, http://www.kunstrestitution.at/English.html (last visited Feb. 21, 2016) (finding that as of January 8, 2016, the database listed 8,935 objects “which may have been, according to latest provenance research” looted).

45. ART DATABASE NAT’L FUND, supra note 44; *The Austrian Art Restitution Law*, supra note 39.

46. *The Restitution Committee’s History in Brief*, supra note 39.


2. United States Responses to the Washington Principles

Following the Washington Conference, the United States government established the Presidential Advisory Commission on Holocaust Assets in the United States (PCHA). The commission’s 2000 report determined United States museums were “develop[ing] tools to achieve full disclosure” of Nazi era looted art being held in United States museum collections. The American Alliance of Museums (AAM), a non-governmental museum organization, also responded to the Washington Principles by developing “Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era” and creating the Nazi-Era Provenance Internet Portal. Though the United States government, museum organizations, and museums took lead roles in the creation of just and fair resolutions to Nazi era art restitution issues in the 1990s, “progress has stalled, and museums that were once on board with restitution have begun to assert technical defenses.”


54. Nazi Era-Provenance Internet Portal, http://www.nepip.org (last visited Feb. 21, 2016). The internet portal is a searchable database of works of art in United States museum collections that were created before 1945, transferred after 1932 and before 1946, and which were or could have been in Continental Europe between those dates. Id. Submission of information is voluntary and not all United States Museums are included in the Portal, including museums currently involved in litigation and mentioned in the WJRO report, such as the Norton Simon Museum. Id.

C. Legal Background and History of Nazi Era Art Restitution Claims in the United States

The United States policy, as stated by the Department of State, is “to support . . . the just and fair resolution of claims to Nazi-confiscated art on the merits.” The AAM states that United States “museums should strive to foster a climate of cooperation, reconciliation and commonality of purpose” and treat Nazi era art restitution claims “openly, seriously, responsively and with respect for the dignity of all parties involved.”

In the United States, the most common causes of action claimants bring in Nazi era art restitution cases are replevin and conversion. A United States museum most often invokes the statute of limitations in its jurisdiction to bar Nazi era art restitution claims. Statutes of limitations “prescribe the periods beyond which a plaintiff may not bring a cause of action” and “are designed, in part, to protect potential defendants from the protracted fear of litigation.” Further, statutes of limitations “recognizes that title to property should not remain in an indefinite state.” Statutes of limitations on disputes involving stolen property “begin[] to run when the rightful owner knew ‘or reasonably should know’ of his or her cause of action and the identity of the possessor of the property.” Museums may choose to waive the use of statutes of limitations as an affirmative defense.

The WJRO report cited examples of United States museums using statutes of limitations to successfully dismiss claims to works of art

---

56. Though out of the scope of this comment, it should be noted that “most civil law countries in Europe recognize that good faith purchaser’s title as superior to the person from whom the art has been stolen,” the opposite of United States law. O’Donnell, supra note 15, at 43.

57. Von Saher Brief, supra note 26, at 18.

58. Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, supra note 53.

59. Replevin is an action seeking return of personal property wrongfully taken or held by a defendant. Replevin, BLACK’S LAW DICTIONARY (10th ed. 2014).

60. Conversion is an unauthorized act depriving an owner of personal property. Conversion, BLACK’S LAW DICTIONARY (10th ed. 2014); Graefe, supra note 13, at 473.

61. See, e.g., cases cited supra note 55.


63. Id. § 8. See also MALARO & DEANGELIS, supra note 34, at 72.

64. MALARO & DEANGELIS, supra note 34, at 72 (citing Wood v. Carpenter, 101 U.S. 135 (1879)).


potentially stolen during the Nazi regime. For example, the Toledo Museum of Art successfully dismissed a claim to Paul Gauguin’s *Street Scene in Tahiti* by arguing the claim was time barred under the four year Ohio statute of limitations since there had been no claim to the painting “during the sixty-six years the painting had hung in the museum.” The Museum of Fine Arts, Boston, also asserted a statute of limitations defense to dismiss a claim to the painting *Two Nudes (Lovers)* by Oskar Kokoschka. The court applied Massachusetts’ three year statute of limitations and found that the “location of the [p]ainting [had] been no secret in this case” since it was on display and listed on the Museum’s provenance database since 2000.

The United States adversarial legal system often results in courts making a “choice . . . that one of two innocent victims will be harmed” in Nazi era art restitution cases. On one side, the original owner or their heirs seek return of a work of art looted during the Nazi regime, on the other side is the museum who in good faith purchased a work of art or accepted the work into the collection through donation or bequest. The significant time lapse between when works were possibly looted and when a claim is made poses significant issues in finding and presenting evidence. In cases where evidence is available, the reliability of the evidence is questionable. For example, a work of art may have been sold under duress, which is not reflected on a sales receipt. Ultimately, “issues of commercial, cultural, ethical, historical, moral, religious, or spiritual” are lost in the adversarial litigation process.

---

72. *Id.*
II. UNITED STATES AND EUROPEAN MUSEUM COMMUNITIES: A COMPARISON

According to the International Council of Museums (ICOM), a museum is a “non-profit . . . institution in the service of society and its development.” A museum “acquires, conserves, communicates and exhibits, for purposes of study, education and enjoyment, the tangible and intangible evidence of people and their environments.” In both Europe and the United States it is recognized that museums hold collections “in [public] trust for the benefit of society and its development.” Though European and United States museums share similar missions they differ on how they govern and implement that mission.

The majority of European museums are controlled and managed by the national government whereas in the United States the majority of museums are privately owned and administered non-profits governed by a board of directors. European museums have a “dual accountability to the State and to all other non-public sources of income.” Many European countries have a Ministry of Culture and governments “have more direct control over . . . museums” and can direct museums to return works of art to claimants. The United States does not have a Ministry of Culture and “few museums are under the direct control of the Federal Government.” The federal government may advise return of a work of art and cite non-binding principles, such as the Washington Principles, but cannot force a museum to do so.

76. Id.
82. Id.
83. Id. The U.S. government may influence museum decisions through federal financial
Unlike European museums, “[t]he ability of an advisory panel to recommend to a minister that a work of art be removed from the wall of a state-owned museum . . . is, not practically speaking, a possibility” because United States museum collections are predominantly held by private institutions.84

In the United States the majority of museums are non-profits governed by a board of directors.85 The board of directors have “obligation[s] to act in the interest of the [museum]” and to “act in good faith; with the care . . . an ordinary prudent person in a like position would exercise under similar circumstances; and in a manner [they] reasonably believe to be in the best interest of the [museum].”86 Further, the board of directors is charged with safeguarding the museum’s tangible assets, such as monetary assets, as well as intangible assets, such as the museum’s reputation.87 The board of directors’ duties to safeguard assets potentially conflict with ethical duties when responding to Nazi era art restitution claims.88

Charles Goldstein, past counsel to the Commission for Art Recovery, discussing the 2014 case Von Saher v. Norton Simon89 stated that the Norton Simon Museum’s “board of directors looks at it as a commercial dispute.”90 This may reflect museum boards responding to the recent downturn in the economy by “drifting uncomfortably in an environment that too often look[s] more entrepreneurial than non-profit.”91 To counter this, museum boards must understand that “there are few winners when it comes to museums and restitution lawsuits” and should support alternative methods of dispute resolution over litigation.92
United States museums receive assistance and guidance from non-governmental organizations, most notably from the American Alliance of Museums (AAM). The AAM is a non-governmental museum organization that brands itself as “the one organization that supports all museums.” The AAM accomplishes this through its mission “to nurture excellence in museums through advocacy and service.” The AAM “strengthens the museum community” by “developing standards and best practices, providing resources,” and “advocating for museums.” United States museums are not legally governed by the AAM but may voluntarily undergo an accreditation process. Accreditation is “based on the core standards for museums” defined in AAM’s Characteristics of Excellence. These standards and best practices are

93. The WJRO report criticized the AAM for not sanctioning and removing accreditation from museums engaging in behavior counter to AAM standards and best practices. The WJRO report cited a recent decision by the AAM to remove the Delaware Art Museum’s accreditation. The Delaware Art Museum did not lose accreditation because of a Nazi era art restitution issue, rather accreditation removal was based on the museum’s sale of works of art to raise funds “for purposes other than acquisitions or direct care of collections.” For reasons outside of the scope of this Comment, the removal of accreditation for misuse of funds from the sale of works of art is not sufficiently similar to issues of Nazi era art restitution to create an easy comparison. WORLD JEWISH RESTITUTION ORG., supra note 4, at 6–7; Press Release, Am. All. of Museums, Statement on the Deaccessioning by the Delaware Art Museum and the Action taken by the AAM Accreditation Commission (June 18, 2014), http://www.aam-us.org/about-us/media-room/2014/delaware-accreditation-status.


95. Id.

96. Id. Standards, as defined by AAM, are “generally accepted levels of attainment that all museums are expected to achieve.” Best practices, according to AAM, are “commendable actions and philosophies that demonstrate an awareness of standards, solve problems and can be replicated.” Standards and Best Practices, AM. ALL. MUSEUMS, http://www.aam-us.org/resources/ethics-standards-and-best-practices/standards (last visited May 18, 2016).

97. See generally Continuum of Excellence, AM. ALL. MUSEUMS, http://www.aam-us.org/resources/assessment-programs (last visited Feb. 24, 2016). The AAM accreditation process takes approximately eight to sixteen months and includes a self study process, site visits by peer reviewers, and an Accreditation Commission review. An accredited museum must undergo re-accreditation every ten years. Although U.S. museums are not required to be accredited through the AAM, museums benefit from the “status and process of accreditation” through heightened “credibility and accountability,” a “clearer sense of purpose,” using accreditation status to “leverage . . . support” and promotion of “sustainability and a stronger institution.” Accreditation is largely based on the AAM’s Characteristics of Excellence, which are purposefully broad to accommodate various sizes and types of museums, including zoos, natural history museums, and art museums. Accreditation, AM. ALL. MUSEUMS, http://www.aam-us.org/resources/assessment-programs/accreditation (last visited Feb. 24, 2016).

“broad, outcome oriented statements” meant to be “adaptable for museums of all types and sizes.”

III. THE NEED FOR A CENTRALIZED RESTITUTION COMMITTEE TO ASSIST IN EFFECTIVE IMPLEMENTATION OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION FOR NAZI ERA ART RESTITUTION ISSUES IN THE UNITED STATES

Since the 1990s, legal scholars, museum professionals, and government officials, have discussed the need for better utilization of alternative methods of dispute resolution for resolving Nazi era art restitution claims in the United States. Unfortunately, use of alternative methods of dispute resolution by United States museums has been inconsistent. Based on examination of European approaches to Nazi era art restitution, the United States government and the museum community should promote and educate museums and claimants on the use of alternative methods of dispute resolution. In addition, the formation of a centralized restitution committee to assist museums and claimants in resolving claims is recommended. Recent criticism by the WJRO highlights the need for United States museums, museum organizations, and the United States government to finally follow through on creating an environment supporting resolution of Nazi era art restitution claims in a just and fair manner.

A. Use of Alternative Methods of Dispute Resolution to Resolve Nazi Era Art Restitution Claims

Use of alternative methods of dispute resolution to resolve Nazi era art restitution claims are promoted in the United States and in Europe. Alternative Dispute Resolution (ADR) “[a]ny procedure for...”

---

99. Characteristics of Excellence, supra note 98. A museum may lose AAM accreditation if they are found to be in direct violation of museum standards and ethics. See, e.g., Press Release, Am. All. of Museums, supra note 93.
100. See generally Kreder, supra note 6, at 89; Davidson, supra note 81.
102. See generally WORLD JEWISH RESTITUTION ORG., supra note 4, at 1–52.
103. See, e.g., Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, supra note 53.
settling a dispute by means other than litigation," including mediation. The most publicized use of ADR to resolve a Nazi era art restitution claim involved the return of five Gustave Klimt paintings, notably Portrait of Adele Bloch-Baur I, by the Austrian government to Maria Altmann. Despite ultimately being resolved through ADR, Altmann and the Austrian Government were involved in lengthy litigation, in which the United States Supreme Court ruled Altmann could bring suit against Austria in United States Court prior to Austria agreeing to arbitration. Altmann’s story was dramatized in the 2015 film, Woman in Gold.

Mediation is the most promoted form of ADR for resolving Nazi era art restitution claims. As stated on the International Council of Museums (ICOM) and World Intellectual Property Organization’s (WIPO) Art and Cultural Heritage Mediation webpage, “all the intricacies of an art . . . dispute may be addressed” in mediation. Mediation is “a neutral forum that provides the flexibility as well as the required legal and technical expertise” to resolve disputes efficiently. The unstructured, confidential process allows parties to collaborate and agree on procedures that work best for each individual dispute.

In general, the mediation process begins when two parties have attempted to settle a dispute but have not been able to come to a resolution. A neutral, third party mediator is brought in and “discuss[es] preliminary issues” including who will participate, who has authority

---


107. Despite ultimately being resolved through ADR, Altmann and the Austrian Government were involved in lengthy litigation before Austria agreed to ADR. Notably the litigation involved the United States Supreme Court ruling Altmann could bring suit against Austria in United States Court. See Republic of Aus. v. Altmann, 541 U.S. 677 (2004); Altmann v. Rep. of Austria, 31 Y.B. Comm. Arb. 13 (ICC Int’l Ct. Arb. 2006); Stamberg, supra note 106; ADELE’S WISH, supra note 21.

108. WOMAN IN GOLD (BBC Films 2015).

109. Art and Cultural Heritage Mediation, supra note 74.


to make decisions, what role the mediator will play, and any documents that will be shared between the parties.\textsuperscript{113} The mediator and parties meet, set the “ground rules of the process” and “identify issues.”\textsuperscript{114} In addition to meetings including both parties the mediator may meet with parties individually.\textsuperscript{115} These individual meetings may examine the “relative strengths and weaknesses of [a parties’] interests and legal position” and provide a “fuller appreciation of the cost and uncertainty of litigating.”\textsuperscript{116} The mediator assists each side with “[e]xplor[ing] the interests of the parties” and “[d]evelop[ing] [and evaluating] options for settlement.”\textsuperscript{117} Ideally both parties agree to terms of settling a dispute and leave mediation with a fuller understanding of the issues and each parties’ interests. Even if a dispute is not settled in mediation the parties “will always come away knowing more about the dispute and, probably, . . . having narrowed the issues in question.”\textsuperscript{118}

There are advantages and disadvantages to using mediation in art restitution claims. One significant advantage is mediation “takes into consideration issues of commercial, cultural, ethical, historical, moral, religious, or spiritual nature” often lost in litigation.\textsuperscript{119} Other advantages of resolving Nazi era art restitution claims through mediation are the potential for a quicker, less costly process; the building of better relationships between claimants and museums; and the creation of more favorable public perception towards museums.\textsuperscript{120} A disadvantage of mediation is that there is no guarantee of a resolution. Additionally, mediation and other forms of ADR do not create precedent and a “judgment may be needed if [a party] resists the enforcement of the agreement.”\textsuperscript{121}

\begin{thebibliography}{9999}
\bibitem{115} \textit{WIPO MEDIATION RULES} art. 12 (WIPO 2016), http://www.wipo.int/amc/en/media-
tion/rules/#10a.
\bibitem{116} \textit{How a WIPO Mediator Helped Parties to Settle Their Dispute}, supra note 113.
\bibitem{117} \textit{Mediation: Frequently Asked Questions}, supra note 112.
\bibitem{118} \textit{Id.}
\bibitem{119} \textit{ICOM-WIPO Art and Cultural Heritage Mediation}, supra note 74.
\end{thebibliography}
B. Examples of Amicable Resolutions to Nazi Era Art Restitution Cases and United States Organizations Assisting Museums and Claimants

1. Recent Use of Alternative Methods of Dispute Resolution in the Amicable Resolutions of Nazi Era Art Restitution Cases by United States Museums

Examples of United States museums using ADR to resolve Nazi era art restitution issues exist and demonstrate how ADR can benefit both parties. Two recent examples are Marei von Saher’s claim to Jacques Adolphz de Claeuw’s painting, *Vanitas*, in the Cummer Museum of Art and Gardens’ collection and the Fischer family claim to Ernst Kirchner’s painting, *Sand Hills (Bei Gruena)*, in the Museum of Modern Art’s collection.122

a. Marei von Saher and the Cummer Museum of Art and Gardens

In 2014, Marei von Saher and the Cummer Museum of Art and Gardens (hereinafter the Cummer Museum) announced the amicable resolution of von Saher’s claim to the still life painting, *Vanitas*, by Jacques Adolphz de Claeuw.123 Following “extensive research” the Cummer Museum’s Board of Trustees voted to restitute the painting to von Saher.124 In return von Saher transferred the painting to the museum “through the combination of a partial purchase and a gift.”125

The mediated agreement between von Saher, represented by Herrick, Feinstein LLP, and the Cummer Museum is an example of an amicable settlement that recognizes the needs of both parties. On one side was von Saher, the sole heir of Jacques Goudstikker, a Jewish art dealer forced to flee Europe whose gallery of approximately 1,400 works of art was looted by the Nazi regime.126 On the other side was the Cummer Museum, who “took the claim seriously” in order to keep
the painting accessible to the public while still “do[ing] the right thing for Holocaust victims and their heirs.”

Balancing these interests in an amicable manner is difficult but this settlement is an example of “how these matters can and should be resolved.”

b. The Fischer Family and the Museum of Modern Art

In November 2015, the Museum of Modern Art (MoMA) and the heirs of German art collector, Max Fischer, reached an agreement concerning the painting *Sand Hills (Bei Gruena)* by Ernst Kirchner. MoMA agreed to restitute the painting to Fischer’s heirs after “conduct[ing] an extensive, multiyear research effort.” The painting was inherited by Max Fischer in 1925 from his parents, Ludwig and Rosy Fischer, whose collection of German Expressionist art “was one of the most important collections . . . assembled in Germany” before the Nazi regime. Fischer was forced to leave parts of his collection, including the Kirchner painting, in Germany when he fled in 1935. MoMA acquired the painting in good faith from the Weyhe Gallery in New York City in 1949.

According to the Fischer family’s attorney, David Rowland, the mediated agreement between MoMA and Fischer’s heirs is an example of “museum best practices in the handling of Nazi-era art claims.” Specifically, Rowland cited MoMA’s “cooperation in sharing research,” and their “analysis of complex historical information.” MoMA’s handling of the Fischer claim has garnered favorable press and serves as an example to other institutions that amicable resolutions through mediation can be good public relations.

---

127. *Id.*
128. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
135. *Id.*
2. Examples of United States Organizations Assisting Museums and Claimants in Resolving Nazi Era Art Restitution Issues

The United States currently has organizations promoting and assisting with resolution of Nazi era art restitution claims. Unfortunately due to budgetary and/or lack of governmental support, these organizations have been unable to make significant impact and ultimately compete with one another for resources. Despite varying successes, these organizations can be models, along with European examples, for the development of a strong centralized restitution committee in the United States.

The New York State Department of Financial Services, Holocaust Claims Processing Office is the best example of a United States organization assisting claimants and museums. The New York State Department of Financial Services formed the Holocaust Claims Processing Office (HCPO) to “advocate[] on behalf of Holocaust victims and their heirs, seeking the just and orderly return of assets to their original owners.” The HCPO stresses use of “non-litigious and fair resolution[s]” to claims. Additionally, the HCPO recognizes that art related claims require a different process than bank or insurance claims and each claim “must be resolved on a painting-by-painting or object-by-object basis.” Since 1998, the HCPO “has helped in the restitution of 101 pieces of art.” Despite these successes the HCPO remains the only state government run office of its kind assisting in Nazi era art restitution issues and is limited by budgetary and staff constraints.

Other non-profits and non-governmental organizations, such as

---

137. See comparison supra note 101.
140. About the HCPO, supra note 139.
141. Id.; Art Claims, supra note 139.
143. Id.
the Monuments Men Foundation for the Preservation of Art and the Commission for Art Recovery, recognize the need for a strong centralized body to assist in Nazi era art restitution and have attempted to fill the void. Unfortunately, without support from all stakeholders, including the United States government, museums, and museum associations, these organizations have had limited success in the United States. Notably, the Monuments Men Foundation for the Preservation of Art, closed in October 2015 due to lack of funds.

C. Creation of a Centralized Restitution Committee to Assist Claimants and Museums in Resolving Nazi Era Art Restitution Disputes

Based on examination of European approaches to Nazi era art restitution, examples of United States restitution organizations, and recent amicable resolutions by United States museums, I recommend that the United States government, museum community, and existing restitution organizations collaborate to form a restitution committee to assist claimants and museums. Notably, a restitution committee can promote use of alternative methods of dispute resolution and establish consistency in art restitution resolutions. Currently, the United States lacks a strong centralized organization resulting in inconsistent use of alternative methods of dispute resolution and museums using procedural defenses in response to restitution claims. The United States government and museum community should examine European models, 

144. The Commission for Art Recovery works with “governments, museums, and other institutions internationally” to assist individuals or their heirs from whom works of art were stolen during the Nazi regime. About, COMMISSION FOR ART RECOVERY, http://www.commartrecovery.org/about (last visited Feb. 26, 2016). It is not a “claims organization” but it “[has] orchestrated the return of many works of art to their rightful owners.” Id. The commission “uses litigation to encourage the adoptions of international practices and principles that redress the injustice of looted art through restitution.” Mission, COMMISSION FOR ART RECOVERY, http://www.commartrecovery.org/mission (last visited Feb. 26, 2016). This focus on litigation is counter to this Comment’s proposed use of ADR. Despite the commission’s emphasis on litigation, its other initiatives promoting legislative policies; assisting and encouraging research; and raising public awareness about Nazi era art restitution could be beneficial to a United States restitution committee. Id.


146. Monuments Men Foundation to Close Due to Lack of Funds, supra note 138.

147. Though out of the scope of this Comment, it should be noted that a restitution committee may be able to assist in other art and cultural property restitution issues beyond Nazi era looted art. This is especially pertinent with the current instability in the Middle East resulting in potentially looted cultural objects entering the art and antiquities market. See generally Steven Lee Myers & Nicholas Kulish, ‘Broken System’ Allows ISIS to Profit from Looted Antiquities, N.Y. TIMES (Jan. 9, 2016), http://www.nytimes.com/2016/01/10/world/europe/iraq-syria-antiquities-islamic-state.html.
such as Austria and the Netherlands discussed in Part I, as well as United States restitution organizations currently assisting museums and claimants, to develop a centralized committee capable of effectively operating in the United States.\textsuperscript{148}

In 2012, then Special Envoy for Holocaust Issues at the United States Department of State, Douglas Davidson, spoke at the International Symposium on Alternatives to Litigation in Nazi-Looted Art Disputes.\textsuperscript{149} Davidson cited differences between European and United States museum communities, including the United States’ lack of a Ministry of Culture and that the majority of museums in Europe are under government control,\textsuperscript{150} as significant impediments to implementing a United States restitution committee similar to those in Europe.\textsuperscript{151} Davidson’s remarks appeared to put an end to the possibility of the United States creating a restitution committee.\textsuperscript{152} Unfortunately since Davidson’s remarks in 2012 the need for a restitution committee has grown, reflected in the rise of museums asserting procedural defenses in response to Nazi era art restitution claims.\textsuperscript{153}

Davidson’s remarks should not be interpreted as fatal to the prospects of the United States creating a restitution committee. Rather, the United States government, museum community, and existing restitution organizations should build on successful uses of alternative methods of dispute resolution, such as the agreements between von Saher and the Cummer Museum and the Fischer Family and MoMA.\textsuperscript{154} Additionally, organizations, such as the New York Department of Financial Services, Holocaust Claims Processing Services, can serve as examples of organizations effectively assisting museums and

\textsuperscript{148} Though the AAM supports just and fair resolutions to Nazi-era art restitution claims and should play a role in the development of a restitution committee, I do not feel a restitution committee should be part of the AAM. The primary reason is AAM’s role as a museum advocacy organization and the potential for biases against claimants. Additionally, the AAM serves all types of museums, not just art museums, potentially making implementation of an art museum specific committee under the AAM umbrella difficult. See generally Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, supra note 53; About Us, supra note 94.

\textsuperscript{149} Davidson, supra note 81.

\textsuperscript{150} See supra Part II.

\textsuperscript{151} Davidson, supra note 81.


\textsuperscript{154} See supra Part III.B.1.
Differences between the United States and European museum communities should be acknowledged but cannot impede creating a workable solution for United States museums and claimants. For example, though the United States does not have a Ministry of Culture, multiple government agencies have sections focused on Nazi era restitution issues. Specifically, the Department of State has a Special Advisor for Holocaust Issues who is “responsible for offering policy advice on Holocaust-related matters.” In recent years, the Department of State has depended on and worked with restitution organizations, such as the Monuments Men Foundation, to “bring missing cultural property to light, and to return it to its rightful owner.” Unfortunately, these non-governmental organizations have had limited and varying success and often do not have the budgetary support to maintain operations; therefore the State Department must take a lead role in forming a centralized restitution committee.

In addition to the State Department, the National Archives, the Department of Interior’s Museum Program, and the Smithsonian Institution can provide resources necessary for creation of a successful restitution committee. The National Archives maintains the International Research Portal for Records Related to Nazi-Era Cultural Property, which, similar to the Austrian National Fund discussed in Part I.B.1., “link[s] researchers to archival materials” and “extend[s] public access” to records. The Department of Interior’s Museum Program “support[s] cooperative efforts among [Department of Interior] bureaus, other Federal agencies, and non-Federal partners to manage museum collections” and “establish[es] policies and procedures for managing museum collections.” The Smithsonian Institution has extensively researched its own collection and through the Provenance in the World War II Era website provides detailed information on

---

155. See supra Part III.B.2.
158. See supra Part III.B.1.
provenance research to the public. These already existing government programs demonstrate that a Ministry of Culture is not necessary if existing agencies collaborate and share resources.

A strong centralized restitution committee can address the differing governance structures of United States and European museums. Though the majority of United States museums are not under the direct control of the government, like many European museums, the United States government can still influence museums by educating museum boards of directors on the advantages of non-litigious resolutions. A restitution committee can advise museum boards of directors on alternative methods of dispute resolution and match museums with resources to effectively implement resolutions. Due to the confidential nature of the mediation process, museums currently have difficulty finding specific information on art restitution mediation agreements and may lack direction in how to effectively implement mediation.

A restitution committee, well versed in the mediation process, can provide consistent, dependable information to museums. Additionally, a restitution committee can track statistical and budgetary data on alternative methods of dispute resolution, and compared to litigation, can provide boards with hard data on potential cost savings.

A centralized committee can also assist museum boards in understanding the ethical considerations of Nazi era art restitution and emphasize that a non-litigious approach may be the most just and fair approach. Further, a restitution committee can instruct museum boards on how to use amicable resolutions advantageously and help boards see that resolving restitution issues without litigation meets the boards’ “obligation[s] to act in the interest of the [museum]” as well as “act in good faith; [and] with care.” For example, the Henie Onstad Art Museum in Norway used the restitution of the Henri Matisse painting, Blue Dress in a Yellow Armchair, as the basis for a popular exhibition.

---


162. Though the recent examples of amicable resolutions discussed in Part III.B.1 demonstrate use of the media to promote mediation as being good for public relations, specific information that could possibly guide other museums on how the claims were mediated and resolved is not easily available. See Crow, supra note 136; Neuendorf, supra note 136; Stephen Dare, Cummer Curator to Speak on Nazi Art Looting in NYC, METRO JACKSONVILLE (June 1, 2015), http://www.metrojacksonville.com/article/2015-jun-cummer-curator-to-speak-on-nazi-art-looting-in-nyc.

163. Currently, statistical and budgetary analysis comparing alternative methods of dispute resolution with litigation is not readily available. A centralized committee will be better situated to track data.

164. Goedert, supra note 86.
2016] RESOLVING NAZI ERA ART RESTITUTION CLAIMS 281

titled “In Search of Matisse.”165 Rather than not publicize the restitution process, the Henie Onstad Art Museum used it to educate the public, furthering the museum’s mission as a “non-profit institution . . . in the service of society and its development.”166 In the United States, the Cummer Museum and MoMA both used the restitution of works of art from their collections to garner favorable press coverage.167

In addition to promoting the favorable aspects of alternative methods of dispute resolution to museum boards of directors, a restitution committee can counter negative aspects of Nazi era art restitution disputes. For example, boards of directors may fear a rise in baseless claims.168 A restitution committee can act as a gatekeeper, possibly performing initial research to determine if the claimant has a strong claim to a work of art. Further, a centralized committee that brings together the resources of multiple government agencies and non-governmental organizations is well situated to assist with the complex, and often expensive, research required in Nazi era art restitution claims, similar to the Netherland Restitution Committee’s Research Agency.169 Providing a new approach and assistance to United States museums and boards of directors is essential to creating an environment for resolving Nazi era art restitution claims equitably.

There are signs the United States government realizes the need to provide greater support to Nazi era art restitution efforts. In July 2015, the Senate Appropriations Committee passed the annual State Department appropriations bill accompanied by a committee report.170 The report included a statement directing the Secretary of State to assess “national laws or enforceable policies . . . regarding the return of or restitution for wrongfully confiscated or transferred Holocaust era assets.”171 Specifically the report requests an assessment of compliance

166. Id.; Glossary, supra note 75.
167. See Crow, supra note 136; Neuendorf, supra note 136; Dare, supra note 162. See supra Part III.B.1.
171. Id.
with the Terezin Declaration of 2009, which re-affirmed the Washington Principles.\footnote{Id.} Additionally, in December 2016 Congress unanimously approved the Holocaust Expropriated Art Recovery Act (HEAR Act).\footnote{Holocaust Expropriated Art Recovery Act of 2016, H.R. 6130, 114th Cong. (2016); Holocaust Expropriated Art Recovery Act of 2016, S. 2763, 114th Cong. (2016); see also Audrey Gascho, Congress Passes Holocaust Expropriated Art Recovery Act, ArtNet News (Dec. 12, 2016), https://news.artnet.com/art-world/congress-ww2-art-retribution-vote-779726; Emmarie Huetteman, Holocaust Survivors Score Victory in Reclaiming Stolen Art, N.Y. TIMES (Dec. 10, 2016), http://www.nytimes.com/2016/12/10/us/congress-holocaust-nazis-stolen-art.html?smid=fb-nytimes&smtyp=cur.} The HEAR Act standardizes statutes of limitations across the United States on claims to potential works of art taken during the Nazi Regime.\footnote{H.R. 6130 supra note 173; S. 2763 supra note 173.} Specifically, claimants have six years to file a claim after identifying potential looted works of art and establishing a potential claim to the works of art.\footnote{H.R. 6130 supra note 173; S. 2763 supra note 173.} As of publication of this article, the effects of the HEAR Act on claims has not been established but passage of the act demonstrates the United States government recognizes the need to resolve Nazi era art restitution claims justly and fairly.

CONCLUSION

In conclusion, it is time for the United States government, museums, and museum organizations to collaborate and finally answer the difficult question of what method is best for balancing the ethical and legal needs of claimants and museums in Nazi era art restitution claims. A new and consistent approach is needed, as demonstrated by the recent WJRO report. United States museums, museum organizations, and the United States government must promote the use of alternative methods of dispute resolution to resolve Nazi era art restitution issues. Additionally, the United States government with museums, museum organizations, and restitution organizations must seriously examine the formation of a centralized restitution committee to assist museums and claimants. It is imperative that United States museums, museum organizations, and the United States government finally follow through on creating an environment supporting resolution of Nazi era art restitution claims in a just and fair manner.

\footnotetext[172]{Id.}
\footnotetext[174]{H.R. 6130 supra note 173; S. 2763 supra note 173.}
\footnotetext[175]{H.R. 6130 supra note 173; S. 2763 supra note 173.}