

Compromise and Example: Continued Issues of Art Restitution and Holocaust-Era Looted Art

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Abstract

Over the past three decades, the art and museum world has taken a keen interest in the legalities of art restitution that specifically deals with artworks and other cultural property from World War II. This subset of art restitution revolves around claims that deal with Holocaust victims and their heirs who have come forward asking for the return of or acknowledgment that their property was wrongfully, and sometimes forcefully taken from them by the National Socialist German Workers' Party. This political group, better known as the Nazi Party was notorious during World War II for the looting of precious family heirlooms and other cultural property, specifically artworks. In recent years, many countries that were involved in World War II have attempted to come together to address the legal and cultural aftermath that resulted from Nazi art looting. However, other countries, including the United States, have chosen to remain within their own legal practices when it comes to Holocaust-era art restitution, thus making it difficult to reach a just conclusion for all parties involved in restitution efforts. In this paper I will analyze the condition of various legislation and museum standards that are currently being utilized by American art museums and other cultural institutions. I shall further discuss the application of these various pieces of legislation and museum standards by analyzing relevant court cases that have dealt with Holocaust-era restitution claims. Finally, I shall make recommendations pertaining to current legislation and museum standards that currently address Holocaust-era restitution claims, and I shall suggest how both American museums and our court system can reach an outcome that is fair and widely applicable when handling such claims.

Keywords

Art Restitution — Nazi-Looted Art — Holocaust

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Introduction

In the events before, during, and after World War II, millions of people lost some of their most prized possessions. Many of these possessions were works of art that families had decided to invest in, or artists/movements that individuals and countries supported in order to further stimulate their culture. The National Socialist German Workers' Party and their confiscation of such valuable possessions from a vast number of occupied territories could well be one of the most heinous examples of the displacement of art and culture the world has ever seen. The looting of works of art, particularly from Jewish families, was not just a random act of war. Not only were 6 million Jews decimated from the Earth, their culture, their livelihood, and the remaining Jewish population was left

in shambles. By the end of World War II, the Germans had stolen over six hundred thousand paintings, of which over one hundred thousand remain missing.¹

When looking specifically at how American art museums today are handling Holocaust-era restitution claims, one notices that such institutions have their hands tied when it comes to addressing a specific subset of restitution claims that deals with the Holocaust-era works that are considered to be part of the Nazi plunder of cultural artifacts. Museums have a legal obligation to the claimants to investigate works within their collections that are declared to have been looted by the Nazi's, and hopefully come to some sort of agreement with the families/representatives; but they also have a cultural obligation to serve as an artistic center for their immediate and international communities. The dilemma for museums and other art institutions thus becomes a question of who they serve in Holocaust restitution claims: do they fully cooperate with the claimant or do they fight such accusations in hopes of keeping the artwork on their gallery walls?

¹Stuart E. Eizenstat. "The Unfinished Business of the Unfinished Business of World War II." *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*. New York University Press (New York and London), edited by Michael J. Bazyler and Roger P. Alford. 2006. 307. Print.

Resources are also another aspect to consider when museums become involved in Holocaust-era restitution claims. Any artwork that was known to have been moved around Europe during World War II between 1933-1945 – these being the dates in which the Nazi Party looted the artworks of many Jewish families and enemy states – is to be flagged for false provenance, and today many American museums are making it a point to go back through their collection and follow up on any art or objects that could have been acquired under false pretenses surrounding the time of World War II.² Unfortunately, a majority of American museums and galleries do not have the adequate resources or staff to conduct fully detailed provenance research of their collection.

Before and after World War II, American museums, galleries, and other various collectors bought artworks from Europe, where they paid for these pieces with the understanding that the transactions were legal because the artworks seemed to have clear provenance. On the other end of these sales of art, however, many of the plundered works were “bought” from Jewish families by the German govt and sold for profit.³ Since World War II, the knowledge of Nazi profiteering in relation to the various ways art was collected, bought, or sold is one of many avenues that must be further investigated when it comes to addressing Holocaust-era restitution claims. The problem with addressing Nazi profiteering from the sale and transaction of artworks is that some American museums and other institutions could argue that at the time, they were saving works of art that would otherwise have been destroyed in Europe. To go beyond the assumption that American museums were attempting to save these artworks, there is documentation of clean bills of sales—works were purchased for greatly reduced rates from Jewish families and others who were being persecuted by the Nazis in hopes of seeking paperwork to flee Germany or Europe altogether.⁴ With documentation of these clean bills of sale, restitution claims require that much more legal attention and reliance on personal accounts from Holocaust survivors who, these many years later, are rapidly dying.

As a cultural institution, museums and other arts organizations have a responsibility to their respective communities to continuously add on to their collections and preserve these works. This also means that these American museums and galleries have a financial stake in addressing and dealing with Holocaust-era restitution claims. But what happens when museums have to pay again in the form of re-purchasing a piece or settling with the accusers as the result of addressing such

claims? These institutions are non-profits who also have an obligation to their funders (i.e. trustees, staff, and government grant agencies) who support these institutions for as long as they continue to collect and appropriate works on behalf of the wants and desires of these supporting organizations.

1. Legislation and Standards

Since World War II, many countries and art institutions have tried to address the issue of Nazi-looted art and have come up with numerous standards and pieces of legislation to return wrongly taken cultural property to rightful owners.⁵ The problem with these efforts, however, is that they have failed to create a cohesive and applicable set of processes that can be used in various restitution cases. The issue with these various pieces of legislation and standards, such as the Washington Conference Principles and guidelines presented from the American Alliance of Museums, and Association of Art Museum Directors, is that each restitution case that arises is unique in its own way, meaning that some laws are not applicable to claimants or there are specific laws that must be followed but are unreasonable in what they require of persons who come forward to prove that they have a rightful claim to an artwork.

In 1998, over forty countries came together and drafted the Washington Conference Principles on Nazi-Confiscated Art. The final draft presented eleven principles that ranged from Nazi-looted art’s needing to be identified, resources made available to identify these works of art, the publicizing lost works, and the addressing of ownership issues in restitution cases.⁶ What is interesting is that these principles recognized the fact that the various nations who participated in this conference all had differing legal systems and that each country could act within the context of their own laws. This realization is a prime example of countries’ coming together to attempt to address the problem of Nazi looted art, but still wanting to keep to their own legal practices rather than come to an international consensus on how this issue of Holocaust-era restitution could be addressed more collaboratively. This resistance to international cooperation poses numerous issues in the field of museum ethics and legal practices, as well as obstacles for further negotiation and progress toward a universally accepted approach to dealing with Holocaust-era restitution claims.

There are also standards that give unclear explanations as to how museums are to deal with Holocaust restitution cases. From a domestic standpoint, American museums follow various standards in relation to “museum best practices” and Nazi-looted art that may be in their collections. The American Alliance of Museums (AAM) released standards that can be applicable to the field and provide guidance to museums when

²Donald S. Burris. “From Tragedy to Triumph: The Development of American Looted Art From a Legal and Practical Perspective – Altmann, Benningson, Von Saher, and Their Progeny.” *Unfinished Business of the Twentieth Century*. Texas A & M Law School Symposium on Looted Art, Cultural Property, and Repatriation. September 8, 2016.

³Lynn H. Nicholas. “World War II and the Displacement of Art and Cultural Property.” *The Spoils of War: World War II and Its Aftermath—The Loss, Reappearance, and Recovery of Cultural Property*. Edited by Elizabeth Simpson. Harry N. Abrams, Inc., Publishers in association with The Bard Graduate Center for Studies in the Decorative Arts. 1997. 39-46.

⁴ibid.

⁵Emily A. Graefe. *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*. Boston College Law School, 2010. Print.

⁶Washington Conference on Holocaust-era Assets. *Washington Conference Principles on Nazi-Confiscated Art*. Washington, DC, December 3, 1998. Web. <http://fcit.usf.edu/holocaust/resource/assets/princ.htm>

they deal with works of art and other objects that came into a museums' collection during or after World War II. The American Alliance of Museums has set forth overarching goals by having museum conduct the following practices:

1. Identify all objects in their collections that were created before 1946 and acquired by a museum after 1932, that underwent a change of ownership between 1932 and 1946, and that were or thought to have been in continental Europe between those dates.
2. Make currently available object and provenance information on those objects accessible.
3. Give priority to continuing provenance research as resources allow.⁷

The more specific AAM standards that address the presence of Nazi-looted art in various aspects of museum practice include: acquisitions, loans, the existing collection, research, the discovery of evidence of unlawfully appropriated objects, claims of ownership, and fiduciary obligations.⁸ The Association of Art Museum Directors (AAMD) also has similar suggestions for museums and their approach to Nazi-looted art within their collections. They too strive to have their museums identify all objects within their collection that were acquired before 1946, publish this provenance information for public record, and also continue in their efforts of researching relevant provenance.⁹

Although these standards cover many bases in museum practice, the guidelines described within each of these areas are vague due to lack of explanation in regards to how these museums should specifically handle themselves after confirming that they indeed have Nazi-looted art within their collection, or are met with accusations that hold legal merit from claimants. It also seems that these standards are not necessarily applicable in a general and universal manner when a museum becomes involved in a Holocaust-era restitution case. When analyzing the relevance of these two organizations and their recommended standards for museums, one notices that both sets of standards are extremely similar; and yet they both have issues in regard to how their guidelines are to be used in Holocaust-era restitution claims. Not only is the goal of these standards set forth by the AAMD parallel to those of the AAM, but the AAMD also provides similar guidelines that generally assist museums in resolving claims. Although both sets of standards set forth from the AAM and the AAMD include ways in which museums can deal with Nazi-looted art among their collection, the redundancy of these standards complicates the legal processes of addressing

Holocaust-era restitution claims, thus proving to be difficult when a museum attempts to apply such standards to a case. The standards set forth from the AAM and the AAMD vaguely set up museums to address Holocaust-era restitution claims in an ethical way. Ideally, these museum standards would compel museums to work with claimants in pursuit of a mutually agreeable solution if the ownership claim is valid – but only if these standards are more detailed on how to proceed with addressing restitution claims can a more widely understood and applicable approach be used when implementing these standards.

In more recent events, the United States Senate has a bill under deliberation entitled the Holocaust Expropriated Art Recovery Act of 2016 (HEAR). This bill addresses the ongoing issue of American restitution cases and the amount of effort that is put into these claims for Holocaust victims who have resettled in America, or whose heirs are American. The overall goal of this bill is “to provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.”¹⁰ The bill recognizes that there are many procedural obstacles that Holocaust victims or their heirs must face when statute of limitations is used as a defense against restitution claims. If passed, HEAR would establish a six-year statute of limitations, which would only be applicable upon the time of “actual discovery,” thus giving victims and their heirs plenty of time to gain solid information as to the previous and current location(s) of the artwork in question and further establish evidence to support their claim.¹¹ This senate bill could be considered a progression in dealing with Holocaust-era restitution claims for not only American museums and collectors, but also for other countries who claim to be committed to solving issues with Holocaust-era restitution cases, and yet have not kept to their word. Skepticism, however, remains as to whether this bill, if enacted into law, will change or influence the way America handles Holocaust-era restitution cases.

Overall, it seems that the various types of legislation and standards that have been presented in years past bring about some debate when dealing with the concerns of what the museum or institution believes is best for its collection. The debate about whether or not these museums and institutions are ultimately in favor of granting restitution to claimants depends on whether or not the institution involved believes that the return of objects is an ethical act that “rights the wrongs of what they view as past atrocities and that the educational value of the [artwork] can only fully be realized in its original [state].”¹² The opposing view in this debate revolves around the institution's believing that its best interest is to try and not

⁷American Alliance of Museums. Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era. Web. <http://www.aamus.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era>

⁸ibid.

⁹Association of Art Museum Directors. *Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era (1933-1945)*. New York, NY. June 4, 1998. Print.

¹⁰“Holocaust Expropriated Art Recovery Act of 2016.” 114th Congress, 2D Session. United States.

¹¹Rafael Hoffman. Legislation Introduced to Aid Holocaust-Era Restitution Cases. April 12, 2016. Web. <http://hamodia.com/2016/04/12/legislation-introduced-aid-holocaust-era-restitution-cases/>

¹²Emily Goldsleger. *Contemplating Contradiction: A Comparison of Art Restitution Policies*. 2005. Print. 109.

grant restitution based on the premise that there is “continued support of the current owners retaining their possessions, arguing that their property was obtained legally and that the work’s current residence allows for more people to be educated about other cultures, ensures better preservation, and guarantees a greater significance of the object.”¹³ In order to help with the ongoing process of having museums and other institutions practice to the best of their ability, these general approaches should be applicable to all Holocaust-era restitution claims in a more cohesive and universal way.

2. Court Cases and Their Outcomes

Holocaust-era art restitution had remained stagnant for about forty years after World War II. In recent years, there have been a number of court cases involving museums and other art institutions battling in court against claimants who declare rightful ownership to a work or collection of works that were stolen from them and their families under Nazi rule. The outcomes of these various court cases speak to the complexity and difficulties both sides must go through from a legal perspective in order to answer for crimes that were committed by an outside entity, the Nazi Party. The reasons for such complex and difficult legal actions and their respective outcomes stem from the array of circumstances under which an artwork was stolen, and how it ended up in an American museum – which is where the vague nature of the varying types of museum standards that have been created to address such circumstances adds more difficulty for both claimants and the museum because accuracy of provenance and legal handling of artworks during World War II is still yet to be fully deciphered. The relation of the “good faith purchaser” to Holocaust-era restitution claims revolves around the idea that these museums and galleries purchased and/or acquired works of art on the good faith that artworks coming out of Nazi Germany were purchased legally, even though a lack of or fake provenance cast doubt on some of the artworks’ whereabouts and form of original detainment.

Today, the increased and renewed interest on behalf of the heirs seeking to reclaim their family’s art stems from the heightened scholarly interest in studying the universal impact of Nazi Germany, declassification of war documents – especially after the Cold War, along with advances in technology, and increase in art prices on the market. Unfortunately, the litigation of Nazi-looted art is often very complex and expensive in regard to the heir’s and their family’s seeking to reclaim a work/works. In a legal setting, it seems that many claimants end up settling or give up all together because the passage of time between the initial act of the artwork being stolen and the time it takes for a family to locate the work, establish the right to make the claim, and present relevant proof, is far too great to receive any positive outcome in court. If heirs are able to prove family ownership of an artwork, they gain a stronger legal position over the good-faith purchaser – the museum, and can thus file an action for replevin, or an action

to repossess personal property that was taken wrongfully.¹⁴ Under these circumstances, the potential success of current pieces of legislation such as the HEAR act could hold influence on the side of claimants by giving them a fair opportunity to recover Nazi-confiscated artworks under the protection of United States policy. If passed, the HEAR act could also benefit claimants legally by ensuring that their cases not be barred by statutes of limitations or other similar legal doctrines that museums use against claimants, and that previously dismissed claims have the potential to reappear in court.¹⁵

In many of these court cases, however, the passage of time seems to act as both the enemy and the hero in the courtroom in respect to the heir or claimant. The passage of time grants heirs the ability to continue looking for stolen artwork while also allowing them to encourage others to come forward before evidence and witnesses are lost. Yet this continuation of time also has a negative impact on claims because there are fewer and fewer generations of witnesses as time passes who might be able to share their oral history or experience, making further evidence harder to obtain and potentially less credible in court. From the claimants’ perspective, it might seem that the defendant is either hoping proof cannot be found or that the family essentially dies off as time passes.

Certain states, like New York, follow the demand and refusal rule, where the statute of limitations begins once the original owner demands the return of the stolen property but is refused by the current possessor or good faith purchaser (i.e. the museum or gallery).¹⁶ This specific type of variation in statute of limitations proves to be beneficial to the possessor because the demand and refusal rule places the burden of providing evidence on the claimant. When museums are faced with a claim by an heir to Nazi-era looted art, they most often utilize the defense of statute of limitations depending on whether the state adheres to the “discovery rule” or the “demand and refusal rule.” Most states utilize the discovery rule, which means that statute of limitations begins to run once the true owner knows or should know the correct person/institution to sue (i.e. the current possessor of the art). The 2006 decision in *Toledo Museum of Art v. Ullin* applied the discovery rule when the heirs of Martha Nathan refused to accept that Nathan “sold” her collection in 1938 after fleeing the Nazis because there was not enough evidence to prove the terms of the sale and purchase. Under the discovery rule, the court held that the heirs had no rightful claim to the paintings because the claim had expired under Ohio’s four-year statute of limitations. In this instance, the discovery rule was used to determine when the statute of limitations began to accrue. The court held this decision because the original owner, Nathan, failed to bring the claim forward in a more timely manner during her lifetime; attorneys also argued that her estate made no claim to the collection, and since there was an increase

¹⁴Emily A. Graefe. *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*. Boston College Law School, 2010. Print. 2.

¹⁵“Holocaust Expropriated Art Recovery Act of 2016.” Section 3 Purposes, Section 5 Statute of Limitations. 114th Congress, 2D Session. United States.

¹⁶ibid.

¹³ibid.

in public interest in regard to Nazi-looted art during the late 1990s, her heirs should have sought restitution earlier than 2006. This case is a prime example in which the courts and defendants ultimately blame the heirs for their lack of diligence in seeking lost family property after World War II. To some, this is problematic in court because many heirs/claimants are not always aware that their family has a claim to Nazi-looted art until after their family members are deceased, or there is a lack of initial proof that artworks were wrongfully taken.¹⁷

In the case discussed above, the court did not properly address whether there was an issue with the “sale” or way in which the museum acquired the respective artwork because it was ruled irrelevant to the application of statute of limitations. Due to the different rules applied in regard to each state’s use of statute of limitations, the issue of whether or not the initial sale of the artworks was forced, voluntary, or simply stolen remains unresolved and these paintings remain within their respective museums.¹⁸ There are some that claim that US federal actions set forth to resolve the issue of Nazi-looted art has been “aspirational rather than practical,” making it seem as if courts are not properly equipped to handle the various and difficult policy implications that are present on a case-by-case basis.¹⁹ To say that many court outcomes are not entirely fair to the claimant – whether that be heir or museum/good faith purchaser, shows that significantly more revision and cooperation needs to occur from both a legal and historical perspective. One might claim that fiduciary actions thus far have done little in relation to providing clear and specific guidelines to museums and the American court system about how to resolve Nazi-looted art cases in such a way that all parties involved receive some justice for past criminality.

Many Holocaust-era restitution cases that have been filed and sometimes argued in American courts mostly see temporary fixes or to feature mixed results. This struggle to find a compromise in legal action for both the claimant and the museum can be attributed to the fact that defendants often utilize a so-called “technical defense” such as the statute of limitations in order to avoid having to return artworks. What is clear from the steady failure of many court cases to reach a compromise is that simply labeling an artwork as being “Nazi looted art” does not necessarily mean that a museum or other defendant will automatically agree with the claimant’s legal position and that restitution should be granted to the victimized party.²⁰ Unfortunately, labels such as these do not hold any real legal merit within the American court system; but if museums were really willing to compromise in court, there would be a greater emphasis on labels such as “Nazi looted art” so that claimants could at least receive some sort of recognition for their troubles under US policy.

3. Recommendations

When and if Holocaust-era restitution claims make it into an American court room, we must keep in mind that neither the museum nor the claimants are at fault in relation to whether or not an artwork was looted by the Nazis during World War II. The fault lies with past actions that were conducted by Adolf Hitler and his followers. Unfortunately, it is the responsibility of the surviving generations of Holocaust victims and American art museums to address what is left of Nazi art plunder. With such a responsibility comes various legal and ethical challenges that we all must answer to. Efforts have been made, and should not be ignored lightly; but what has been done, and specifically under American policy and museum practices, is still not enough. Addressing Holocaust-era restitution claims on a case-by-case basis is only progressive to certain points within the American court system, even though cases are unique and vary in what is necessary for proof of ownership in a family or legality of purchase from a museum. But, if American legislation and museum standards could give more insight or offer more cohesiveness into how museums and claimants should go about addressing restitution claims in such manner as to effect mutual compromise, the United States could lead by example and show other countries how they too can cohesively address Holocaust-era restitution claims.

There is some disagreement, however, about how to resolve such claims. A lawsuit was filed recently in a U.S. court to reclaim items seized by “forced sale” in Nazi Germany in 1935. As of this writing, the suit is pending, but there is some question of whether it is feasible, or even legal, to adjudicate German property claims in an American court.²¹ A more likely strategy is for American courts to engage the international institutions with experience in handling these types of claims. The International Commission of Holocaust Era Claims (ICHEIC) has been marginally successful in obtaining restitution of claims from governmental entities, among them the German and other European governments. With these institutions working together, some of the claimants have been restituted up to 40% of the value of their stolen or looted property.²² While this outcome is far from optimal, it may best be the best way to adjudicate some of these claims while avoiding the thornier issues of international law.

It is no secret within the art and museum world that Holocaust-era restitution claims are not an easy and simple subject to address. Even though numerous efforts have been made in an attempt to reconcile the aftermath of art looting from World War II, many countries, including the United States, are still choosing to address these issues within their own legal practices. These efforts are appreciated, but only to a certain point before legal and ethical practices become so entangled in vague standards or faulty pieces of legislation

¹⁷ibid.

¹⁸See supra note 11.

¹⁹Katharine Skinner. “Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums.” *Vanderbilt Journal of Entertainment and Technology Law*. Volume 15. Issue 3.

²⁰See supra note 2. “Section E – Where Are the Cases Going?” 24-26.

²¹Sam Hananel. “US Court Ruling Could Bring More Suits over Nazi-Looted Art.” *Associated Press*, April 6, 2017.

²²Stanley Zabudoff, “Restitution of Holocaust-Era Assets: Promises and Reality,” *Jewish Political Studies Review* 19:1-2.

that are not guaranteed to produce any real compromise for claimants, museums, or the countries where these issues are occurring. The continuing discovery of Nazi-looted art also presents issues in relation to current legal and ethical practices because there is still not a cohesive and applicable approach, nor open access to resources that benefit all parties involved in Holocaust-era restitution.

As works of art are being rediscovered or reclaimed, it seems that an establishment of “good versus evil” develops within the court room. The claimants who come forward on behalf of Holocaust victims are seen as the underdog who most likely won’t realize any significant results on behalf of their claim within a reasonable amount of time, and the museum or other art institution that currently owns the artwork is seen as the greedy, evil, government-run entity that just blatantly won’t return the artwork. The establishment of these roles would be less detrimental to both parties inside a court room if museum standards and legislation were to work in common to create a compromise that addressed all aspects of these restitution cases.

This analysis of how American museum standards and various pieces of legislation affect Holocaust-era restitution cases brings to mind several recommendations for achieving a compromise between parties. First, museum standards would need to be rewritten in a formulaic format that is applicable to both museums and claimants so that one does not have an advantage over the other. This formula would consist of a more detailed approach to how museums could ethically and legally handle or prevent such claims, and also contain more information in regard to the claimants by providing a list of resources or a “how-to” checklist of some sort so that they are just as prepared to back up their claim when presenting it in court. American legislation would also need to be more aware that when Holocaust-era restitution claims appear in court, the outcome should not be one that is hastily put together as the result of a nasty legal battle, but one where compromise for all parties involved is the final result.

Author Biography

Caitlin Bellet is from North Richland Hills, Texas, where she has lived for most of her life. She is a senior in the Art History department with a minor in Management Studies. Caitlin has also been a part of the Honors College since her sophomore year. Having interned with a number of world-class art museums, Caitlin hopes to attend graduate school in Fall 2018 to pursue a Masters in Arts Administration and continue working in museum-type settings. Her future career plans include working in the arts and culture industries as a leader in museum practice, policy, and general administration.