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Recommended Citation

Jennifer E. Smith, *A "Just and Fair Solution": Creating an Environment for Resolving Nazi Era Art Restitution Claims Equitably*, 31 Md. J. Int'l L. 257 ().

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol31/iss1/12>

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Notes and Comments

A “Just and Fair Solution”¹: Creating an Environment for Resolving Nazi Era Art Restitution Claims Equitably

JENNIFER ELISA SMITH*

INTRODUCTION

A segment from the 2014 film, *The Monuments Men*,² 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

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1. *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T ST. (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>. Many countries and organizations have adopted language from the Washington Conference Principles in Nazi era art restitution policies, especially the emphasis on “just and fair solution[s]” found in principles eight and nine. See also Terezin Declaration, June 30, 2009, <http://www.state.gov/p/eur/rls/or/126162.htm> (using “just and fair solution” five times in a declaration reaffirming the Washington Conference Principles).

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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 reconstitute 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.³ 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.⁴ The strongest criticism is from the World Jewish Restitution Organization (WJRO), which cited recent "aggressive litigation conduct of museums" in a 2015 report.⁵ 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.⁶ 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%20Secretary%20Kerry%20re%20Holocaust%20Restitution%20in%20Europe%2006-29-2015.pdf>.

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.⁷ Part II analyzes differences between the United States and European museum communities.⁸ Part III discusses use of alternative methods of dispute resolution in Nazi era art restitution cases.⁹ 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.¹⁰

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.¹¹ 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-Baur I*; and Raffaello Sanzio da Urbino, *Portrait of a Young Man*.¹²

The Nazi regime looted art for economic, aesthetic, and discriminatory purposes.¹³ In order to fund the regime and purchase works of art deemed acceptable and worthy, the regime sold and traded works

7. See *infra* Part I.

8. See *infra* Part II.

9. See *infra* Part III.

10. *Id.*

11. Kreder, *supra* note 6, at 75, 89; Bert Demarsin, *Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 118, 118 n.1 (2011); Kevin P. Ray, *Restitution of Cultural Objects Taken During World War II (Part I)*, NAT'L L. REV. (Mar. 19, 2015), <http://www.natlawreview.com/article/restitution-cultural-objects-taken-during-world-war-ii-part-i>; Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL J. ART & ENT. L. 27, 36 (1999). See generally HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (Tim Bent trans., Basic Books 1998); LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1995).

12. See generally FELICIANO, *supra* note 11; NICHOLAS, *supra* note 11.

13. Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C.L. REV. 473, 473 (2010); Rachel Dubin, *Museums and Self-Regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Property*, 18 U. MIAMI BUS. L. REV. 101, 105–106 (2010).

of art,¹⁴ particularly “degenerate” works.¹⁵ Additionally, looting contributed to the regime’s systematic collecting of acceptable and worthy art, specifically representational, non-abstract, European art.¹⁶ 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.”¹⁷ 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.”¹⁸ Many works of art were slated for inclusion in the *Fürhermuseum*, a massive museum planned for Hitler’s hometown of Linz, Austria.¹⁹

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.²⁰ 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).

15. Degenerate art included abstract, modernist, and expressionist styles “deemed insufficiently German” by the Nazi regime. Nicholas M. O’Donnell, *Nazi-Looted Art: Risks and Best Practices for Museums*, in *THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS* 42 (Julia Courtney ed. 2015). Artists whose work was considered degenerate included, Wassily Kandinsky, Paul Klee, Piet Mondrian, and Pablo Picasso. Max Nordau, in his 1892 book, *Degeneration* (*Entertung* in German), popularized the term degenerate art. Nordau felt society was degenerating and viewed modern art, including the Impressionists, as a visual representation of this degeneration. After World War I, Nordau’s theories developed racist and “anti-Semitic overtone[s]” and were later adopted by Hitler to describe non-Germanic art. Dubin, *supra* note 13, at 108. *See generally* P.M. Baldwin, *Liberalism, Nationalism, and Degeneration: The Case of Max Nordau*, 13 *CENT. EUR. HIST.* 99 (1980); ALFRED ROSENBERG, *THE MYTH OF THE TWENTIETH CENTURY: AN EVALUATION OF THE SPIRITUAL-INTELLECTUAL CONFRONTATIONS OF OUR AGE* 63–100 (1930), https://archive.org/stream/TheMythOfTheTwentiethCentury/Myth_djvu.txt; NICHOLAS, *supra* note 11, at 23–25.

16. Alex Shoumatoff, *The Devil and the Art Dealer*, *VANITY FAIR NEWS* (Apr. 2014), <http://www.vanityfair.com/news/2014/04/degenerate-art-cornelius-gurlitt-munich-apartment>. *See generally* ROSENBERG, *supra* note 15.

17. NICHOLAS, *supra* note 11, at 10.

18. *Nazi Approved Art*, *FLA. CTR. FOR INSTRUCTIONAL TECH.: A TEACHER’S GUIDE TO THE HOLOCAUST*, <https://fcit.usf.edu/holocaust/arts/ARTREICH.HTM> (last visited Feb. 29, 2016).

19. Noah Charney, *Inside Hitler’s Fantasy Museum*, *DAILY BEAST* (Feb. 7, 2014), <http://www.thedailybeast.com/articles/2014/02/07/inside-hitler-s-fantasy-museum.html>. *See generally* FELICIANO, *supra* note 11; NICHOLAS, *supra* note 11.

20. Graefe, *supra* note 13, at 474; Pell, *supra* note 11, at 30.

from Jewish collectors for purposes of “Aryanizing” Jewish assets.²¹ The regime utilized outright taking of Jewish assets as well as forced sales of works of art.²² Additionally, property of Jews who fled Europe was “rendered stateless and was subject to immediate seizure.”²³ The systematic looting by the Nazi regime on the European continent resulted “in the dispersal of looted art across the world.”²⁴

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.²⁵ 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.²⁶ 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.²⁷ 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.²⁸

Countries receiving returned works of art were charged with internally restituting art to individuals or families from which they were stolen.²⁹ Internal restitution policies varied by country, resulting in some policies deemed unfair and unjust by later generations.³⁰

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.*

24. Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 646 (2010).

25. Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, Jan. 5, 1943, <http://www.lootedartcommission.com/inter-allied-declaration>; Kreder, *supra* note 6, at 131.

26. Brief for the United States as Amicus Curiae at 2–3, *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1158 (2015) (No. 09-1254) [hereinafter *Von Saher Brief*].

27. PRESIDENTIAL ADVISORY COMM’N ON HOLOCAUST ASSETS IN THE U.S., *Findings: Implementation of Restitution Policy in Europe*, in PLUNDER & RESTITUTION: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT (2000), http://govinfo.library.unt.edu/pcha/Plunder-Restitution.html/html/Findings_RestitutionEur.html.

28. *Id.*

29. See *Von Saher Brief*, *supra* note 26, at 2–3.

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 1951.³¹ 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.”³² 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.”³³

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.³⁴ 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).³⁵ 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.”³⁶ The principles are “aspirational standard[s]” but are not a legally binding treaty.³⁷

of restitution.” *Id.* at 4. Similarly, Austria’s early restitution policy required the Austrian Federal Monument Agency’s permission to export “artworks . . . deemed to be important to [the country’s] cultural heritage.” The Agency “forc[ed] Jews to donate or trade valuable artworks . . . in exchange for export permits for other works.” *Republic of Aus. v. Altmann*, 541 U.S. 677, 682–84 (2004).

31. Sharon Flescher, *A Brief Guide to Provenance Research*, in *THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS* 55, 67 (Julia Courtney ed., 2015).

32. Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP’T ST. BULL. 337, 339 (1951).

33. NICHOLAS, *supra* note 11, at 442.

34. MARIE MALARO & ILDIKO POGANY DEANGELIS, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 124 (3d ed. 2012); O’DONNELL, *supra* note 15, at 41, 43.

35. The Washington Principles were reaffirmed in 2009 through the Terezin Declaration, which urged “all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions.” Terezin Declaration, *supra* note 1; *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 1. See generally *Washington Conference on Holocaust-Era Assets*, FLA. CTR. FOR INSTRUCTIONAL TECH.: A TEACHER’S GUIDE TO THE HOLOCAUST, <https://fcit.usf.edu/holocaust/resource/assets/index.HTM> (last visited Sept. 26, 2015) (providing links to proceedings, remarks, and factsheets from the Washington Conference).

36. Von Saher Brief, *supra* note 26, at 5; *Washington Conference on Holocaust-Era Assets*, *supra* note 35.

37. O’Donnell, *supra* note 15, at 41, 44.

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.”³⁸ Many European countries established restitution committees to assist with the new, more equitable restitution processes.³⁹ Specifically, Austria and the Netherlands implemented restitution laws and established committees tasked with assisting in restituting art looted during the Nazi regime.⁴⁰

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.”⁴¹ 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.⁴² Austria amended the restitution law in 2009 “to be less restrictive.”⁴³

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

38. Von Saher Brief, *supra* note 26, at 7; William D. Cohan, *The Restitution Struggle: Malaise, Indifference, and Frustration*, ARTNEWS (Sept. 11, 2013), <http://www.artnews.com/2013/09/11/the-restitution-struggle>.

39. See *The Austrian Art Restitution Law*, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf> (last visited Feb. 21, 2016); *The Restitution Committee's History in Brief*, RESTITUTIECOMMISSIE, http://www.restitutiecommissie.nl/en/the_restitutions_commissiees_history_in_brief.html (last visited Feb. 23, 2016).

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).

43. WESLEY A. FISHER & RUTH WEINBERGER, CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., HOLOCAUST-ERA LOOTED ART: A CURRENT WORLD-WIDE OVERVIEW 12 (2014), http://www.lootedart.com/web_images/pdf2014/Worldwide-Overview.pdf. Specifically, the amended law expanded “the area of the lootings” from Austria “to all the territory under the rule of Nazi Germany” and expanded the time period of looting from March 12, 1938, through May 8, 1945, to January 30, 1933, through May 8, 1945. Edith Palmer, *Austria: Restitution of Nazi-Looted Art*, LIBR. CONGRESS: GLOBAL LEGAL MONITOR (Dec. 2, 2009), <http://www.loc.gov/law/foreign-news/article/austria-restitution-of-nazi-looted-art>.

looted or coercively donated during the Nazi regime.⁴⁴ 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.⁴⁵

The Netherlands established a restitution committee in 2001.⁴⁶ 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.⁴⁷ 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.⁴⁸ 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.”⁴⁹ Claims are submitted to the Committee for “investigation and opinion, as an alternative way of settling a dispute.”⁵⁰

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.

47. *Id.* (“According to the government, this suited a more policy-related approach to the issue of restitution than a strictly judicial one.”). *See also* Besluit adviescommissie restitutiezoekers cultuurobjecten en Tweede Wereldoorlog 16 november 2001, Stcrt. 2001, 24 (Neth.), translated in Decree Establishing the Advisory Committee on the Assessment of Restitution Applications, Nov. 16, 2001, <http://www.restitutiecommissie.nl/en/system/files/Decree%20establishing%20RC.pdf>. The Restitution Committee also includes a Research Agency that “investigate[s] claims and report[s] their findings to the members of the committee.” *Government Bodies: The Restitutions Committee*, LOOTEDART.COM, <http://www.lootedart.com/MFEU4J93254> (last visited May 18, 2016).

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

49. *Two Tasks*, RESTITUTIECOMMISSIE, http://www.restitutiecommissie.nl/en/two_tasks.html (last visited Feb. 29, 2016).

50. *Introduction to Binding Opinion*, RESTITUTIECOMMISSIE, http://restitutiecommissie.nl/en/introduction_to_binding_opinion.html (last visited Feb. 21, 2016).

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).⁵¹ 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.⁵² 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"⁵³ and creating the Nazi-Era Provenance Internet Portal.⁵⁴ 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."⁵⁵

51. *About Us*, PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS U.S., <http://govinfo.library.unt.edu/pcha/aboutpcha.htm> (last visited Feb. 21, 2016). *See generally* MALARO & DEANGELIS, *supra* note 34, at 72.

52. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., *supra* note 27. The Association of Art Museum Directors (AAMD) also published a report on United States museums titled *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945)*. ASS'N OF ART MUSEUM DIRS., ASSOCIATION OF ART MUSEUM DIRECTORS REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933-1945) (1998). The report promoted transparency of museum collections records and encouraged United States museums to resolve claims "in an equitable, appropriate, and mutually agreeable manner." *Id.* at 4.

53. *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, AM. ALL. MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> (last visited Feb. 21, 2016).

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.*

55. Cohan, *supra* note 38 (quoting Stuart E. Eizenstadt, the Clinton Administration's Special Representative and Secretary of State for Holocaust-Era Issues, and organizer of the Washington Conference). *See, e.g.*, *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. 2014); *Grosz v. Museum of Modern Art*, 403 F. App'x 575 (2d Cir. 2010); *Museum of Fine Arts, Bos. v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010); *Detroit Inst. of Arts v. Ullin*, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (2009).

*C. Legal Background and History of Nazi Era Art Restitution
Claims in the United States*⁵⁶

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.”⁵⁷ 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.”⁵⁸

In the United States, the most common causes of action claimants bring in Nazi era art restitution cases are replevin⁵⁹ and conversion.⁶⁰ A United States museum most often invokes the statute of limitations in its jurisdiction to bar Nazi era art restitution claims.⁶¹ Statutes of limitations “prescribe the periods beyond which a plaintiff may not bring a cause of action”⁶² and “are designed, in part, to protect potential defendants from the protracted fear of litigation.”⁶³ Further, statutes of limitations “recognizes that title to property should not remain in an indefinite state.”⁶⁴ 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.”⁶⁵ Museums may choose to waive the use of statutes of limitations as an affirmative defense.⁶⁶

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.

62. 51 AM. JUR. 2d *Limitations of Actions* § 2 (2015).

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)).

65. MARILYN E. PHELAN, *MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL* 251 (Rowman & Littlefield, 4th ed. 2014) (citing *O’Keefe v. Snyder*, 416 A.2d 826 (N.J. 1980)).

66. 51 AM. JUR. 2d *Limitations of Actions* § 345 (2015).

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."⁶⁷ 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.⁶⁸ 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 2000.⁶⁹

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.⁷⁰ 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.⁷¹ In cases where evidence is available, the reliability of the evidence is questionable.⁷² For example, a work of art may have been sold under duress, which is not reflected on a sales receipt.⁷³ Ultimately, "issues of commercial, cultural, ethical, historical, moral, religious, or spiritual" are lost in the adversarial litigation process.⁷⁴

67. Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 805 (N.D. Ohio 2006); WORLD JEWISH RESTITUTION ORG., *supra* note 4, at 17–18.

68. Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 2 (1st Cir. 2010); WORLD JEWISH RESTITUTION ORG., *supra* note 4, at 26.

69. *Seger-Thomschitz*, 623 F.3d at 7.

70. DeWeerth v. Baldinger, 804 F.Supp. 539, 554 (S.D.N.Y. 1992).

71. Flescher, *supra* note 31, at 56.

72. *Id.*

73. *See Seger-Thomschitz*, 623 F.3d at 2.

74. ICOM-WIPO Art and Cultural Heritage Mediation, WIPO, <http://www.wipo.int/amc/en/center/specific-sectors/art/icom> (last visited Feb. 29, 2016).

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.”⁷⁵ A museum “acquires, conserves, communicates and exhibits, for purposes of study, education and enjoyment, the tangible and intangible evidence of people and their environments.”⁷⁶ 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.”⁷⁷ 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 government⁷⁸ whereas in the United States the majority of museums are privately owned and administered non-profits governed by a board of directors.⁷⁹ European museums have a “dual accountability to the State and to all other non-public sources of income.”⁸⁰ 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.⁸¹ The United States does not have a Ministry of Culture and “few museums are under the direct control of the Federal Government.”⁸² 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.⁸³

75. *Glossary*, INT’L COUNCIL MUSEUMS: CODE ETHICS, <http://icom.museum/the-vision/code-of-ethics/glossary> (last visited Feb. 24, 2016).

76. *Id.*

77. ICOM CODE OF ETHICS FOR MUSEUMS 3 (2013), http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf. See also *Code of Ethics*, ASS’N ART MUSEUM DIRECTORS, <https://aamd.org/about/code-of-ethics> (last visited Feb. 24, 2016).

78. *Complete Data*, EUR. GROUP MUSEUM STAT., http://www.egmus.eu/nc/en/statistics/complete_data (last visited Feb. 24, 2016); PHELAN, *supra* note 65, at 4.

79. Graefe, *supra* note 13, at 493. See also PHELAN, *supra* note 65, at 4; *An Interview with Wesley A. Fisher on the Restitution of Nazi-Looted Art*, PRIV. ART INV. (Aug. 6, 2015), <http://www.privateartinvestor.com/art-law-2/art-restitution/an-interview-with-wesley-a-fisher-on-the-restitution-of-nazi-looted-art> [hereinafter Wesley Fisher Interview].

80. Diana Eccles (Rapporteur for the Comm. on Culture, Science, Education and Media), *The Libraries and Museums of Europe in Times of Change: Preliminary Draft Report*, at 8, Council of Europe Doc. AS/Cult (2015) 26 (Apr. 6, 2015), <http://www.irishmuseums.org/as-sets/15-CoE-1.pdf>.

81. Douglas Davidson, Special Envoy for Holocaust Issues, U.S. Dep’t of State, Remarks at the International Symposium on Alternatives to Litigation in Nazi-Looted Art Disputes (Nov. 27, 2012), <http://www.state.gov/p/eur/rls/rm/2012/201790.htm> (quoting Stuart E. Eizenstadt, the Clinton Administration’s Special Representative and Secretary of State for Holocaust-Era Issues, and organizer of the Washington Conference).

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 Simon*⁸⁹ 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

assistance restrictions. Federal financial assistance “brings out layers of oversight that can have a dramatic impact on the administration and budget of a museum.” This issue is out of the scope of this Comment and has not been widely discussed in relation to Nazi era art restitution but could be significant as more museums seek financial or other assistance from the federal government. MALARO & DEANGELIS, *supra* note 34, at 36–37.

84. Davidson, *supra* note 81.

85. Graefe, *supra* note 13, at 493. See also Wesley Fisher Interview, *supra* note 79.

86. Paula Cozzi Goedert, *Guide for Board Members*, AM. ALL. MUSEUMS, <http://www.aam-us.org/resources/professional-networks/leadership-and-management/guide-for-board-members> (last visited Feb. 24, 2016).

87. *Id.*

88. Graefe, *supra* note 13, at 473. See also Wesley Fisher Interview, *supra* note 79.

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

90. Cohan, *supra* note 38.

91. MALARO & DEANGELIS, *supra* note 34, at 20.

92. O’Donnell, *supra* note 15, at 52.

United States museums receive assistance and guidance from non-governmental organizations, most notably from the American Alliance of Museums (AAM).⁹³ The AAM is a non-governmental museum organization that brands itself as “the one organization that supports all museums.”⁹⁴ The AAM accomplishes this through its mission “to nurture excellence in museums through advocacy and service.”⁹⁵ The AAM “strengthens the museum community” by “developing standards and best practices, providing resources,” and “advocating for museums.”⁹⁶ United States museums are not legally governed by the AAM but may voluntarily undergo an accreditation process.⁹⁷ Accreditation is “based on the core standards for museums” defined in AAM’s Characteristics of Excellence.⁹⁸ 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>.

94. *About Us*, AM. ALL. MUSEUMS, <http://www.aam-us.org/about-us> (last visited Feb. 24, 2016).

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).

98. *Accreditation*, *supra* note 97; *Characteristics of Excellence*, AM. ALL. MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/characteristics-of-excellence> (last visited Feb. 24, 2016).

“broad, outcome oriented statements” meant to be “adaptable for museums of all types and sizes.”⁹⁹

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.¹⁰⁰ Unfortunately, use of alternative methods of dispute resolution by United States museums has been inconsistent.¹⁰¹ 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.¹⁰²

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 States¹⁰³ and in Europe.¹⁰⁴ 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.

101. *Compare* Von Saher v. Norton Simon Museum of Art, 754 F.3d 712 (9th Cir. 2014), with *Marei Von Saher Announces Resolution of Claim Against the Cummer Museum of Art and Gardens Regarding Nazi-Looted Painting*, HERRICK, FEINSTEIN LLP: EXPERIENCE NEWS (June 26, 2014), <http://www.herrick.com/sitecontent.cfm?pageID=26&itemID=10887>.

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.

104. *See e.g.*, U.N. Charter art. 33, ¶ 1; WORLD INTELLECTUAL PROP. ORG. [WIPO], ALTERNATIVE DISPUTE RESOLUTION, <http://www.wipo.int/amc/en/> (last visited Feb. 23, 2016); *Art and Cultural Heritage Mediation*, *supra* note 74; *Restitution of Cultural Property: Intergovernmental Committee (ICPRCP)*, U.N. EDUC., SCI. & CULTURAL ORG. [UNESCO], <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property> (last visited

settling a dispute by means other than litigation,” including mediation.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ Altmann’s story was dramatized in the 2015 film, *Woman in Gold*.¹⁰⁸

Mediation is the most promoted form of ADR for resolving Nazi era art restitution claims.¹⁰⁹ 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.¹¹⁰ Mediation is “a neutral forum that provides the flexibility as well as the required legal and technical expertise” to resolve disputes efficiently.”¹¹¹ The unstructured, confidential process allows parties to collaborate and agree on procedures that work best for each individual dispute.¹¹²

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

Feb. 23, 2016).

105. *Alternative Dispute Resolution*, BLACK’S LAW DICTIONARY (10th ed. 2014). See also Christa Roodt, *State Courts or ADR in Nazi-Era Art Disputes: A Choice “More Apparent Than Real?”*, 14 CARDOZO J. CONFLICT RESOL. 421, 434 (2013).

106. See generally Susan Stamberg, *Immortalized as ‘The Woman in Gold,’ How a Young Jew Became a Secular Icon*, NPR (June 23, 2015), <http://www.npr.org/2015/06/23/416518188/immortalized-as-the-woman-in-gold-how-a-young-jew-became-a-secular-icon>; ADELE’S WISH, *supra* note 21.

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.

110. *ICOM-WIPO Art and Cultural Heritage Mediation*, *supra* note 74.

111. *ICOM-WIPO Mediation Rules*, WORLD INTELLECTUAL PROP. ORG., <http://www.wipo.int/amc/en/center/specific-sectors/art/icom/rules/#art13> (last visited Feb. 23, 2016).

112. *Mediation: Frequently Asked Questions*, WIPO, <http://www.wipo.int/amc/en/mediation/guide/index.html#mainsteps> (last visited Feb. 23, 2016).

to make decisions, what role the mediator will play, and any documents that will be shared between the parties.¹¹³ The mediator and parties meet, set the “ground rules of the process” and “identify issues.”¹¹⁴ In addition to meetings including both parties the mediator may meet with parties individually.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.”¹¹⁶ The mediator assists each side with “[e]xplor[ing] the interests of the parties” and “[d]evelop[ing] [and evaluating] options for settlement.”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.”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.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.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.”¹²¹

113. *How a WIPO Mediator Helped Parties to Settle Their Dispute*, WIPO, <http://www.wipo.int/amc/en/mediation/scenario.html> (last visited Feb. 23, 2016).

114. . *Principal Steps in a Mediation*, WIPO, <http://www.wipo.int/amc/en/mediation/principal-steps.html> (last visited Feb. 23, 2016).

115. WIPO MEDIATION RULES art. 12 (WIPO 2016), <http://www.wipo.int/amc/en/mediation/rules/#10a>.

116. *How a WIPO Mediator Helped Parties to Settle Their Dispute*, *supra* note 113.

117. *Mediation: Frequently Asked Questions*, *supra* note 112.

118. *Id.*

119. *ICOM-WIPO Art and Cultural Heritage Mediation*, *supra* note 74.

120. See Roodt, *supra* note 105, at 434–435; *ADR Advantages*, WIPO, <http://www.wipo.int/amc/en/center/advantages.html> (last visited Dec. 5, 2015); *How Courts Work: Mediation*, AM. BAR ASS’N, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_advantages.html (last visited Feb. 23, 2016).

121. Roodt, *supra* note 105, at 435, 441. See generally Jacqueline Nolan-Haley, *Mediation: The Best and Worst of Times*, 16 CARDOZO J. CONFLICT RESOL. 731, 737 (2015); Melissa Wai, *Techniques in Mediation: A Closer Look at Decision Analysis*, 8 AM. J. MEDIATION 45

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 Her-rick, 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

(2015).

122. *Marei Von Saher Announces Resolution of Claim Against the Cummer Museum of Art and Gardens Regarding Nazi-Looted Painting*, *supra* note 101; CUMMER MUSEUM, ANNUAL REPORT 2014, at 8, <http://www.cummuseum.org/sites/default/files/annual-report-2014.pdf>; Press Release, Museum of Modern Art, The Museum of Modern Art Restitutes Ernst Ludwig Kirchner's Sand Hills in Engadine to the Heirs of Max Fischer (Nov. 15, 2015), http://press.moma.org/wp-content/files_mf/moma_kirchner_pressrelease.pdf.

123. *Marei Von Saher Announces Resolution of Claim Against the Cummer Museum of Art and Gardens Regarding Nazi-Looted Painting*, *supra* note 101.

124. *Id.*; CUMMER MUSEUM, *supra* note 122, at 8.

125. *See* sources cited *supra* note 124.

126. *Id.*

the painting accessible to the public while still “do[ing] the right thing for Holocaust victims and their heirs.”¹²⁷ Balancing these interests in an amicable manner is difficult but this settlement is an example of “how these matters can and should be resolved.”¹²⁸

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.¹²⁹ MoMA agreed to restitute the painting to Fischer’s heirs after “conduct[ing] an extensive, multiyear research effort.”¹³⁰ 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.¹³¹ Fischer was forced to leave parts of his collection, including the Kirchner painting, in Germany when he fled in 1935.¹³² MoMA acquired the painting in good faith from the Weyhe Gallery in New York City in 1949.¹³³

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.”¹³⁴ Specifically, Rowland cited MoMA’s “cooperation in sharing research,” and their “analysis of complex historical information.”¹³⁵ 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.¹³⁶

127. *Id.*

128. *Id.*

129. Press Release, Museum of Modern Art, *supra* note 122.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Press Release, Museum of Modern Art, *supra* note 122.

135. *Id.*

136. See Kelly Crow, *Museum of Modern Art Returns Painting to Heirs of Man Who Fleed Nazis*, WALL ST. J. (Nov. 16, 2015, 8:25 PM); Henri Neuendorf, *MoMA Restitutes Ernst Ludwig Kirchner Painting to Heirs of Jewish German Collector*, ARTNET NEWS (Nov. 17, 2015), <https://news.artnet.com/art-world/moma-restitution-kirchner-painting-365402>.

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.¹³⁷ 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.¹³⁸ 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.”¹³⁹ The HCPO stresses use of “non-litigious and fair resolution[s]” to claims.¹⁴⁰ 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.”¹⁴¹ Since 1998, the HCPO “has helped in the restitution of 101 pieces of art.”¹⁴² 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.¹⁴³

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

137. See comparison *supra* note 101.

138. See *Monuments Men Foundation to Close Due to Lack of Funds*, DENVER POST (Oct. 21, 2015, 8:17 AM), http://www.denverpost.com/ci_29001403/monuments-men-foundation-close-due-lack-funds.

139. *About the HCPO*, N.Y. ST. DEP’T FIN. SERV. HOLOCAUST CLAIMS PROCESSING OFF., <http://www.dfs.ny.gov/consumer/holocaust/hcpoindex.htm> (last visited Feb. 26, 2016). The HCPO was formed in 1997 to handle claims to insurance and bank assets. In 1998 the HCPO’s mission was expanded to include art assets. Anyone, not just New York state residents, may initiate a claim through the HCPO. *Id.*; *Art Claims*, N.Y. ST. DEP’T FIN. SERV. HOLOCAUST CLAIMS PROCESSING OFF., http://www.dfs.ny.gov/consumer/holocaust/hcpoclaims_art.htm (last visited Feb. 26, 2016); *Contact Us*, N.Y. ST. DEP’T FIN. SERV. HOLOCAUST CLAIMS PROCESSING OFF., <http://www.dfs.ny.gov/consumer/holocaust/hcpocontact.htm> (last visited Feb. 26, 2016).

140. *About the HCPO*, *supra* note 139.

141. *Id.*; *Art Claims*, *supra* note 139.

142. Stewart Ain, *New Art Restitution Effort Fueled By Return of Work*, JEWISH WEEK (May 6, 2015), <http://www.thejewishweek.com/news/international/new-art-restitution-effort-fueled-return-work>.

143. *Id.*

the Monuments Men Foundation for the Preservation of Art and the Commission for Art Recovery,¹⁴⁴ recognize the need for a strong centralized body to assist in Nazi era art restitution and have attempted to fill the void.¹⁴⁵ 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.¹⁴⁶

*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.¹⁴⁷ 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 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.*

145. *See generally About*, MONUMENTS MEN FOUND. FOR PRESERVATION ART, <http://www.monumentsmenfoundation.org/> (last visited Dec. 5, 2015); *About*, *supra* note 144.

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.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.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,¹⁵⁰ as significant impediments to implementing a United States restitution committee similar to those in Europe.¹⁵¹ Davidson's remarks appeared to put an end to the possibility of the United States creating a restitution committee.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.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.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

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.

149. Davidson, *supra* note 81.

150. *See supra* Part II.

151. Davidson, *supra* note 81.

152. *Id.*; Irina Tarsis, *Pragmatic Not Sympathetic US Rejects ADR Forum for Nazi Looted Art*, CTR. FOR ART LAW (Jan. 25, 2013), <http://itsartlaw.com/2013/01/25/pragmatic-not-sympathetic-us-rejects-adr-forum-for-nazi-looted-art>.

153. *See Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. 2014); *Grosz v. Museum of Modern Art*, 403 F. App'x 575 (2d Cir. 2010); *Detroit Inst. Of Arts v. Ullin*, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); WORLD JEWISH RESTITUTION ORG., *supra* note 2, at 1–52.

154. *See supra* Part III.B.1.

claimants.¹⁵⁵

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.”¹⁵⁶ 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.”¹⁵⁷ 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.¹⁵⁸

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.¹⁵⁹ 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.”¹⁶⁰ 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.

156. Stuart E. Eizenstat is the current Special Advisor for Holocaust Issues. He has held the position since 2013. *Stuart E. Eizenstat, Senior Official Biography*, U.S. DEP’T ST., <http://www.state.gov/r/pa/ei/biog/218946.htm>.

157. Remarks of Victoria Nuland, Assistant Secretary, Bureau of European and Eurasian Affairs, at Art Restitution Ceremony (May 5, 2015), <http://www.state.gov/p/eur/rls/rm/2015/may/241958.htm>.

158. See *supra* Part III.B.1.

159. *International Research Portal for Research Related to Nazi-Era Cultural Property*, U.S. NAT’L ARCHIVES, <https://www.archives.gov/research/holocaust/international-resources> (last visited Feb. 6, 2016).

160. *Interior Museum Program*, U.S. DEP’T INTERIOR, <https://www.doi.gov/museum> (last visited Feb. 7, 2016).

provenance research to the public.¹⁶¹ 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.¹⁶² 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.¹⁶³

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."¹⁶⁴ 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

161. *Provenance in the World War II Era*, SMITHSONIAN INSTITUTION, http://provenance.si.edu/jsp/provenance_main.aspx (last visited Feb. 26, 2016).

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.

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

165. Julia Gronnevet, *For Norwegian Museum, a Loss Produces a Gain*, N.Y. TIMES (Sept. 28, 2015), <http://www.nytimes.com/2015/09/29/arts/international/for-norwegian-museum-a-loss-produces-a-gain.html>.

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.

168. Patricia Cohen, *Museums Faulted on Restitution of Nazi-Looted Art*, N.Y. TIMES (June 30, 2013) <http://www.nytimes.com/2013/07/01/arts/design/museums-faulted-on-efforts-to-return-art-looted-by-nazis.html>.

169. *See supra* Part I.B.1.

170. S. Rep. No. 114–79, at 36 (2015).

171. *Id.*

with the Terezin Declaration of 2009, which re-affirmed the Washington Principles.¹⁷² Additionally, in December 2016 Congress unanimously approved the Holocaust Expropriated Art Recovery Act (HEAR Act).¹⁷³ The HEAR Act standardizes statutes of limitations across the United States on claims to potential works of art taken during the Nazi Regime.¹⁷⁴ 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.¹⁷⁵ 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.

172. *Id.*

173. 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>.

174. H.R. 6130 *supra* note 173; S. 2763 *supra* note 173.

175. H.R. 6130 *supra* note 173; S. 2763 *supra* note 173.